

**THE NEW YORK  
ENVIRONMENTAL ENFORCEMENT UPDATE  
2013 ANNUAL REPORT**

**Published by  
The Environmental Law Section of the  
New York State Bar Association**

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## INTRODUCTION

This publication had its origins over twenty-five years ago when the Environmental Law Section first published “The New York State Environmental Crimes Digest for the Years 1987 – 1989”, in collaboration with the old New York State Legislative Commission on Toxic Substances and Hazardous Wastes (edited by Section member Scott N. Fein, Esq.).

The 1989 “Digest” was in turn a continuation of an earlier “New York State Environmental Crimes Digest (1983-1987), which appeared in the Environmental Law Section Journal, Vol. 7, No. 4, December 1987, pp.6-11 (edited by Section members Michael Elder, Esq. and Scott N. Fein). The underlying theme of both publications was to collate enforcement information from disparate sources while assisting government attorneys, policy makers, regulators, defense counsel and the general public in evaluating the impact and effectiveness of environmental enforcement on environmental quality, public health and the economy.

Great credit must be given to these Section members and their collaborators at the time for undertaking the arduous task of compiling and editing these comprehensive publications. Such credit is especially warranted as these works were assembled in the ancient times before the advent of the internet. However, despite the many kudos issued at the time (the Digests were one of my standard desk references for many years), the compilation and reporting of New York’s Criminal (or civil) environmental issues fell to the wayside.

But in late 2012, Sam Capasso, the newly appointed Editor of “Envirosphere” the ELS blog, was seeking new blog content. As an addicted web browser and observer of the environmental enforcement scene, I volunteered and we quickly decided to publish and post the monthly “New York Environmental Enforcement Update.” The 2013 Annual Report is a compilation in e-book format of the first twelve monthly issues of the Environmental Enforcement Update as posted on the ELS blog (Volumes 1, Issues 1-12).

The items that comprise the content of the 2013 Annual Report reflect one view of the broad topical environmental enforcement issues faced by New York practitioners, regulators and policy makers. Federal, state and local enforcement and policy are covered including certain administrative enforcement venues that are rarely reported or considered by the traditional environmental media (asbestos abatement and workplace environmental quality, for example). The main sources used for this Annual Report are included here under a separate entry in the Table of Contents. Government sources have been used for primary source materials with a secondary reliance on news media. I have also added commentary and annotations to assist the busy user who may not have time to explore the underlying hyperlinks and more in depth source materials.

However, the ability to gather enforcement information online is not comprehensive. Part of the poor excuse for this editorial decision is the time limitations of the Annual Report’s staff. But, it is also due to real data gaps in publically reported environmental enforcement statistics. In particular, some of the largest state and local environmental agencies have simply stopped publically reporting environmental enforcement dispositions. Other information is

distributed via the Freedom of Information Law or via obscure government reports which are issued without much fanfare or online access. We all can conjecture as to why this is so. But despite the technological revolution that makes the e-book format so useful, certain enforcement information was more freely available back when the original “Digest” was published in the old “hard copy” 1980’s. Regardless, the Environmental Law Section and the blog staff will continue to seek new and more informative sources to assist our users in the future.

In closing, I would like to dedicate this 2013 Annual Report to the late NYSBA and Environmental Law Section member Louis A. Evans. Lou was one of the original environmental attorneys that defined New York environmental enforcement practice in both the public and private sectors. He generously imparted his wit and wisdom to the author and many others over his long career and service to the bar including during the early stages of this publication. He will be missed by all who knew him.

Michael J. Lesser, Esq.  
June 18, 2014

## **HOW TO USE THIS E-BOOK**

This e-book is published using Adobe 9.0 in pdf format. It is intended to be both a historical chronicle and a reference work for practitioners, government regulators, policy makers and the general public. Accordingly, the content of this e-book may be accessed in several ways:

- Chronologically by month;
- By linking within each month via the TAGS at the end of each chapter; and,
- By key word search (on tool bar) within the text of the document.

Of course, the original hyperlinking used for the individual blog items can still be used to reach original source materials and additional information. Publically accessible government web sites were used for the majority of source materials. At this writing, most of the links are still operable. However, be aware that the web is always changing and sites can come and go or change format. For example, an election change at the Kings County District Attorney's Office led to the disconnection of the pre-2014 web site (and all of its data). Hopefully, that is the exception as public online information sources continue to remain informative and more or less accessible.

**ABOUT THE NY ENVIRONMENTAL ENFORCEMENT UPDATE,  
THE AUTHOR AND THE EDITOR**

The NY Environmental Enforcement Update and the 2013 Annual Report are services presented by the Environmental Law Section of the New York State Bar Association which is based on a general survey of approximately twenty-five public government and media websites. These sources commonly report on news relevant to New York's environmental issues. But these publications are by no means comprehensive and are presented for educational purposes only. Neither the author, the Editor nor NYSBA make any guarantees as to the accuracy of the sources cited. Please contact Sam Capasso, the Blog Administrator and Editor of the NY Environmental Enforcement Update with any additional information or corrections.

**Author Michael J. Lesser** is currently Of Counsel to Sive Paget & Riesel, P.C. in New York City where he specializes in New York environmental enforcement and remediation law. He was formerly an enforcement attorney in the Office of General Counsel of the New York State Department of Environmental Conservation where among other positions he was the department's criminal enforcement attorney and counsel to the N.Y.S. Environmental Conservation Police. He holds a J.D. from Touro Law Center and has published numerous articles on environmental issues and administrative and environmental law. He is an active officer and member of the Environmental Law Section of the New York State Bar Association.

**Editor Samuel J. Capasso III** is currently on the Federal Emergency Management Agency (FEMA) staff at the Sandy Recovery Office, where he works on hazard mitigation. He was previously a Theodore W. Kheel Research Scholar at the Land Use Law Center at Pace Law School, where he obtained his J.D. and LL.M.

## SELECTED SOURCES

### New York State

N.Y.S. Adirondack Park Agency (APA) - <http://apa.ny.gov/>

N.Y.S. Office of the Attorney General - <http://www.ag.ny.gov/press-releases>

N.Y.S. Department of Environmental Conservation - <http://www.dec.ny.gov/>

N.Y.S.D.E.C Office of Hearings and Mediation Services –

<http://www.dec.ny.gov/hearings/34828.html>

N.Y.S.D.E.C Region 4 Enforcement Consent Orders

<http://www.dec.ny.gov/regulations/45353.html>

N.Y.S. Department of Labor

<http://www.labor.ny.gov/pressreleases/pressreleases.shtm>

N.Y.S.D.O.L Administrative Asbestos Decisions

<http://labor.ny.gov/legal/adjudication-decisions.shtm>

N.Y.S. Department of Health - <http://www.health.ny.gov/>

N.Y.S. Legislature (Laws) - <http://public.leginfo.state.ny.us/menuf.cgi>

N.Y.S. Department of Parks, Recreation & Historic Preservation - <http://nysparks.com/>

N.Y.S. Office of Comptroller Thomas P. DiNapoli - <http://www.osc.state.ny.us/>

N.Y.S. Office of Governor Andrew M. Cuomo - <https://www.governor.ny.gov/>

### N.Y. Local Government

New York City Department of Environmental Protection (NYCDEP) -

<http://www.nyc.gov/html/dep/html/home/home.shtml>

Albany Co. District Attorney - <http://www.albanycountyda.com/Media/PressReleases.aspx>

Bronx Co. District Attorney - <http://bronxda.nyc.gov/frames.html>

Clinton Co. District Attorney -

<http://www.clintoncountygov.com/departments/da/DAPressReleases.html>

Erie Co. District Attorney - <http://www2.erie.gov/da/index.php?q=news>

Kings Co. District Attorney - <http://www.brooklynda.org/>

Nassau Co. District Attorney -

<http://www.nassaucountyny.gov/agencies/DA/NewsReleases/index.html>

N.Y. County (Manhattan) District Attorney - <http://manhattanda.org/press-release>

Onondaga Co. District Attorney <http://www.ongovda.net/section/media/?cat=2>

Richmond Co. District Attorney <http://rcda.nyc.gov/press.html>

Suffolk Co. District Attorney - <http://www.suffolkcountyny.gov/da/NewsReleases.aspx>

Westchester Co. District Attorney - <http://www.westchesterda.net/news-and-information/current-press-releases>

#### U.S. Federal Agencies

U.S. Environmental Protection Agency - <http://www.epa.gov/enforcement/criminal/2013.html>

U.S. Department of Justice - <http://www.justice.gov/enrd/News.html>

Federal Consent Decrees - [http://www.justice.gov/enrd/Consent\\_Decrees.html](http://www.justice.gov/enrd/Consent_Decrees.html)

U.S. District Court, EDNY - <http://www.justice.gov/usao/nye/pr/pressrel.html>

U.S. District Court, SDNY - <http://www.justice.gov/usao/nys/pressreleases/?m=03&y=2013>

U.S. District Court, NDNY - <http://www.justice.gov/usao/nyn/news.html#mar2013>

U.S. District Court, WDNY - <http://www.justice.gov/usao/nyw/news.html#mar2013>

U.S. Department of Labor, Occupational Health & Safety Administration (OSHA)

[https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=NEWS\\_RELEASES&p\\_id=25596](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=25596)

Susquehanna River Basin Commission - <http://www.srbc.net/>

Delaware River Basin Commission - <http://www.state.nj.us/drbc/>

#### Media

Middletown Times Herald Record <http://www.recordonline.com/>

Westchester Rockland Journal News <http://www.lohud.com/>

Albany Times Union <http://www.timesunion.com/>

Newsday <http://www.newsday.com/>

Syracuse Post Standard <http://www.syracuse.com/poststandard/>

Buffalo News <http://www.buffalonews.com/>

Rochester Democrat and Chronicle <http://www.democratandchronicle.com/>

Watertown Dailytimes <http://www.watertowndailytimes.com/>

Plattsburgh Press-Republican <http://www.watertowndailytimes.com/>

Binghamton Press & Sun <http://www.watertowndailytimes.com/>

Jamesport News <http://www.topix.com/city/jamesport-ny>

#### Miscellaneous

The Drudge Report - <http://www.drudgereport.com/>

Fox News - <http://www.foxnews.com/>

Time Warner Cable - <http://www.rr.com/>

Weather Underground - <http://www.wunderground.com/blog>

Bloomberg Business Week - <http://www.businessweek.com/>

# [NY Environmental Enforcement Update January 2013, #1](#)

## **Enforcement News**

The turn of the New Year found news stories focusing on the extensive efforts of the DEC Divisions of Law Enforcements (DLE) and Fish & Wildlife to [crack down on the illegal ivory trade](#) in New York. Recent law enforcement efforts have resulted in the confiscation of more than two tons of ivory. The ivory trade has been banned in New York with few exceptions since the early 1970's, as set forth in various provisions of Article 11, of the NY Environmental Conservation Law.

### *Criminal Environmental Damage Law Introduced*

This proposed legislation introduced as [S1016-2013](#) by Senator Robach (reproduced in its entirety below) is an attempt to correct the inequities left by lingering environmental impacts that are often more costly and damaging than the underlying crime. In effect, as the bill's justification states, the environment is a victim worth protecting in its own right. While the draft bill requires an underlying felony as a prerequisite it is classified as a Class C Penal Law Felony with severe penalties in its own right. Without such a law, prosecutors and law enforcement are often left with the unsatisfactory choices of trying to fit environmental damages within the constraints of lesser Penal Law offenses such as criminal mischief or vandalism or even establishing damages under the ECL via inquest and expensive forensic investigation (See [ECL Section 71-2723](#)).

At this writing, the bill has no Assembly counterpart and may be little more than an academic exercise in this legislative session. But, it is still an interesting start in addressing a vexing side effect of many non-environmental crimes.

### *USEPA Region 2 News*

There can be no better news in the depth of winter than to know that the USEPA has scheduled a public listening session by its Caribbean Coral Reef Protection Group, in St. Thomas, USVI, on February 25, 2013 (with live videoconference locations in San Juan, Puerto Rico and St. Croix, USVI). As painful as this seems to those of us who cannot be at any of these locations, the vital work of this multi-agency Group, led by USEPA Region 2, will proceed in seeking its goal of coordinating government strategies to protecting the fragile coral reefs near Puerto Rico and the USVI from further damage. Threats to these ecosystems include manmade pollution, poor recreational boating habits and global climate change. It is unfortunate that the Group's jurisdiction would not appear to extend to the coral reefs off the coast of Florida which face many of the same dangers. For more information, contact USEPA via John Martin, (212) 637-3662, [martin.johnj@epa.gov](mailto:martin.johnj@epa.gov).

## **DEC Administrative Enforcement**

January 2013, saw two more examples of the department's ongoing efforts to enforce administrative Orders on Consent in default previously entered in settlement with Respondents (citations and links below). The underlying Orders in both matters involved water quality or petroleum bulk storage issues. If the Respondent's do not comply with these new Orders, the matters will most likely be referred by DEC to the Attorney General's office for further enforcement. The message is simple: DEC will enforce its consent orders and seek additional penalties for violations.

*In the Matter of HEZEKIAH VARCIANNA,*

Case No. R2-20121025-653

*In the Matter of the ADE RANTI,*

Case No. R2-20121025-650

Tags:

[Administrative Consent Orders](#), [Administrative Enforcement](#), [Climate Change](#), [Commissioner's Orders](#), [Coral Reefs](#), [Default on Orders](#), [DLE](#), [ECL Article 11](#), [Environmental damages](#), [EPA](#), [Ivory](#), [New York Penal Law](#), [DEC](#), [Pollution](#), [Senate Bill S1016-2013](#), [USEPA Region 2](#)

## [NY Environmental Enforcement Update February 2013, #2](#)

### **Enforcement News**

#### *Commissioner Proposes Environmental Audit Initiatives Policy*

February finds the [DEC seeking public comment](#) for the first new major enforcement initiative in several years. [The proposed Commissioner Policy \("CP"\)](#) encourages regulated entities to perform facility audits to achieve more compliance with the Environmental Conservation Law ("ECL"). At its core, the proposed CP is a revised version of an older DEC amnesty policy which reduces or waives penalties for violations that are discovered and disclosed voluntarily subject to certain exceptions and conditions. What really differentiates this proposed CP from previous policies is the potential involvement of other state agencies and public authorities in the pollution prevention process. This includes audit assistance and reimbursement of some compliance costs. This proposed policy supersedes and repeals Commissioner Policy 19, entitled "Small Business Self-Disclosure Policy." The 60 day public comment period extends through Monday, April 22, 2013. Written comments can be directed to:

Monica Kreshik  
NYS DEC  
Office of General Counsel  
625 Broadway  
Albany, NY 12233-1500

or via to the Office of General Counsel at [ogc@gw.dec.state.ny.us](mailto:ogc@gw.dec.state.ny.us)

#### *Attorney General Schneiderman Continues Air Enforcement Action*

New York joined seven states, the U.S. Environmental Protection Agency (EPA) and several environmental groups in reaching an agreement that will require American Electric Power (AEP), the nation's largest power company to make further cuts in air pollution emissions at 16 of the company's coal-fired power plants. [The agreement](#) updates a previous settlement, and requires AEP to pursue greater and faster reductions in sulfur dioxide (SO<sub>2</sub>) emissions. The settlement also increases the funding AEP will pay New York by an additional \$715,000 to fund environmental and public health projects.

### **DEC Administrative Enforcement**

#### *In the Matter of Trinity Transportation Corporation*

DEC enforcement hearing regulations found at [6 NYCRR Part 622.12](#), allow the department's staff to commence an enforcement action using a motion for order without hearing. These are commenced by the submission of supporting affidavits reciting all the material facts and other available documentary evidence. The legal standards necessary to sustain the motion are those

used for a CPLR summary judgment. In this case, [Ruling, February 12, 2013, DEC File No. R1-20111206-200](#), the Administrative Law Judge ("ALJ") found that there were no material issues of fact regarding the underlying ECL violations (the improper disposal of a number of waste drums). However, the ALJ did find that there were substantial questions of fact regarding the civil penalty amount requested by DEC Staff due to disputes as to the number and condition of the drums.

The true value of this case to the practitioner is that the ALJ provides a clear and concise summary of the administrative hearing precedents for these motions as well as the rulings on Respondent's defenses including a rejection of selective prosecution.

## **State Criminal Enforcement**

### *Dye Test Leads to Guilty Plea for Sewage Discharge into Catskill Creek*

Following a DEC investigation and dye test, [a defendant pleaded guilty on January 10, 2013](#), in the Town of Catskill Justice Court to discharging sewage to the waters of the state without a valid permit. He was fined \$15,000, in the disposition of a misdemeanor charge. The defendant was charged with one count of discharging sewage to Catskill Creek for pumping raw sewage from the septic tank at his rental property into a nearby drain which then flowed into the municipal storm water system and then eventually to the creek. While not specified in the news item, unpermitted sewage discharges may invoke [ECL Section 17-0803](#) as enforced by the criminal provisions of [ECL Section 71-1933](#).

## **Federal Criminal Enforcement**

The rundown of February's [USEPA](#) and [US DOJ](#) enforcement summaries read more like the synopsis of a [Carl Hiaasen](#) novel than a criminal docket given the focus on rare and endangered species. If you are unfamiliar with Hiaasen's fiction, his villains are often sordid environmental despoilers that ultimately learn the literal meaning of the term "environmental justice" in a spectacularly lethal way.

### *Antiques Dealer Sentenced to Six Months for Illegal Trafficking of Endangered Rhinoceros Horns (SDNY)*

On February 14th, an antiques dealer in Manhattan was [sentenced in Manhattan federal court](#) to six months in jail for obstruction of justice and creating false records in connection with illegal rhinoceros horn trafficking.

### *Rhino Smuggling Ring Broken Up (SDNY and other federal courts)*

[Three people were charged](#) with wildlife smuggling and related charges for their alleged roles in an international rhino horn smuggling ring. The arrests and charges were part of "Operation Crash", a nationwide effort led by the U.S. Fish & Wildlife Service (FWS) and the Justice

Department to investigate and prosecute those involved in the black market trade of endangered rhinoceros horns.

*Executive Sentenced to Pay \$1.1 Million in Fines and Community Service for Illegal Trade of Protected Black Coral (US Virgin Islands)*

The former executive of a U.S. Virgin Islands-based company was [sentenced in federal court in St. Thomas, U.S.V.I.](#) for felony customs violations for the illegal import of protected black coral. Previously, his co-defendants had been penalized millions of dollars in additional financial penalties. Two of them were also sentenced to prison.

Tags:

[6 NYCRR Part 622.12](#), [Air Pollution](#), [Amnesty](#), [Audits](#), [CAA](#), [Clean Air Act](#), [CWA](#), [DEC](#), [Endangered Species Act](#), [Environmental Audits](#), [ESA](#), [Fish and Wildlife](#), [Incentive Policy](#), [DEC](#), [Rhino](#), [Rhino horn](#), [SO2](#), [Trinity Transport](#), [US F & WS](#), [Water Pollution](#)

## [NY Environmental Enforcement Update March 2013, #3](#)

This Month of March 2013, certainly roared in like an enforcement lion with a significant federal court CAA and RCRA enforcement jury verdict, a major federal CERCLA settlement and two significant 6 figure DEC administrative penalty cases. These plus an eclectic mix of enforcement cases gives us something for everyone this month.

### **Enforcement News**

#### *Unforeseen Hurricane Sandy Impact, Car Storage Tears Up LI Pine Barrens*

What does one do with approximately 30,000 storm-damaged cars that have been shipped to eastern Long Island for storage? Some get parked on the former Grumman plant runways, but many other are parked and left on open, environmentally-sensitive land thus creating a proverbial "mud hole" and ensuing environmental damage within the protected Pine Barrens area. DEC is [commencing enforcement against the property owners](#).

#### *DEC Penalizes Operator for Improper Emergency Operation of Air Pollution Source*

DEC Region 4 remains active in enforcing state and federal air pollution laws as demonstrated when [a company's air control equipment exploded last fall due to improper operation](#). The operator agreed to pay an \$112,500 fine under the as per an administrative Consent Order signed with the state Department of Environmental Conservation. The operator also agreed to DEC oversight in obtaining and installing new pollution control equipment for its chemical resin processing operation. \$165,000 in civil penalties was suspended pending compliance with the Order. The underlying explosion was deemed by DEC to be due to a lack of knowledge about the facilities operations by its employees. Therefore, DEC also deemed that the operation without pollution controls was not due to an emergency and not justified.

#### *DEC Region 9 Enforcement Summary*

Unfortunately, not all DEC Regional offices offer this information in a convenient format. Region 9's enforcement summary can be found [here](#).

#### *The Susquehanna River Basin Commission Enforcement*

The place name may evoke an old [Abbott & Costello comedy routine](#), but the [SRBC](#) means serious business. [New York's nascent yogurt industry](#), as well as other large quantity industrial water users, now have both state and SRBC regulation to adhere to (and potentially big penalties to worry about) depending on their location. [Large quantity water usage without the requisite](#)

[permits](#) can be costly as a major yogurt manufacturer discovered when it was [penalized \\$130,000.00](#), by the SRBC.

## **Enforcement People in the News**

We begin with the unusual news about the [resignation of three experienced state environmental enforcement officials](#) at roughly the same time. Most notable is the resignation of Robert Hallman from his position as Governor Cuomo's environmental advisor. This important change was accompanied by the departure of DEC Deputy Commissioner and General Counsel Steven Russo and DEC Region 3 Director Willie Janeway. All three were key enforcement policy makers as well as long-time friends of the Environmental Law Section.

In related news, former DEC Commissioner Erin Crotty has been selected to become the [new Executive Director of Audubon New York. The Environmental Section](#) wishes them all well in their future endeavors.

Sadly, our Section also notes the recent passing of former DEC/NYSDOH Hearing officer and [Administrative Law Judge Francis "Frank" Serbent](#). The Environmental Law Section extends its deepest condolences to Frank's family and many friends.

## **Criminal Enforcement**

### *Tonawanda Jury Conviction for CAA Violations*

In a rare federal jury trial, a [corporation was convicted](#) of 11 counts of violating the Clean Air Act and three counts of violating the Resource Conservation and Recovery Act. In addition, the company's Environmental Control Manager, was found guilty of one count of obstruction of justice and three counts of violating the RCRA. The company's underlying acts included the release of coke oven gas containing benzene into the air through an unreported pressure relief valve, operating a coke-quenching tower without baffles in violation of its Title V Clean Air Act permit. The manager's conviction was due to his instructing another employee to conceal that an unreported pressure relief valve emitted coke oven gas directly into the air.

Environmental Law Section member and AUSA Rocky Piaggione was one of the [lead prosecutors](#) for this case. The indictment can be found [here](#).

### *Another Endangered Species Act Ivory Conviction*

Whether it's [rare rhinos](#) or endangered elephants, government agencies continue to focus on the ESA in general and the illegal ivory trade in particular. On March 8, a [Manhattan-based entity pled guilty](#) to one count of felony-level "Illegal Commercialization of Wildlife." The company

owner also pled guilty to one count of misdemeanor-level Illegal Commercialization of Wildlife. As part of the plea settlement, the guilty will forfeit more than 70 pounds of seized ivory pieces which have an estimated retail value of more than \$30,000. In addition, a donation of \$10,000 was made to the Wildlife Conservation Society for use in international elephant conservation programs.

This case serves as an example of interagency cooperation as it involved federal and state investigators as well as prosecution by the Manhattan DA. The ESA enforcement sector has become very busy on state and federal levels in recent years. While low key, DEC and the US F & WS have had a strong working relationship for many years. Law enforcement personnel from both agencies are often cross deputized which opens the possibility of federal and state prosecutions for the same underlying offenses. It is easier to run afoul of these laws than one might think. So I am sure we will see more of these prosecutions.

### *Used Cooking Oil Thefts, A New Environmental Crime?*

This item as reported in the NY Post can be construed as a testament to the effectiveness of the alternative biodiesel fuel boom. Criminals are now [stealing used cooking oil](#) left to be picked up by legal recyclers.

However, one can also assume that it is only a matter of time before this new breed of bio-pirates precipitates a serious spill or discharge of smelly grease to the environment. DEC seems to have anticipated some issues by [issuing a biodiesel fact sheet](#). However, to complicate enforcement versus these crooks used cooking oil is an exception to the state's regulated waste regulations which usually govern commercial waste haulers, [6 NYCRR Part 364\(1\)\(e\)\(2\)\(i\)](#). If a spill does occur, the state may have to rely on the historic prohibition against "Putting noisome or unwholesome substances or maintaining noisome business on or near a highway" as per [ECL § 71-3501](#).

## **Federal Civil Enforcement**

### *Multi-Party NRD CERCLA Settlement in Long Running Case*

[The settlement](#) between Alcoa Inc. and other defendants and the St. Regis Mohawk tribe and state and federal officials involves historic discharges from two factories in Massena that released numerous pollutants, damaging the environment and the downstream Akwesasne (Mohawk) reservation along the Canadian border. Among other items, the settlement provides for \$7.3 million for restoring grasslands, wetlands and fisheries; \$1 million for buying hundreds of acres for state protection and \$8.4 million for tribal programs.

## **DEC Administrative Orders**

*In the Matter of 636 Holding Corp.*

Order, March 20, 2013  
DEC File No. R2-20110208-46

This significant DEC administrative enforcement proceeding concerns the Respondent's failure to comply with ECL Article 19 and various Sections of 6 NYCRR Part 201 by failing to file a permit or registration application with the Department for its Bronx facility in compliance with 6 NYCRR 201-6.3, and 6 NYCRR 201-6.1(a)(1). The operation ran without a permit for more than six years. The gist of the violations concerned the operation of three stationary combustion boilers without having obtained the required Title V permit, state facility permit or registration certificate. A civil penalty of \$159,195 was assessed.

*In the Matter of Johnson*

Order, March 13, 2013  
DEC CASE NO: 2416-2012DK

This Order issued upon a motion for a default judgment for a failure to appear addressed an individual Respondent's violations of ECL 23-0305(8)(f) and 6 NYCRR 551.2, for failing to file complete and accurate annual well reports for the two years for a privately owned gas well. This decision gives some insight into the minimal penalties provided by the ECL for this category of violations. Despite the default and failure to appear, Respondent's penalty was reduced to \$1,000, of which only \$250 was payable with the balance suspended pending compliance with the law.

*In the Matter of West 161, LLC*

Order, March 5, 2013  
DEC Case No. PBS 2-328669NTM

*In the Matter of 2112 Honeywell Avenue LLC*

Order, March 6, 2013  
DEC Case No. PBS 2-310816NDK

Finally, these two Commissioner's Orders continue the DEC methodical efforts to clear the unregistered petroleum bulk storage ("PBS") tank docket. What is notable and instructive is that both of these Orders cite and rely on the staff's standard penalty matrix based on the duration of the unregistered period (absent aggravating factors) as follows:

0-2 yrs. unregistered	\$5,000.00
2-5 yrs.	\$7,500.00
5 yrs. or more	\$10,000.00

Tags:

[Abbott & Costello](#), [Air pollution](#), [Akwesasne](#), [Alternative fuels](#), [Bio-diesel](#), [CAA](#), [CERCLA](#), [Commercial hauler](#), [Elephant Ivory](#), [Endangered Species](#), [Erin Crotty](#), [ESA](#), [Fish and Wildlife](#), [Flood damaged cars](#), [Francis "Frank" Serbent](#), [Gas well regulation](#), [Gasoline tanks](#), [Hurricane Sandy](#), [Ivory](#), [Mohawk](#), [NRD](#), [NY Mining law](#), [PBS](#), [Pine Barrens](#), [Recycling](#), [Robert Hallman](#), [Rocky Piaggione](#), [SRBC](#), [Steven Russo](#), [Susquehanna](#), [Title V](#), [Title V Air pollution](#), [Unregistered oil](#), [US F & WS](#), [Used cooking oil](#), [Waste transporter permits](#), [Water usage regulation](#), [William Janeway](#)

## [NY Environmental Enforcement Update April 2013, #4](#)

### **Enforcement News**

#### *Nanotech's Mega-Leak*

The Albany media has regularly reported on the ever-expanding local nanotech and computer chip industries and the economic benefits that follow. Until now, there has been virtually no reporting on the environmental issues raised by those industries. In an article dated April 16th, 2013, the [Albany Times Union reported](#) that several workers were injured and hospitalized moving a large computer chip manufacturing machine into a new building at the College of Nanoscale Science and Engineering (SUNY Albany) after hydrogen peroxide leaked from the equipment. A machine was shipped loaded with a solution of 30% hydrogen peroxide, a concentration far higher than the antiseptic form of the chemical many of us keep in our first aid kits and which can cause severe burns to the skin and lung irritation.

[ECL Article 37](#) serves as the general authority for hazardous substance regulation. Furthermore, [6 NYCRR Part 597.2\(b\)](#) Table 1, includes hydrogen peroxide on the list of New York hazardous substances and provides a reportable quantity. Finally [6 NYCRR Parts 595.2\(a\)](#) and [595.3](#) provide hazardous substance spill reporting criteria and release reporting procedures. It is not clear from the news item whether these release reporting standards were implemented. However, it behooves counsel for nanotech clients to be aware of the enforcement implications of handling hazardous substances.

#### *POTW Operators Must Report Sewage Discharges to DEC*

[The new law](#), signed by Governor Andrew Cuomo on August 9, 2012, changes the requirements for reporting untreated or partially treated sewage discharges, also known as bypasses, from publicly owned treatment works and imposes new reporting requirements for publicly owned sewer systems ("POTW") and combined sewer overflows ("CSO"). It should be noted that DEC has failed to meet the deadline for the promulgation of regulations to support the new law. In lieu of the regulations, DEC will assist operators with questions or compliance until the regulations are in place. The Sewage Pollution Right to Know Act went into effect on May 1, 2013.

#### *Attorney-General Eric Schneiderman Celebrates Earthday by Releasing Compilation of Recent Accomplishments*

AG Schneiderman's office has provided [a record of his environmental accomplishments](#) for the past two years, which includes details about several significant enforcement accomplishments.

#### *\$5.5 Million Settlement Between U.S., New York, & GM Resolves Long Standing Natural Resource Damage Claims At Onondaga Lake Superfund*

This is one of a number of related settlements that address bankruptcy claims regarding environmental releases from the old General Motors Corporation and related entities. Old GM formerly manufactured and assembled metal and plastic automobile parts at its Inland Fisher Guide facility, which was adjacent to a tributary of Onondaga Lake. USEPA's claims at the site were previously settled for roughly \$39.2 million. Under the terms of this separate agreement, the settling governments will receive additional allowed claims in the total amount of \$5.5 million to settle claims for damages to natural resources at the Onondaga Lake site. The U.S. Department of the Interior serves as joint natural resource trustee along with the State of New York and the Onondaga Nation. [The NRD settlement](#) will be allocated and distributed under a complex settlement formula.

### *DEC Enters Administrative Consent Order with Hillcrest Industries*

Under the terms of this DEC Administrative Consent Order, Hillcrest Industries will fund an Environmental Benefit Project (EBP) in the Village of Attica and will undertake a number of pollution control measures for numerous violations of state environmental water, air and solid waste standards. The Order also requires Hillcrest to reduce facility emissions, comply with a remedial schedule, fund environmental monitoring services to be performed by a third party contractor and designate an employee as an on-site Environmental Compliance Officer. An additional \$300,000 penalty was suspended based on future compliance with the Order. Hillcrest Industries manufactures abrasive blasting media and recycled glass material at its facility in the Village of Attica, Wyoming County.

The EBP includes improvements to the Village's pool and playground. A review of this Settlement and Order will be especially educational regarding the DEC approach to multimedia violations. DEC has made [the Consent Order](#) available on its website.

In [a parallel USEPA enforcement case](#), the Respondent spent more than \$1 million to cease and prevent deleterious air emissions.

## **DEC Criminal Enforcement**

While the sudden appearance of criminal deer hunting dispositions in early spring may seem odd, one must remember that the justice system is often catching up with investigations commenced and enforcement actions filed during the various late fall and early winter hunting seasons. Typical serious ECL criminal violations committed while hunting include discharging firearms at night or on or near roadways or near houses. On many occasions, these crimes occur while the suspect is using an illegal deer hunting technique known as "Deer Jacking" where the hunter uses a vehicle mounted searchlight to illuminate and freeze a deer in the darkness for an easy kill shot. The danger to anybody nearby is obvious.

Also included is a rare example of an illegal animal trapping spree. Reading [the details of these investigations](#) will give the reader a glimpse into the difficulties and dangers of investigating this important but often overlooked area of environmental enforcement.

*April 26, 2013, Four Charged with Multiple Deer Violations in Otsego County*

Four Otsego County men were ticketed with [multiple deer hunting violations](#) on for illegally killing eight deer including discharging a firearm across a roadway.

*April 9, 2013, DEC Investigation Leads to 54 Misdemeanor Charges in Chautauqua County Deer Jacking Case*

DEC Conservation Police charged a [man with 46 ECL Misdemeanor violations and 8 Penal Law Misdemeanors](#) including:

- Prohibited use of a weapon (4 counts)
- Reckless endangerment, Second degree (4 counts)
- Possessing a loaded firearm in a motor vehicle (4 counts)
- Taking deer while in a motor vehicle (4 counts)
- Taking a deer from a public highway (4 counts)
- Taking deer out of season (3 counts)
- Taking deer out of legal hunting hours (1 count)
- Illegal taking of a deer (4 counts)
- Hunting deer with an artificial light (4 counts)
- Discharging a firearm over a road (4 counts)
- Discharging a firearm within 500 feet of a school property (1 count)
- Discharging a firearm within 500 feet of a factory (1 count)

In addition to being charged with misdemeanors of Environmental Conservation Law, charges also include reckless endangerment charges for shooting on public property and within a residential area. Each misdemeanor carries a jail term of up to one year and fines range from \$200 to 2,000 per charge.

*March 20, 2013, Man Pleads Guilty to Numerous Counts of Illegal Trapping*

A Franklin County man pleaded guilty last week to [31 violations of Environmental Conservation Law](#) related to illegal trapping. Offenses included unlawfully setting 15 snares for coyote, multiple counts for unlawful use of body gripping traps on land and numerous related violations. The accused pleaded guilty to all charges and was ordered to pay total of \$3,875 in fines and surcharges.

## **DEC Administrative Decisions Rulings & Orders**

*In the Matter of Stasack, William and Stephen Stasack,*

Ruling of the Chief ALJ on Motion of Summary Judgment - April 25, 2013

[The Stasack Ruling](#) is important for its analysis of some unresolved issues that arise from time-to-time to vex practitioners defending DEC Respondents. These include:

1. The definition of a navigable water way for the purposes of enforcing violations of Article 15 freshwater waterway regulatory procedures as per ECL Section 15-1505;
2. The duality of Article 71, of the ECL which allows for parallel criminal and administrative prosecutions by DEC for the same underlying violation;
3. An analysis of Summary Judgment standards considered by the DEC Office of Hearings and Mediation Services.

This long environmental saga commenced with the Respondent's placement of fill materials in a relatively small and allegedly isolated pond with limited public access. Was the pond a navigable waterway for purposes of enforcing the ECL? Respondent's various motions to determine otherwise were denied and this matter plods on.

However, it behooves a party that wants to improve any waterfront property to check with DEC before improvements begin. A costly and lengthy litigation may be avoided.

*In the Matter of BCD Tire Chip Manufacturing Inc.,*

Decision and Order, March 26, 2013  
DEC File No. R4-2011-0505-53

In [this administrative enforcement proceeding](#), DEC and Respondent tangled over an esoteric, but important, environmental issue regarding what exactly constitutes waste tires in an amount that triggers the ECL regulatory threshold. The Respondent allegedly stored 1,000 or more waste tires without a permit in the form of tire derived aggregate ("TDA") in violation of 6 NYCRR 360-13.1(b). The Commissioner held that TDA does constitute waste tires under the law and Respondent was therefore required to obtain a permit for its facility. Respondent was penalized \$31,000 with \$10,000, suspended.

## **Weird News**

*Giant Snails Invade Florida! Invasive Species Slimes Locals!*

Between climate change and careless commerce, invasive species are a growth area for environmental regulations and related enforcement. In a campaign both serious and somewhat unbelievable, [South Florida residents are being warned](#) to be on the lookout for one of the world's most destructive invasive species: the giant African land snail. The mammoth mollusks can grow to be rat-sized and were first spotted in Florida in 2011. More than 1,000 are being caught each week in Miami-Dade County as the snails relentlessly gnaw through stucco houses

and most known species of plants. Experts recently gathered for a Giant African Land Snail Science Symposium to find solutions (now that would make a great T-shirt).

Giant snails have not attacked New York yet, but for a quick refresher on New York's [aquatic](#) and [other invasive species](#) enforcement efforts, check the DEC website.

Tags:

[Administrative Hearings](#), [AG Eric Schneiderman](#), [Consent Orders](#), [CSO](#), [Deer Jacking](#), [EBP](#), [ECL criminal and civil enforcement](#), [ECL Section 15-0505](#), [Environmental Benefit Projects](#), [Fish and Wildlife Violations](#), [Giant African Snails](#), [GM Bankruptcy](#), [Hazardous Substance violations](#), [Hydrogen Peroxide](#), [Illegal Trapping](#), [Invasive Species](#), [Nanotech](#), [Navigable Waterways](#), [NRD](#), [NYS Attorney General](#), [Onondaga Lake](#), [POTW](#), [Release Reporting](#), [Sewage Pollution Right to Know Act](#), [SUNY College of Nanoscale Science and Engineering](#), [TDA](#), [Tire Derived Aggregate](#), [Waste Tire Violations](#)

## [NY Environmental Enforcement Update May 2013, #5](#)

### **Enforcement News**

#### *Evolution of an Asbestos Enforcement Case*

Asbestos regulation has always been one of the most ubiquitous yet confusing areas of environmental enforcement because oversight and enforcement cut across a number of federal, state and local regulatory schemes. These various schemes can address asbestos as a waste product, a hazardous substance, an air pollutant or a water pollutant (or all of the above). Furthermore, asbestos regulation can arise from abatement during construction or demolition, transportation or unlawful and unreported disposals and releases. A [recent Times Union story](#) infers many of the above issues and EnviroSphere will continue to follow this story as it develops.

To start deciphering the mysteries of asbestos regulation see the [DEC asbestos webpage](#) and then follow the related links to other federal, state and local agencies.

#### *A.G. Schneiderman Launches New Animal Protection Initiative*

Attorney General Eric T. Schneiderman has commenced a [new Animal Protection Initiative](#) aimed at shutting down criminal animal fighting rings, ensuring compliance with New York State's Pet Lemon Law and charging those who abuse or neglect animals. The new initiative will use civil and criminal remedies to target allegations of animal cruelty and unscrupulous sales of pets and other animals.

The Initiative will employ the OAG's Regional Offices, the Consumer Fraud Bureau, the Criminal Prosecutions Bureau, the Organized Crime Task Force and the Investigations Bureau.

### **Enforcement People in the News**

#### *A.G. Schneiderman Appoints New Executive to Oversee Environmental Protection*

Attorney General Eric T. Schneiderman [appointed Alvin L. Bragg, Jr.](#) to serve as Executive Deputy Attorney General for Social Justice. He will oversee six bureaus, including Charities, Labor, Civil Rights, Tobacco Compliance, Healthcare and Environmental Protection. Mr. Bragg was formerly an Assistant United States Attorney in the United States Attorney's Office in New York's Southern District where he investigated and prosecuted white collar and street crimes. He also served with the New York City Council as the Chief of Litigation and Investigations.

*Assistant Attorney General Ignacia S. Moreno Departs from the U.S Department of Justice*

Ignacia S. Moreno, Assistant Attorney General of the Environment and Natural Resources Division, will be [leaving the DOJ in June 2013](#). Attorney General Eric Holder lauded Ms. Moreno for her Division's many record setting accomplishments under her tenure.

## **Federal Enforcement News**

*U.S. Attorney for NDNY Cracks Down on Power Wash Runoff*

The indicted parties in this matter are principles of a company that engaged in hydro-demolition. This is a procedure that uses high pressure water to remove concrete from buildings during demolition. However, the waste runoff generated by the hydro-demolition process can consist of slurry of high PH industrial waste including concrete wastes.

Unfortunately, this toxic slurry was allegedly released from a Binghamton area demolition site into the nearby Susquehanna River. In turn, this led to [multiple felony indictments](#) for discharging untreated industrial waste-water from a hydro-demolition process without a permit in violation of the Clean Water Act. Several federal, state and local agencies collaborated in the investigation.

Hydro-demolition can now be added to the list of industrial practices likely to need regulatory supervision under the CWA and related state laws.

## **Special Feature: NYC Department of Environmental Protection News**

*NYCDEP Takes On Idling Vehicles*

The NYC Department of Environmental Protection commenced a [crackdown on vehicle idling](#) near schools and in neighborhoods with high numbers of trucks and buses. DEP inspectors will begin targeted enforcement of Local Law 5, which was enacted in 2009 and limits idling in school zones to one minute. Drivers observed illegally idling will be issued a warning for a first offense and a \$350 fine for subsequent offenses.

[DEC's state idling diesel regulations](#) provide a good comparison.

*NYCDEP Requires Dry Cleaners to Disclose Chemicals*

The New York City Department of Environmental Protection ([DEP](#)) [announced](#) that dry cleaners will be required to post the primary chemicals used in the dry cleaning process. The approximately 1,400 dry cleaners in New York City will be required to list the chemicals and a

link to information about their health effects beginning in February, 2014. The DEP has created a template of the disclosure form.

Most dry cleaners use perchloroethylene or "perc," which is regulated by Federal, State, and City governments as exposure to perc vapor can have negative health effects. Non perc alternatives must also be disclosed. Dry cleaners will have to fill out and print the applicable forms from the DEP website and post these in their business. The draft form for [perc dry cleaners](#) and [non-perc dry cleaners](#) have been made available.

## **DEC Consent Orders, Administrative Orders and Rulings**

*In the Matter of Pile Foundation Construction Company Inc., et al.*

Commissioner's Order, May 17, 2013  
DEC File No. R2-20090406-241

The good news for Respondents in this [DEC Region 2 water pollution-wetlands case](#) was that they were found not liable for certain compliance schedule violations arising from the Department's enforcement of an earlier 2009 Order on Consent. The bad news however was that they were found jointly and severally liable for a civil penalty of \$500,000.00 (partially suspended).

The trend that stands out in this matter is the Department's expanding use of the administrative Motion for an Order without Hearing ([6 NYCRR 622.12](#)) to prosecute major violations of existing administrative Orders on Consent. In past years, the practice was for DEC to refer such violations to the Environmental Protection Bureau of the Attorney General's Office which would then commence a civil enforcement action in state supreme court to enforce the terms of the underlying Order. Here, rather than wait for a court determination, the DEC has moved forward administratively and added hefty civil penalties for violations of the Order to "encourage" compliance.

*In the Matter of Beach*

Administrative Ruling, May 3, 2013  
DEC Case Number: R5-20121024-2023

Unlike the Pile Order above, here the Department's staff overreached with their Motion for a Part 622.12 Order without Hearing while trying to address what appears to be a complicated state land trespassing and real property law case. Apparently, there were too many unresolvable substantive issues and the [summary motion was denied](#). However, pursuant to 6 NYCRR 622.12(e), staff's motion papers and respondent's responsive papers were deemed to be the complaint and answer, respectively, for the purposes of this proceeding. In an unusual but telling

"suggestion" the parties were reminded that independent mediation services are available and encouraged through the Office of Hearings and Mediation Services.

While not often utilized, the [DEC Hearing's Office](#) provides independent mediation services using trained (and free) mediators upon request. For more information about this service, contact the DEC Office of Hearings and Mediation Services.

## **Weird News**

*US v. Wal-Mart*

[\\$110 million in total criminal fines](#) in multiple jurisdictions is enough to get this blogger's attention even though this criminal case evolved outside of New York. The fines and compliance costs are especially staggering for a case that did not involve a massive oil spill or other traditional environmental quality violation. Simply put, Wal-Mart illegally mishandled, released and disposed of the garden chemicals routinely stored and sold via the lawn centers at its numerous retail locations.

Growing up deep in Long Island's suburbia, I can recall the rather casual garden center operations of the time. These places were sloppy at best with broken bags of fertilizers, herbicides and other nasty stuff spread all over. Cleanup was an after-thought. And when it rained, the mess ran off to groundwater (not storm sewers) and eventually to Great South Bay. So, I was surprised to learn that Wal-Mart thought that it was still operating by 1960's regulatory standards (and that state and federal regulators would not notice).

In any event, fertilizer and garden chemical handling are now worthy of a distinct regulatory oversight program. For more information on the state requirements for garden retailers, see New York's relatively new ["Runoff Law" ECL Article 17, Title 21](#), the [FAQ on Phosphates](#), and the impact on [commercial pesticide applicators](#) are also available online.

Tags:

[6 NYCRR Part 622.12](#), [AG Eric T. Schneiderman](#), [Alvin L. Bragg Jr.](#), [Animal Cruelty](#), [Asbestos](#), [Clean Water Act](#), [Commissioner's Order](#), [Dry Cleaners Disclosure](#), [Fertilizers](#), [FIFRA](#), [Herbicides](#), [Hydro-Demolition](#), [Idling Vehicles](#), [Ignacia S. Moreno](#), [Mediation](#), [Motion for an Order Without Hearing](#), [NYC Local Law 5](#), [NYCDEP](#), [Office of Hearings and Mediation Services](#), [Order Enforcement](#), [Perc](#), [Perchloroethylene](#), [Pesticides](#), [Pet Lemon Law](#), [Runoff Law](#), [Walmart](#), [Water Pollution](#)

## [NY Environmental Enforcement Update June 2013, #6](#)

### **Enforcement News**

#### *Sewage, Sewage Everywhere*

Despite previous enforcement and significant fines, aging sewage treatment infrastructure and lots of rain makes some sewage overflows seemingly inevitable. Once again, Rensselaer County is the culprit as described in this June 13, 2013, [Albany Times Union story](#). But, in this case, observers from the Riverkeeper organization spotted the sewage violations on the Wyantskill River who in turn informed DEC.

Given the severity of a previous administrative consent order, DEC used a bit of prosecutorial discretion by [deciding not to seek additional penalties](#) for the unauthorized sewage discharges.

#### *TCI Has to Do It Better*

The DEC ordered [TCI to halt its operations](#) because it lacked registration and two permits for solid waste handling and transportation. The transformer recycling company recently moved to the Port of Coeymans after losing its plant in Ghent, Columbia County, in a [destructive fire last August 2012](#). As the plant handled PCBs, the fire left many apprehensive about the level of regulatory oversight over TCI's operations. By taking the extremely rare step of [ordering a complete shutdown](#), DEC has at least demonstrated that it has been keeping an eye on TCI and its operations.

#### *Proposed Replacement of the 1891 Lacey Act*

U.S. Senator Kirsten Gillibrand, a member of the Senate Environment & Public Works Committee, [announced](#) the [introduction of the Invasive Fish and Wildlife Protection Act](#). The [purpose of this legislation](#) would be to stop the spread of invasive species and would also augment a new Federal, State and local agreement to fund two boat inspection and washing stations being funded through an EPA grant of \$50,000.00 to the Lake George Park Commission. Lake George will now have a total of three voluntary decontamination sites at its busiest boat launches. In addition, the legislation would protect New York from the threat of invasive species by preventing the importation of potentially harmful species across state lines or into the United States by reforming the [Lacey Act](#).

### **State Criminal Enforcement**

#### *Waste Oil Abandoned in Brooklyn!: Attorney General's Office and DEC Indict Waste Oil Parties (Kings Co. Sup.)*

In a variation of a common criminal waste disposal scheme, a waste oil facility unable or unwilling to pay for the proper disposal of its waste oil employed parties to fill tanker trailers and

then brazenly abandon these at random locations on the streets of Brooklyn. In the past, conspirators of this sort sought remote rural locations to abandon hazardous substances, but [not this bunch](#). Rather than use legitimate vehicles to carry the waste oil, the principles retained a third party to steal tanker trailers from New Jersey. These trailers were then covertly filled with the waste oil at the storage facility and driven off to be abandoned. The non-environmental Penal Law indictments for these alleged outrageous activities were numerous. However, for environmental crime purposes, recall that abandonment qualifies as a release for invoking New York's hazardous substance release prohibitions. Therefore, Endangering Public Health, Safety or the Environment in the Second Degree (E.C.L. § 71-2713(3), a Class D Felony) and Endangering Public Health, Safety or the Environment in the Third Degree (E.C.L. § 71-2712(2), a Class E Felony) were the significant environmental crimes cited in the indictments.

### *Brooklyn Whistle Blower Sinks Illegal Sewer Disposal Scheme (Kings Co. Sup.)*

Perhaps the most difficult environmental crime to detect is illegal dumping into the New York City Sewer System or "POTW.". This is due to the sheer volume of liquid in the system and instant dilution of the pollution beyond practical detection methods. Such unlawful disposals not only endanger water quality but can also damage the system and endanger human health depending on the nature of the water pollutants involved.

However, [in this matter](#), a former employee of this manufacturing concern did come forward and revealed that the company was discharging wastes contaminated with heavy metals into the sewer system rather than incur the expense of treating these wastes before discharge.

The plea taken in Kings County Supreme Court led to the corporation to be sentenced to a conditional discharge and a \$2.8 million settlement, including \$1.5 million of unpaid corporate taxes, and four years of an extensive compliance, monitoring and remediation plan with the New York City Department of Environmental Protection and the DEC.

## **Federal Criminal and Civil Prosecutions**

### *Plating Polluter Pleads Guilty for Pollution in Sewers (WDNY)*

The underlying facts in this federal water pollution case brought in the Western District of New York are similar to the state level Brooklyn case cited above. Both involved manufacturers that wished to avoid the costs of treating industrial wastes by pumping those wastes directly into the local sewer system. However, in this matter, the illegal water pollutants were most likely easier to isolate and detect in a small local sewer system which connected to Lake Ontario unlike the vast NYC sewer system in the Brooklyn case. The facility manager [pleaded guilty](#) and will be sentenced for violations of the federal Clean Water Act.

### *US v. Palmer (NDNY) - Clean Air Act Felony for Illegal Asbestos Abatement*

Defendant [pled guilty](#) in U.S. District Court in Syracuse to a felony violation of the Clean Air Act, 42 U.S.C. § 7413(c), and improper disposal of asbestos wastes at a local landfill. Palmer,

owner of a former industrial facility which contained more than two thousand feet of friable asbestos insulation on interior pipes, had directed unlicensed individuals to perform asbestos removal without taking precautions to mitigate exposure to this carcinogen without filing a notification to EPA or any other level of government. He is scheduled to be sentenced in October where he faces a maximum sentence of five years in prison and a \$250,000 fine.

*US v. Mazza (NDNY) - Illegal Asbestos Dumping*

[In this case](#), multiple defendants were sentenced in District Court in Utica for conspiring to violate the Clean Water Act, Superfund statute (CERCLA), and to defraud the United States by illegally dumping thousands of tons of asbestos-contaminated construction debris on a 28-acre piece of property on the Mohawk River in upstate New York. In addition, the Mazza defendants were also sentenced on charges of obstructing justice and making false statements to law enforcement.

The old Yiddish term "[chutzpa](#)" seems appropriate for these defendants because of the scheme they used to perpetuate and conceal their criminal disposals. The defendants conspired to fill in the entire property over the course of five years with pulverized construction and demolition debris that was processed at New Jersey solid waste management facilities and then transported to the disposal location in Frankfort, N.Y. The plot was uncovered after the defendants had already dumped at least 400 truckloads of debris at the site. Much of the material was contaminated by asbestos and then dumped in waterways and wetlands on or near the property. The plotters further sealed their fates by using a fraudulent DEC permit complete with the forged name of a DEC official to conceal their crimes.

The Defendants' sentences included:

- Dominick Mazza, 51 months in prison to be followed by three years of supervised release, payment of a \$75,000 criminal fine and \$492,000 in restitution.
- Mazza & Sons Inc., to pay a \$100,000 criminal fine and \$494,000 in restitution and cleanup costs, and imposed five years corporate probation.

The court also ordered:

- Mazza & Sons' recycling facility to fund and implement an environmental compliance plan to prevent future environmental violations at their Tinton Falls, N.J. operation, which is to be administered by a third-party auditor.
- Cross Nicastro (the property owner) imprisoned for 33 months with three years of supervised release and to pay \$492,494 in restitution and a \$25,000 criminal fine.

*S. African Rock Lobster Smugglers ordered to Pay \$22.5 Million in Restitution (SDNY)*

The U.S. Attorney for the Southern District of New York sought and received a [restitution order](#) for the government of South Africa after a successful appeal to the U.S. Court of Appeals for the

Second Circuit of the District Court's 2007 orders that restitution was not available for crimes prosecuted under the Lacey Act. The Lacey Act makes it a crime to, among other things, import into the U.S. any fish, wildlife, or plants taken in violation of state or foreign law. In this case, it was unimportant that the law broken was from South Africa. Previously, the defendants had also paid seven million dollars in restitution in that country.

*Company Sued Over Fishy Shipments of Patagonian Toothfish (a/k/a Chilean Sea Bass) (NDNY)*

The U.S. Attorney for the Northern District of New York [settled](#) with a Florida fish importer for violations of national and international regulations governing the importation and exportation of Chilean Sea Bass based upon the company's exportation, and subsequent re-importation, of 9,600 pounds of this popular fish dish. As part of the settlement, a Consent Decree which authorized civil penalties, forfeiture and permanent injunctive relief against the defendant was issued. Defendant will pay civil penalties totaling \$35,000.00, forfeit \$96,013.76 (the proceeds from the sale of the Toothfish which were exported and re-imported), and the company is enjoined from committing similar violations in the future. The international conservation community is deeply concerned with the enforcement of these various laws due to the vulnerability of this popular species to rapid population declines without proper monitoring.

## **DEC Administrative Hearing Orders and Decisions**

These administrative determinations represent the usual eclectic mix. However, in two unrelated cases these months' decisions do shed some light on the Commissioner's application of joint and severable liability where there are multiple liable respondents. Two older 2007 cases focused on dam safety have also reached dispositions.

*In the Matter of the Village of Florida, Town of Chester and County of Orange, Respondents*

Decision and Commissioner's Order, May 23, 2013  
DEC Case No. CO3-20070201-2

This administrative enforcement action, originally commenced in 2007, concerns the responsibility of municipalities for the safe maintenance of local dams and associated infrastructure under their control. DEC staff alleged that the three municipal respondents: (i) failed to operate and maintain the Glenmere Lake Dam in a safe condition, in violation of Environmental Conservation Law (ECL) § 15-0507(1); and (ii) performed repairs on the dam without obtaining the required permits, in violation of ECL § 15-0503(1) and § 608.3 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR). The DEC had classified the dam as "Class C, High Hazard." The hearing record indicated that the dam's failure and the subsequent injury of people and property was possible.

The alleged violations were hardly sudden. DEC had first noted violations as early as 1971, and continuously thereafter given the steady deterioration of the 19th century dam in question.

The Respondents claimed that they were not "owners" of the dam, and were therefore not responsible for inspecting or maintaining the dam or performing any of the other activities required by the relevant statute and regulations. But, based on the factual record, the Commissioner held that the Respondents were owners because ECL § 15-0507(1) broadly defines the "owner" of a dam as "any person or local public corporation who owns, erects, reconstructs, repairs, maintains or uses a dam or other structure which impounds waters."

The Commissioner also held that the liability of the three municipalities under ECL § 15-0507(1) was joint and severable even though the ECL is silent on that point of law. However, using the same analysis, joint and severable liability was found not to apply for individual violations of ECL § 15-0503(1) for unpermitted work on the dam.

Ultimately, the Commissioner ordered the repair of the dam and assessed civil penalties of \$350,000 against the three respondents, broken down as follows:

- \$330,000 assessed jointly and severally against respondents for their violations of ECL §15-0507(1);
- Of the \$330,000, \$30,000 shall be due and payable and \$300,000 shall be suspended contingent upon respondents' compliance with the terms and conditions of the decision and order;
- \$20,000 allocated and assessed for violations of ECL § 15-0503(1) and 6 NYCRR 608.3.

DEC maintains an extensive webpage on New York's [dam safety and inspection programs](#).

*In the Matter of Jerome Muffler, et al.*

Order, May 24, 2013  
DEC Case No. CO2-20100615-26

*In the Matter of Jerome Transmissions, et al.*

Order, May 28, 2013  
DEC Case No. CO2-20100615-17

In two related, but distinct and separate, administrative actions, the Commissioner issued stern Orders against two automobile inspection stations that deliberately used an unauthorized device to fraudulently issue a false passing emissions test as part of the motor vehicle inspection process in violation of ECL Article 19, specifically 6 NYCRR 217-4.2, as enforced under ECL § 71-2103(1). Such violations involve the manipulation of the on-board diagnostics systems (OBD) necessary to test modern vehicles. The record indicates that at the first facility (Jerome Muffler) Respondents collectively simulated false motor vehicle of record on 3,532 separate occasions

between 2008 and 2010. In the second case (Jerome Transmission), the Respondents racked up another 900 false emission tests in roughly the same time period.

However, in assessing civil penalties in both cases, the Commissioner determined that the weight of the penalty should fall on the corporate entities as the holders of the DMV inspection permit. He further found that while the individual Respondents were liable, joint and severable liability did not apply to them and that the individual Respondent's penalties should be proportionate to the number of times they performed the fraudulent emissions test.

Civil penalties of \$570,000, were assessed in the first case as follows:

- Respondent Jerome Muffler, \$450,000;
- Respondent Almonte, 3,379 inspections, \$114,000;
- Respondent Bermudez, 10 inspections, \$1,000; and
- Respondent Ramos, 143 inspections, \$5,000.

In the second case, civil penalties of \$160,000 were assessed as follows:

- Respondent Jerome Transmissions Corp., \$100,000;
- Respondent Almonte, 862 inspections, \$57,000;
- Respondent Bermudez, 11 inspections, \$1,000; and
- Respondent Ramos, 27 inspections, \$2,000.

Oddly, the cases were not combined. The Commissioner held that as the violations in each case were contemporaneous but committed by two separate entities, the violations at one facility could not be used as a factor to enhance the penalty calculation at the other.

DEC maintains a comprehensive webpage on [vehicle air emission testing](#).

*In the Matter of 35-60 74th St. Realty*

Order, June 4, 2013

DEC File No. R2-20120927-616

Once again, a Respondent has demonstrated the folly of defaulting on a Motion for an Order without Hearing (6 NYCRR Part 622.12) by DEC staff based on its failure to comply with a previously entered DEC administrative Order on Consent to correct oil storage tank violations. Not only did the Commissioner order payment of a previously suspended penalty, he also assessed an additional penalty of \$37,500, which is the maximum penalty allowed for a single violation of ECL Article 17, as prescribed pursuant to ECL § 71-1929(1). The new violation was of course for the failure to comply with the terms of the first Order.

*In the Matter of Berger, et al.*

Decision and Order, June 17, 2013  
DEC Case No. CO3-20070201-9

Here, the Commissioner is forced to address another case of Respondents' failure to properly maintain a Class "C" High Hazard Dam as required by various provisions of ECL Article 15. In this case, the deteriorating Honk Falls Dam spans Roundout Creek, a tributary of the Hudson River. As in the Village of Florida case described above, the Commissioner held that the various parties that used or owned land abutting the dam were indeed owners and therefore liable for the dam's expensive upkeep and permit requirements pursuant to ECL § 15-0507(1).

This Order and the underlying ALJ hearing report will be of particular interest to practitioners who need references and an in-depth analysis of the law as it relates to ownership of underwater lands. In particular, the language in a deed conveyance may also confer ownership of a dam for purposes of establishing liability for its maintenance under the ECL.

This Order is also interesting in that to direct Respondent's resources towards fixing the dam, the Commissioner assessed a comparatively modest total joint and severable civil penalty of \$116,500, of which \$30,000 was payable and the remaining \$86,500, was suspended contingent upon Respondents' compliance with the terms and conditions of the decision and order. In an unusual reference, the Commissioner supported this position by citing the testimony of the DEC lead engineer who pontificated on the need to diverting the Respondent's assets from penalties towards fixing the dam. Helpful testimony if a Respondent can get it!

## **Weird News**

### *Giant Mosquitoes Invade Florida*

As regular readers of these posts already know, I enjoy poking fun at our friends in Florida because of the odd environmental anomalies of that state. So, I am delighted to report that [giant mosquitoes](#) approximately 20 times larger than the usual kind are set to take over the sunshine state due to heavy rains. The flying nuisances, known as gallinippers, are similar in appearance to their smaller cousins except for being about the size of a quarter. They also deliver a painful bite. Buzz buzz!

### *Death Penalty for Polluters in China*

I have heard of various tough approaches to environmental law enforcement but it goes without saying that this is certainly the ultimate deterrence. Polluters in China could soon [face the death penalty](#) after the authorities increased the courts' powers to punish firms and individuals who carry out serious environmental crimes. China already imposes the death sentence for economic

and corruption crimes. It can only be a matter of time before the first environmental death sentence is handed down. We here at the Update will be watching for it with morbid fascination.

**Tags:**

[6 NYCRR Part 622.12](#), [Air pollution](#), [Asbestos Abatement](#), [Asbestos disposal](#), [Automobile Emissions testing](#), [CAA](#), [CERCLA](#), [Chilean Sea Bass](#), [China](#), [Chutzpah](#), [Class C High Hazard](#), [Clean air Act](#), [Clean Water Act](#), [CWA](#), [Dam](#), [Dam Safety](#), [Death Penalty](#), [Default](#), [ECL Article 15](#), [Florida](#), [Forfeiture](#), [Gallinippers](#), [Hazardous Substance Abandonment](#), [Invasive Fish and Wildlife Protection Act](#), [Invasive Species](#), [Joint and Severable Liability](#), [Lacey Act](#), [Mosquitoes](#), [Motion for Order without Hearing](#), [OBD](#), [Oil disposal](#), [Patagonian Toothfish](#), [Conservation](#), [POTW](#), [Restitution](#), [Rock Lobsters](#), [Senator Kirsten Gillibrand](#), [Sewage discharges](#), [Sewer system](#), [Solid Waste](#), [South Africa](#), [Superfund](#), [TCI](#), [Waste Oil](#), [Water Pollution](#)

## [NY Environmental Enforcement Update July 2013, #7](#)

### **Enforcement News**

#### *Former Nuke Plant Manager Charged with False Filings*

Charges were filed by the SDNY US Attorney's office against a former chemistry manager for the Indian Point nuclear power facility located in Peekskill. Specifically, he allegedly committed [deliberate misconduct by filing phony test results](#) about contamination in diesel fuel for the facility's power emergency generators in an attempt to hide the true results from the [Nuclear Regulatory Commission \("NRC"\)](#). He also allegedly falsified a written report of the results prior to an NRC's inspection of the facility and then later admitted that he falsified the test results so Indian Point would not have to shut down. The NRC said that he acted alone. The impact of this charge on the current licensing process for the facility is not known at this time.

#### *Revised Government-LaFarge Settlement Sets Stricter Limits and Funds Local Environmental Projects*

Attorney General Schneiderman, DEC Commissioner Joe Martens, and federal officials announced an amended settlement with Albany County cement plant operator Lafarge North America. In exchange for an additional 18 months for Lafarge to build a new kiln with advanced air pollution controls, the settlement [sets stricter annual limits on allowable emissions of nitrogen oxides \(NOx\) and sulfur dioxide \(SO2\)](#). The revised settlement also commits Lafarge to fund [\\$1.5 million in projects to further reduce pollution emissions at the plant and in the surrounding communities](#).

A separate agreement between New York State and LaFarge limits mercury emissions to levels 25% lower than the plant's current air pollution control permit.

#### *DEC Region 7 ECO Criminal Cases Now On-line*

The [Syracuse Post Standard](#) has started a [new feature](#) in cooperation with DEC Division of Law Enforcement to publish dispositions for prosecutions generated by the DEC Environment Conservation Officers ("ECO") for the Department's Region 7 based in Syracuse. What is most notable at first glance is that the 21st century court surcharges are often more than the early 20th century fines prescribed for current offenses. Many of these ECL criminal fines have been unchanged since the 1930's.

#### *Adirondack Park Agency ("ADA") Celebrates 40th Anniversary*

The [Adirondack Park Agency \(the "APA"\)](#) maintains an [active administrative enforcement docket](#) related to the regulation of private land use and development in the Park. This significant state environmental management agency is celebrating its 40th anniversary this year.

### *NY Bans Shark Fin Trade*

Despite the endless bad publicity heaped on sharks (Note, the spate of man eating shark movies on the SyFy cable channel including [Ghost Shark](#), [Sharknado](#), and my favorite, [Sharktopus](#), New York State is banning the sale, possession and trade of shark fins. An [estimated 73 million sharks are killed worldwide to meet market demand](#). The fins harvested in this maritime slaughter are mainly used in a soup popular in traditional Asian cuisine. Under current law, it is already illegal to "fin" a shark in New York waters, a practice where a shark is caught, its fin removed, and then returned to open waters to die.

### *Billions of Gallons of Sewage Released in NY Annually*

As [previously reported by the Update](#), the state's overused, over-stressed and over-the-hill sewage and storm water runoff systems are still releasing large amounts of untreated sewage, especially after heavy rains. This is a statewide problem, as demonstrated when a July storm took the Niagara Falls sewage treatment plant offline, sending [more than 100 million gallons of wastewater into the Niagara River](#). A new state sewage spill reporting law that was effective on May 1, 2013 was intended to address the issue, but has experienced problems of its own in attempts to implement it.

## **Enforcement People in the News**

Governor Cuomo's office announced several high level appointments in the health field including that of [Courtney Burke to serve as Deputy Secretary for Health](#).

## **State Criminal and Civil Enforcement**

### *ECOs Arrest Lead To Felony Charges Against Illegal Horseshoe Crabbers*

Add horseshoe crabs to the list of those species threatened due in part to illegal poaching. In a night time investigation, the [DEC apprehended and charged three Suffolk County men](#) with illegally harvesting almost 1,500 horseshoe crabs from an inlet of Great South Bay. The commercial license limit is only for thirty crabs. The seized horseshoe crabs were released safely back into Great South Bay. The three were charged with E-Felonies for their alleged misdeeds which allows for sentences of 1 to 4 years in prison and criminal fines of up to six figures based on the numbers of horseshoe crabs actually taken.

Additional information about this fascinating "living fossil" is available on the [DEC's website](#).

### *Man Kills Bear (and Pays!)*

DEC Police [charged defendant with a criminal misdemeanor](#) for the out-of-season shooting and killing of a 150 pound black bear he saw walking in his backyard in Greene County. After some CSI-style investigation, DEC determined that the bear was not threatening and was shot while moving away from the shooter. But, should the shooter-homeowner be burdened with a criminal

conviction when it was obvious that he did not intend to poach the bear for profit? Luckily for the shooter, the DEC and the court agreed to use a legal option known as the [Civil Compromise, ECL § 71-0519](#), which is applicable to those ECL sections that derive from the pre-1970 Conservation Law. This section of the ECL allows the parties to enter into a civil compromise and dismiss the criminal charges. However, the bear shooter did pay a \$752.50 penalty in Cairo Town Court for his ursine run in. But the simple lesson is that, unless threatened or licensed, it is not a good idea to shoot a bear. Instead, call the local police and the proper state or local personnel will advise or respond.

## **Federal Enforcement**

### *Environmental Inventor and Developer Pleads Guilty in \$5 Million Dollar Fraud Scheme (EDNY)*

This is a cautionary tale for all. One cannot work in the environmental business very long without running into the promise of a scientific or engineering miracle that purports to easily alleviate an otherwise impossible or expensive environmental problem. As the old cliché goes, if it is too good to be true, then, well you know the rest. Here, the fraudster in question [pleaded guilty to wire fraud](#) for falsely taking \$5 million dollars from an investor for his so called "Clean Air Valve." According to [the criminal complaint](#), the fraud victim was enticed by the promise of millions in profits from the device. Apparently, the only thing cleaned was his bank account.

### *Bilge Waste Releases Pollute NY Area Waterways (NDNY)*

This case involves an old problem that state and federal regulators have been battling since the onset of environmental enforcement: deliberate bilge releases by transient ships. In addition to the release of actual pollutants, bilge pumping by international ships also is a primary source for introduction of destructive invasive species, such as the zebra mussel. [Here](#), shipping companies located in Germany and Cyprus were sentenced in Federal District Court to pay a \$10.4 million combined penalty for felony obstruction of justice charges and violating the [Act to Prevent Pollution from Ships \("APPS"\)](#). Specifically, the defendants deliberately concealed pollution by falsifying logs and other records.

## **DEC Administrative Enforcement Actions**

### *In the Matter of New Power Muffler Inc., Miguel Marte, Johann Gonzalez, Reynaldo A. Medina and Jovanny F. Ortega, Respondents*

Order, July 15, 2013  
DEC Case No. CO2-20100615-23

The Commissioner [assessed six figure penalties](#) against Respondents for performing more than 2,500 phony onboard diagnostic ("OBD") II vehicle inspections with noncompliant equipment and procedures in violation of 6 NYCRR 217-4.2. OBD inspections, when properly conducted, are designed to monitor systems responsible for controlling air emissions.

However, in a setback to responsible corporate officer liability doctrine, the Commissioner also held that the Department's staff did not provide evidence establishing the decision making authority of the corporation's principal as a basis for his liability for the corporation's actions. Therefore, the corporation's principal was not personally responsible for noncompliant inspections performed by the corporation that he did not personally perform.

*In the Matter of U.S. Energy Development Corporation, Respondent*

Ruling of the Chief ALJ on Motion to Stay Proceedings, July 10, 2013  
DEC File No. R9-20111104-150 July 10, 2013

[In a Ruling](#) that may have great significance in enforcement actions against natural gas drillers, the Department held that it would not grant a Motion to Stay administrative proceedings pending the disposition of a Respondent's appeal of a dismissal of an Article 78 Petition originally commenced to seek to discontinue the Department's the same underlying administrative enforcement action.

Here, water pollutants released from Respondent's natural gas drilling facility in Pennsylvania entered New York waterways in Allegany County. Respondent and the DEC then entered into an Order on Consent which allowed for mitigation and prevention of future releases, but to no avail, as the releases allegedly continued in violation of the Order. DEC then commenced an administrative action seeking penalties and enforcement for violations of the Order. The Respondent then commenced an Article 78 Petition alleging that the DEC had overstepped its jurisdiction. In turn, that Petition was dismissed in Supreme Court and Respondent then moved for a stay of the administrative action pending the perfection and disposition of an appeal seeking to overturn the Order of the Supreme Court.

The Chief ALJ denied the Motion for a Stay relying on CPLR 2201 and relevant case law. The Chief ALJ also held that the Respondent failed to establish either that an appellate decision was imminent or that any such decision would likely expedite the present administrative proceeding. He also noted that Respondent failed to demonstrate any undue prejudice by continuing the administrative enforcement proceeding.

*In the Matter of Quadrozzi Concrete Corp. Respondent*

Order, July 8, 2013  
DEC Case No: CO2-20121011-4

[In this case](#) we learn that the going administrative penalty in a default for the failure to file an annual DMR (Discharge Monitoring Report) and an ACR (Annual Certified Report) as required by the Department's SPDES Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity, Permit is \$10,000, for violations of both the permit and 6 NYCRR 750-2.5(e).

However, the Commissioner did note that though the Respondent corporate permittee dissolved subsequent to the failure to file, it was still liable for its pre-dissolution transgressions violations

citing the Business Corporation Law ["BCL"] §§ 1006[a][4] & [b] and 1009 and previous Commissioner's Decisions. These prior decisions held that a dissolved corporation continues its corporate existence for purposes of paying liabilities or obligations, for being sued, and to participate in administrative proceedings in its corporate name.

*In the Matter of Susan E. Gardner, LLC, Respondent*

Order, July 2, 2013

DEC Case No. R4-2008-1110-157

Here, Respondent was found to have [excavated and changed the course of a tributary](#) of Kinderhook Creek in Rensselaer County without a permit in violation of ECL § 15-0501 and 6 NYCRR 608.2. Respondent's unlawful activities also created a pond that impacted the flow of the tributary into the Creek and the quality of the trout habitat of the stream. Respondent had argued that the pond had been present on the location for "generations," but before and after excavation aerial photographs of the location depicted the sudden appearance of a much larger the pond due to the unauthorized damming of the waterway in question.

Interestingly, DEC staff were apparently more interested in restoration (and removing the ersatz multi-generational pond) than seeking a stiff penalty. Despite the potential calculation of a six figure penalty, staff sought a penalty of only \$6,400.00, and that Respondent develop an approvable restoration plan. Furthermore, the Commissioner agreed with the ALJ recommendation and modified the civil penalty by suspending \$4,000 of that amount, contingent upon respondent's compliance with the restoration requirements.

*In the Matter of Airport Auto Wrecking, Respondent*

Ruling on Motion to Amend the Complaint - June 27, 2013

DEC Case No. CO9-20130325-01

Once again, the folly of ignoring a DEC administrative complaint and associated motion practice is demonstrated with a new twist by this matter. In this case, Respondent's [failure to respond to a Motion to Amend](#) allowed DEC central office staff and Region 9 staff to coordinate and combine parallel administrative enforcement cases and seek higher penalties. Region 9 staff had inspected Respondent's auto dismantler in October 2012 and allegedly discovered various environmentally serious operating violations. However, before they could file their complaint, central office staff beat Region 9 to the courthouse by commencing an action in March 2013 against the same party for a less serious filing failure.

The Department's Uniform Enforcement Hearing Procedures (6 NYCRR part 622 [Part 622]), provide that a party may amend its pleading once without permission at any time before the period for responding expires (see 6 NYCRR 622.5[a]). Thereafter, either party may amend its pleading at any time prior to the final decision of the Commissioner by permission of the ALJ or the Commissioner, and absent prejudice to the ability of any other party to respond (see 6 NYCRR 622.5[b]). When no ALJ has been assigned to the case, the motion is made to the Chief ALJ ( see 6 NYCRR 622.6[c][1]).

In this case, Respondent made no response to the Motion to Amend (or, it seems, to the original complaint) and the Chief ALJ granted the Motion. Thus, Respondent found itself facing a more serious set of charges and higher penalties in the amended complaint. Was Respondent prejudiced or given an advantage by having to face the combined charges of the new amended complaint? We will not know until this matter reaches a disposition. Arguably however, Respondent would have had more options if it had responded to its mail.

## Weird News

*Pirates Invade Brooklyn! (pirate radio operators, that is)*

The Kings County District Attorney [arrested two men for allegedly sending Unauthorized Radio Transmissions](#), a class-A misdemeanor. Unauthorized Radio Transmission is knowingly making a radio transmission on a radio frequency assigned and licensed by the Federal Communications Commission ("FCC") for use by AM and FM radio stations without authorization or having first obtained a license from the FCC. Bluntly, the defendants operated an unlicensed pirate radio station on the FM frequency band usually occupied by commercial radio stations. What intrigues most however, is that, without much fanfare, the state recently enacted a law which essentially criminalized federal communications law violations. The new law, [Penal Law § 190.72](#) (enacted in 2011, effective in 2012) bans unauthorized radio transmission on the standard AM/FM commercial frequencies.

Unlicensed "Pirate Radio" has been part of broadcasting since the first federally licensed broadcasters squawked onto the airwaves in the early 1920s. So, why pass a state law now and why should the DA expend resources to prosecute what has always been a federal crime for violations of a federal regulatory scheme? Well, part of the answer [is that NY leads all other states in FCC enforcement against pirate stations with 330 actions taken since 2003](#).

But still, does that justify state enforcement in this area of federal regulatory practice? You be the judge.

Tags:

[6 NYCRR Part 622](#), [A.G. Schneiderman](#), [ACR](#), [ADA](#), [Air pollution](#), [APPS](#), [Article 78](#), [Auto Dismantler](#), [BCL](#), [Bears](#), [Bilge wastes](#), [Cement](#), [Clean Air](#), [Clean Water](#), [Commissioner Martens](#), [Complaints](#), [Courtney Burke](#), [CSO](#), [DMR](#), [ECL](#), [ECL Civil Compromise](#), [ECO](#), [Environmental Fraud](#), [FCC](#), [Finning](#), [Fracking](#), [Gas Drilling](#), [Ghost Shark](#), [Governor Cuomo](#), [Great South Bay](#), [Horseshoe Crabs](#), [Indian Point](#), [International Trade](#), [Kinderhook Creek](#), [Kings County DA](#), [LaFarge](#), [Mercury](#), [Motion to Amend](#), [Natural Gas](#), [Nitrous Oxide](#), [NOx](#), [NRC](#), [DEC Region 7](#), [OBD](#), [Penal Law](#), [Pirate Radio](#), [Poaching](#), [Runoff](#), [Sewage](#), [Shark Fins](#), [Sharknado](#), [Sharktopus](#), [Shell fishing](#), [Ships Bilges](#), [SOx](#), [SPDES](#), [Stream Excavation](#), [Stream Restoration](#), [Sulfur dioxide](#), [Water](#), [Water Pollution](#)

## [NY Environmental Enforcement Update August 2013, #8](#)

### **Environmental Enforcement News**

#### *Spotlight on the DEC Forest Rangers*

The advent of August means forest fire awareness. Fire danger also raises awareness of the other DEC police force, the [NY Forest Rangers](#). The Rangers high profile mission is as the state's premier forest fire prevention and wilderness rescue unit. However, having been [upgraded from Peace Officer to full Police Officer](#) status [CPL Section 1.20(v)c] , the Rangers also have a considerable enforcement presence on state lands and campgrounds in the Catskills, Adirondacks and Southern Tier. The [unit's 2012 Annual Report](#) details more than 2,000 enforcement actions commenced for violations of various parts of the Environmental Conservation Law and the Vehicle and Traffic Law (for boats, ATVs and other motor vehicles).

#### *NYC Dept. of Environmental Protection Installs Sewer Monitoring Gizmos*

Readers will recall that the Update previously commented on the difficulties of documenting unauthorized releases into the New York City sewer system (and the advantage that gives to criminals that deliberately release hazardous substances into the system)([see Enforcement Update Issue # 6, June 2013](#)). Therefore, it is timely to note that NYCDEP has responded by [deploying a system of flow monitors](#) to discover such releases. While primarily focused on preventing and responding to blockages, I suspect that the new equipment will also detect large water pollution violations as well.

### **Enforcement People in the News**

DEC Investigator Robert O'Connor received the "[Officer of the Year Award](#)" for Outstanding Service by the [Northeast Conservation Law Enforcement Chiefs Association](#) (NECLECA). NECLECA consists of the law enforcement chiefs of conservation agencies from 13 Northeastern states, three Eastern provinces of Canada and the United States and Canadian conservation law enforcement agencies. Investigator O'Connor started with DEC in 1989, and has been cited repeatedly for his many contributions and accomplishments.

Attorney Michael S. Caruso, formerly of the DEC Office of General Counsel, has been [appointed to the Department's Office of Hearings and Mediation Services](#) as an Administrative Law Judge. He is already hard at work as illustrated by this month's administrative hearing summaries below.

The [Susquehanna River Basin Commission](#) (SRBC) has announced the appointment of Andrew D. Dehoff as its [new executive director](#). He will serve as only the third executive director in the agency's 42-year history. His appointment becomes effective on September 19, 2013.

### **Federal Criminal and Civil Enforcement**

*P. v Walker Puts Pit Bull Abuser Behind Bars (Albany County Court)*

This defendant was sentenced to six months in county jail and five years of Felony Probation after he [pleaded guilty to one count of Aggravated Cruelty to Animals](#), an unclassified felony as per [N.Y. AGM § 353-a](#). As a condition of probation, the defendant cannot possess or reside with animals. He had intentionally left four pit bull dogs unattended in a trailer for an extended period of time without adequate food, water or care. One of the dogs suffered serious physical injury which satisfied one of the elements of the felony crime used.

*Feds Thwart Mob Control of Carting Business...For Now (SDNY)*

Three defendants [pleaded guilty to loansharking or conspiracy to commit extortion](#) in connection with their roles in a larger scheme to exert control over the commercial waste-hauling industry in the greater New York City metropolitan area and in parts of New Jersey. They were participants in the scheme, along with other members and associates of three different Organized Crime Families of La Cosa Nostra ("LCN") - the Genovese, Gambino, and Luchese Crime Families.

*Asbestos Dumpers Pay Big for Violating the Clean Water Act (NDNY)*

In a continuation of a case first reported on by the Update in July # 6 ([see previous post on U.S. v. Mazza \(NDNY\)](#)), three more individuals were sentenced in federal court in the NDNY, for [illegally dumping thousands of tons of asbestos-contaminated construction debris](#) on a 28-acre piece of property on the Mohawk River in Frankfort.

The first was sentenced to serve 36 months in prison followed by three years of supervised release while the other was sentenced to five years' probation, including six months of home confinement. Two were ordered to pay \$492,000 in restitution for, among other things, cleanup expenses at the site. Criminal violations included those for the Clean Water Act, CERCLA, wire fraud and for defrauding the United States.

In addition, one defendant pleaded guilty to substantive wire fraud and making false statements to law enforcement in connection with a fabricated "permit letter" the conspirators created and used to dump at the site.

Finally, the truck broker in the operation was sentenced to 15 months in prison for conspiring to commit wire fraud, thus ending this sordid affair but not before the conspirators had [dumped at least 400 truckloads of asbestos laden debris at the site](#).

*Fisherman and Fish Dealer Plead Guilty for Phony Flounder Records (EDNY)*

In yet another assault on the state's and region's fishing resources the operator of a commercial dragger vessel operating in local waters and his fish dealer pleaded guilty in federal court to federal violations for [systematically under reporting their harvest of fluke \(summer flounder\)](#). As part of the plea deal, the defendants agreed to pay between \$480,000 and \$516,000 in combined fines and forfeitures. The defendants also agreed to severe multiple sentence conditions,

including relinquishment of federal fishing permits, a ban on participation in a federal research program, divestiture of the fishing vessel, and shutting down the dealership. The court will hear individual sentencing recommendations at a hearing set for Nov. 22, 2013.

To compare, see both New York's [commercial](#) and [recreational legal fishing limits](#).

#### *Artifact Smuggler Gored for Dealing in Illegal Rhino Horns (SDNY)*

A New York antiques dealer pleaded guilty in federal court to [conspiracy to smuggle Asian artifacts made from rhinoceros horns and ivory](#) and violate wildlife trafficking laws. Defendant was apprehended as part of "Operation Crash," a nation-wide crackdown in the illegal trafficking in rhinoceros horns and artifact smuggling to Hong Kong and China. He conspired with others to smuggle the objects out of the United States knowing that it was illegal to export such items without required permits.

Since 1976, the rhino horn trade has been regulated under the [Convention on International Trade in Endangered Species of Wild Fauna and Flora](#) (CITES), a treaty signed by over 170 countries around the world to protect imperiled fish, wildlife, and plants.

The investigation was collaboration between the [U.S. Fish and Wildlife Service](#), the [DEC Division of Law Enforcement](#), and [U.S. Immigration and Customs Enforcement's Homeland Security Investigations](#).

## **Administrative Enforcement Actions and Settlements**

#### *DEC Administrative Settlement (pre-hearing) Reporting (Region 4)*

One of the glaring deficiencies in DEC information services is the failure to release notice or copies of routine administrative consent orders. While major settlements are often reported via press release, the vast majority of the department's settlements and consent orders are not individually reported or are otherwise buried in obscure or infrequently released annual reports. Therefore, DEC Region 4 is to be commended for independently providing a [web link to administrative consent orders issued by that office](#).

You can view some of the most recent DEC administrative actions by visiting the [Recent Decisions](#) page on the DEC website.

#### *In the Matter of G & J Ready Mix & Masonry Supply, Inc., Respondent*

Order, August 27, 2013  
DEC Case No.: CO2-20121011-2

The Commissioner issued an Order granting the staff's Motion for a Default Judgment against Respondent for the [failure to file](#) an annual discharge monitoring report ("DMR") for calendar year 2011 and an annual certification report ("ACR") for calendar year 2011 for its facility in

Queens, New York in violation of 6 NYCRR 750-2.5(e) and the Department's SPDES Multi-Sector General Permit for Stormwater Discharges. Respondent was ordered to submit the documents and pay a civil penalty of 10,000.00.

*In the Matter of J & M Used Auto Parts, Inc., Respondent*

Order, August 27, 2013  
DEC Case No.: CO2-20121011-7

Similar to the above, the Commissioner issued an Order granting the staff's Motion for a Default Judgment against Respondent for the [failure to file](#) an annual discharge monitoring report ("DMR") for calendar year 2011 and an annual certification report ("ACR") for calendar year 2011 for its facility in Brooklyn, New York in violation of 6 NYCRR 750-2.5(e) and the Department's SPDES Multi-Sector General Permit for Stormwater Discharges. Respondent was ordered to submit the documents and pay a civil penalty of 10,000.00.

*In the Matter of Cushman, Heath d/b/a Ironman Scrap Removal, Respondent*

Order, August 27, 2013  
DEC Case No. R6-20121107-72

Here, the Region 6 staff commenced an enforcement action against a Gouverneur facility with an all too common problem: the [unauthorized storage of more than 1,000 tires](#). This scenario creates the potential for water, air and regulated waste pollution (not to mention the fire and pest nuisance inherent in stockpiling old tires). The potential for a pollution release was enhanced by additional solid waste permit, gasoline discharge and spill reporting violations. Respondent failed to answer and appear and Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 was granted. Despite Respondent's default, the Commissioner ordered half of the penalty suspended (from \$40,700 assessed to \$20,300 payable) pending remediation of the tires and the gasoline spill.

*In the Matter of U.S. Energy Development Corp., Respondent*

Ruling of the Chief Administrative Law Judge on Motion for Dismissal of Affirmative Defenses, August 23, 2013

This Ruling by Chief ALJ McClymonds [continues efforts to reach a resolution of an administrative prosecution](#) that may be important to future enforcement cases involving mining waste discharges (including fracking wastes). Recall that the facts of this case were previously reported by the [Update in the July Issue #7](#) where the Chief ALJ denied Respondent's Motion for a Stay pending resolution of a parallel Article 78 Petition.

Among rulings on a number of motions by both parties to dismiss or dismiss affirmative defenses, the Chief ALJ addressed the issue of federal preemption by the Clean Water Act (CWA). Recall that the original release occurred in Pennsylvania before entering a NY waterway and was first addressed by Respondent by entering into two Orders on Consent with DEC. Using

that fact, the Chief ALJ noted that as Respondent had executed the two consent orders with the Department and that Respondent was also aware of the federal preemption defense. Despite these factors, Respondent still made the business decision to settle with the Department. Therefore, the Respondent voluntarily consented to the application of New York's standards to resolve the Department's claims under ECL 17-0501 and serve as the basis for its obligations under the consent orders.

In an attempt to defer liability, Respondent argued in several defenses that additional state and federal agencies should be joined in the action as violators themselves. In dismissing these defenses, the Chief ALJ noted that whether the failure to join necessary parties is an available defense is undecided according to previous administrative rulings. However, the defenses failed on the merits anyway due to the lack of prejudice and because relief could be granted without the other parties. In addition, he noted that if others were liable (as established by the record), Respondent's liability may be mitigated as well.

*In the Matter of Johanna Transmission Parts, Inc., et al., Respondent*

Order, August 21, 2013  
DEC Case No. CO2-20100615-22

The Department [continued its enforcement efforts against illegal automotive emissions testers](#) by finding both a Manhattan-based business entity and the individual inspectors (including managers) in violation for using an ersatz testing device to deliver dummy emission results in violation of 6 NYCRR 217-4.2 (operating an official emissions inspection station using equipment and procedures that are not in compliance with the Department's procedures and standards). The business was held liable for each of the 1,584 violations documented by DEC staff. The Respondent business did not file an answer or otherwise appear in the hearing although two of the three employees did appear at the hearing.

However, as with the previous violation Administrative Orders involving onboard diagnostic (OBD) II inspections, the real issue was in the differing civil penalty calculations and legal theories used by the Commissioner (and ALJ) and the DEC staff. Staff had requested a penalty of \$792,000, representing a penalty of \$500 per violation. This was far less than the multi-million dollar penalty range allowed under ECL 71-2103(1). Instead, the Commissioner ordered a reduced total penalty of \$281,600, with \$225,000 against the business as license holder and the rest in separate penalties against each of three individuals. These were calculated by the percentage of the number of phony emission tests performed by each individual Respondent out of the total performed.

Once again, as set forth in other recent Orders in this field (see, [Jerome Muffler Orders, May 24, 28, Update Issue # 6](#); [New Power Muffler Inc., Order, July 15, 2013, Update Issue # 7](#)), the Commissioner has set a high bar for the Staff to establish both to joint and several liability and corporate officer liability in these OBD cases.

*In the Matter of Brooklyn Resource Recovery, Inc., Respondent*

Ruling, August 16, 2013  
DEC Case Nos. 2-20010326-183 and 2-20110520-178

In an interesting ruling on Motions for an Order without Hearing and Cross Motions to dismiss, the ALJ issued [useful analysis on the statute of limitations and constitutional due process](#). To appreciate the Rulings, one must be aware that the parties have been actively nursing a simmering dispute over an alleged oil spill at the site of Respondent's auto shredder since 2006. The confusing and contradictory affidavits presented by the parties made any summary proceeding on the spill issue impossible and a hearing was scheduled.

However, Respondent also cross-moved for dismissal based on a violation of the Statute of Limitations and on various constitutional due process grounds (the alleged use of hearsay by DEC staff being prominent). The ALJ ruled that while there is no specific Statute of Limitations for an administrative action in the State Administrative Procedure Act (SAPA), Respondent could not show that it met any of the unfairness standards that would allow for such limitations to be created citing [Matter of Gramercy Wrecking and Environmental Contractors, Inc.](#), ALJ Ruling, Jan. 14, 2008, citing *Matter of Cortlandt Nursing Home v Axelrod*, 66 NY2d 169, 178).

In regards to the use of hearsay, the Ruling noted that hearsay evidence is admissible in an administrative adjudicatory proceeding and can be the basis of an administrative enforcement determination (see SAPA § 306[1][agencies need not observe the rules of evidence observed by courts]).

*In the Matter of Autoramo Inc., Luis A. Ramos, and Rafael Tavera, Respondent*

Order, August 13, 2013  
DEC Case No. CO2-20100615-06

This matter has virtually the same on-board diagnostic OBD inspection fact pattern and legal issues as those in the Johanna and Jerome Muffler Orders referenced above. Only here, evidence indicated only a mere [315 falsified vehicle emission tests](#). However, using a modification of the penalty calculation used in the previous cases, the company was assessed a penalty of \$75,000 and one of the employees was ordered to pay \$30,000. However, the overall penalty was reduced by one third due to bad service on one of the Respondents. Under the modified proportionality scheme the remaining Respondent was assessed \$30,000, for his inspections.

## **Weird News**

*Blood Worms Infest Local Oklahoma Water Supply*

Yecchh! [I say no more!](#)

*Japanese Start Sperm Bank for Endangered Species*

Sometimes these posts just seem to [write themselves](#).

Tags:

[ACR, Administrative settlements, Administrative Statute of Limitations, Air emissions tests, Albany County District Attorney, ALJ Michael S. Caruso, Andrew D. Dehoff, Animal Cruelty, Asbestos dumping, Auto fluff, Auto Shredder, Blood worms, CITES, Clean Water Act, CWA, DMR, ECI Robert O'Connor, Endangered Species, Endangered species sperm bank, Federal Preemption, Fluke, Fracking, Gambino Crime Family, Genovese Crime Family, Ivory, Ivory Smuggling, Joinder of parties, La Cosa Nostra, Luchese Crime Family, Mohawk River, NDNY, NYCDEP Sewer Monitors, NYS Forest Rangers, DEC OHMS, OBD, Oil spills, On board diagnostic, Operation Crash, Rhino horn, Rhinoceros, SDNY, SPDES, SRBC, Summer flounder, Tires, US F&WS](#)

## [NY Environmental Enforcement Update September 2013, #9](#)

### **Enforcement News**

*\$5 Billion Environmental Bond Act Backed by Sen. Mark Grisanti and Assem. Robert Sweeney*

[Sen. Mark Grisanti](#) and [Assem. Robert Sweeney](#), the Environment Committee Chairs of the NYS Legislature, and a host of others endorsed a [proposed new state environmental bond act](#). The Act would generally address a number of categories including infrastructure and storm damage projects. But, as in previous bond acts (1986 and 1996) the exact projects and funding are to be named later.

However, the proposed Bond Act first must go before the voters in 2014 at the earliest. A bill to do that has been introduced for the 2014 legislative session ([A8121](#)) along with a [Sponsor's Memorandum](#) that may answer (or create) more questions about this proposal.

Hopefully, if passed, some of this money will be directed to the state's depleted regulatory enforcement staff (see item below). From personal experience, previous bond acts have funded additional DEC staff.

*NY Environmental Advocates Issue Provocative Report on DEC Enforcement Decline*

[The Report](#) documents the steady decline in certain New York State Department of Environmental Conservation (DEC) enforcement metrics (inspections, violations noted, etc.) due to systemic staff shortages. In short, as the Report states, the agency is doing "less with less." It is no secret that the agency has endured an approximate 25% overall cut in staff positions over the past five to ten years. Therefore, regardless of the accuracy of the particulars, this Report and its conclusions are certainly no surprise to anybody that follows these matters. If passed, perhaps some of the five billion dollars from the proposed Bond Act (see item above) can be used to hire new DEC staff.

*DEC Proposes Liquefied Natural Gas Regulations*

In a portent of things to come, the DEC will hold a hearing and solicit public comment on proposed regulations for liquefied natural gas (LNG) facilities. This proposal arrives in the midst of a [growing controversy](#) about a proposed LNG terminal off-shore of Long Island. [The hearing](#) is scheduled for October 30, 2013 with comments accepted until November 4th.

Note, NY had previously rejected the [proposed Broadwater LNG Terminal](#) in 2008 which was to have been located in Long Island Sound.

Historically, New York had maintained a moratorium on these facilities between 1973 and 1999, following a devastating [40 fatality accident](#) in Staten Island back in 1973.

### *Greenpoint Grants Available from 2011 Exxon-Mobil Enforcement Settlement Fund*

The [Greenpoint Community Environmental Fund](#) ("GCEF") is seeking viable community projects to take advantage of the \$19.5 million fund was established with money paid by ExxonMobil in a [2011 settlement with New York State](#). The fund was a benefit of the related settlement related to the huge oil spill that spread under large parts of Greenpoint, Brooklyn. The settlement requires the company to fully clean up the spill and pay \$19.5 million to fund local environmental benefit projects.

The GCEF is administered by the AG's Environmental Protection Bureau and the DEC, in conjunction with a joint partnership of the Greenpoint-based North Brooklyn Development Corporation and the National Fish and Wildlife Foundation.

### *Adirondack Park Agency (APA) August Enforcement Update*

For those that follow this lesser known, but locally important, enforcement niche, the [August 2013 report](#) is available via the [APA website](#).

### *Carnival Cruise Settlement Sets New Emission Standards for Cruise Fleet*

In a move that will certainly impact New York coastal waters, the U.S. Environmental Protection Agency (EPA) and Coast Guard have reached an [agreement in principle with Carnival Corporation](#) to develop advanced emission control technology. Carnival will develop and install a new exhaust gas cleaning system on up to 32 ships over the next three years. These ships are to be used in the North American and U.S. Caribbean Emission Control Areas (ECA) to create zones where ships reduce harmful air pollution emissions including SOx and particulates.

### *So Cal. Chain Drugstores Pay Up for Dumping Toxics! Is New York Next?*

This non-local item is another example of the growing enforcement trend involving nontraditional retail targets. Here, a group of local Southern California District Attorneys commenced civil actions against a number of national drugstore chains for various hazardous substance and waste handling and disposal violations at their numerous locations. These violations involved products such as paints, pesticides, automotive chemicals and house hold cleaning products. [Rite Aid paid \\$12.3 million](#) in fines to the counties involved.

Previously, the [Walgreen Co. had paid a 14 million dollar settlement](#). Are New York's drug stores next?

### *Is there a Boat Sewage Discharge Ban in Lake Erie's Future?*

To dump, or not to dump? That is the question! [USEPA continues to solicit comments](#). NY has already petitioned the USEPA to make the [NY portion of the Lake "discharge free."](#)

### *Rotting Grass - A New and Potentially Dangerous Water Pollution Source?*

This item almost went straight to the Weird News section, but this is a [new and very serious environmental and public health threat](#). Long Island, with its sole source aquifers, is especially vulnerable. The [culprits appear to be commercial composting facilities](#) which release manganese into groundwater at levels far in excess of the applicable state water quality standards for groundwater. See a [July 2013 assessment report](#) focused on a Yaphank composter for particulars.

## **Enforcement People in the News**

*Gov. Appoints Jon Kaiman as New L.I. Storm Recovery Chief*

Former North Hempstead Town Supervisor Jon Kaiman assumed a [new state storm-recovery position](#) as the special adviser for Long Island storm recovery to Governor Cuomo. The appointment was [first announced](#) in July.

## **Federal Criminal Enforcement**

*Angry Man Poisons Hospital!*

In [U.S. v. Kimber \(NDNY\)](#), the defendant was sentenced for using the deadly hazardous substance mercury as a weapon and for tampering with a consumer product. He was sentenced to 14 years in prison, 5 years supervised release thereafter, forfeiture of his home and car which were used to store the mercury, and more than \$200k in restitution to the Albany Medical Center. At sentencing the defendant admitted depositing this heavy metal at various times and in various areas of the hospital, including in cafeteria food products. Mercury is highly toxic upon exposure via inhalation or contact. Kimber sought to retaliate for what he thought were high and unfair hospital bills. As a pharmacist, he was well-aware of the dangers of mercury and where to purchase it.

*Explosive Situation in Webster NY*

In [U.S. v. Maracle Finishing et al. \(WDNY\)](#), the defendants worked with phosphorus and chromium chemicals used in the metal and powder production industry. The facility's drain and storage system connected to an outside sewer line which ultimately led to the local Publicly Owned Treatment Works (POTW) and then to Lake Ontario. The company's POTW permit did not allow for the discharge of any industrial wastes into that system. The discharged chemicals were also highly explosive and flammable.

The defendant corporation was sentenced to three years of probation and was ordered to pay a \$10,000 fine, while the company's General Manager was placed on probation for three years, ordered to pay a \$4,000 fine, and ordered to complete 80 hours of community service. The President of the company was also ordered to implement a company-wide environmental compliance program.

*Another Alleged Rhino Crime!*

An [individual was charged in EDNY](#) for false labeling in connection with his alleged role in the international smuggling of rhinoceros horns in violation of the Lacey Act. "Operation Crash" is an initiative to investigate and prosecute those involved in the black market trade in endangered rhinoceros horns. The Defendant is alleged to have fraudulently purchased a set of black rhinoceros horns in Texas and then traveled to New York with a falsified document where he sold the horns for \$50,000.

*NY Munis, Take Note! Columbia, S.C. Settles and Upgrades Sewer System*

While this is not a local case, it should serve as [a cautionary tale](#) regarding USEPA enforcement for NY municipalities that are struggling to maintain and upgrade local sewer systems. In this matter, the City of Columbia, S.C. was ordered by USEPA to implement extensive improvements at an estimated cost of \$750 million.

*Safeway Supermarket Gets Zapped for Ozone Depleting Emissions*

Huh? The nearest [Safeway](#) is in Delaware. But, here we see yet another example of non-traditional sector enforcement by USEPA that may be worth noting in NY. For violations of the Clean Air Act (CAA), the [Safeway grocery store chain will pay a \\$600,000 civil penalty](#) and implement a plan to reduce its emissions of ozone-depleting substances from refrigeration equipment at 659 of its stores nationwide at an approximate cost of \$4.1 million.

## **DEC Administrative Enforcement**

*In the Matter of Frisina, Kyle M.*

Assistant Commissioner Decision, September 12, 2013  
DEC Shellfish Permit No. 24333

[This decision](#) provides a rare glimpse into the world of fish and wildlife license revocations. The Petitioner here applied for the reinstatement of his shellfish digger's permit (clamming license), one of the requirements for harvesting commercial shellfish. Previously, the [permit had been revoked](#) by DEC staff following a conviction for unsafely taking shellfish from uncertified lands (on three separate occasions within a five-year period) in violation of ECL § 13-0309 of the Environmental Conservation Law (ECL). ECL § 71-0927(1) further provides that any person convicted of violating ECL §13-0309(1)(a) two or more times within five years shall have their permit revoked and shall not be re-permitted for a period of at least five years thereafter. Furthermore, ECL § 71-0927(4), makes the revocations automatic upon the second conviction without a hearing.

However, ECL § 71-0927(6) allows a party to apply to the Commissioner for reinstatement of the permit upon such conditions as are determined to be appropriate and necessary to protect public health and natural resources of the State. Despite the Petitioner's pleas and other evidence, the Assistant Commissioner remained unconvinced about the Petitioner's veracity and denied the application.

*In the Matter of 234-250 Andrew St. LLC*

Report and Recommendation, September 5, 2013  
DEC Index # B8-0692-05-04 Site # C828127

In [another matter](#) that rarely reaches the Office of Hearings, an applicant seeks to invoke the "Formal Dispute Resolution" (FDR) provision of a Brownfield Cleanup Agreement (BCA) entered with the DEC to retain the [statutory benefits of the state's Brownfield Cleanup Program \(BCP\)](#). Here, the ALJ is providing a decision to the DEC Director of Environmental Remediation as to whether to proceed as the designated FDR presiding hearing official. The ALJ recommended that the Applicant had missed the window of opportunity under the terms of the BCA to file for FDR and was therefore barred from invoking that privilege.

Previously, the Applicant and DEC staff had entered into informal dispute resolution which, if unsuccessful, allowed for the FDR hearing at issue but only for thirty days after the conclusion of the informal period. But, the ALJ noted that the Applicant waited approximately six months to request the FDR and only did so after the DEC formally terminated the BCA for failure to comply with its terms. The lesson here is not to be complacent about the time periods of any agreements or orders entered with DEC. To do so is to risk losing critical legal rights and benefits.

For an interesting similar decision, and subsequent Appellate Division and underlying Article 78 Orders, see [Corastor Holding Co., Inc. and Hamil Stratten Properties, LLC](#) Decision by Dale Desnoyers, May 2, 2008; [Hamil Stratten Properties, LLC et al. v. DEC](#) (App. Div. 2d Dept) 79 A.D.3d 747, 913 N.Y.S.2d 282, 12/7/10, and [Hamil Stratten Properties, LLC, et al. v. DEC](#), Queens Co. Supreme, 2009 WL 2696931 (N.Y.Sup.), 2009 N.Y. Slip Op. 31887, 8/7/09.

*In the Matter of Kara Fibers RHRF and Bonnie L. Silvernail, Respondents*

Order, September 23, 2013  
DEC Case No. CO 5-20111215-28

Subsequent to a Motion for an Order without Hearing as per 6 NYCRR Part 622.10, the [Commissioner Ordered](#) a default judgment pursuant to 6 NYCRR Part 622.15 due to the failure to file an annual report for a Solid Waste Management for two years in violation of 6 NYCRR Part 360-12.2(d). A penalty of five thousand dollars (\$5,000) was assessed as requested by DEC staff and Respondent was also directed to submit the tardy annual reports.

*In the Matter of Jason Roberts Development Corp., Respondents*

Order, September 14, 2013  
DEC Case No. CO 5-20120412-07

In [an ECL Article 15 action](#), Respondent was assessed a \$10,000 penalty for the failure to submit an Emergency Action Plan (EAP) for the Rainbow Lake Dam in violation of 6 NYCRR Part 673.7. The Commissioner held that that DEC Staff's ten thousand dollar (\$10,000) penalty

request was authorized by either ECL §71-1127 or ECL §71-1109(1), based on the three years of daily violations for the failure to file the EAP.

*In the Matter of 235 St. Nicholas, Inc., et al. Respondents*

Order, September 5, 2013  
DEC Case No. CO2-20100615-07

The [enforcement sweep](#) of illegal vehicle emissions testers continues for performing fraudulent onboard diagnostic (OBD) II emission inspections using noncompliant equipment and procedures in violation of 6 NYCRR 217-4.2. The Commissioner and ALJ relied on the recent precedents established in similar DEC enforcement actions in distinguishing individual inspector versus corporate liability and the formula for calculating penalties (see Matter of Jerome Muffler Corp., Order of the Commissioner, May 24, 2013; Matter of Autorama, Order of the Commissioner, August 13, 2013; Matter of New Power Muffler Inc., Order of the Commissioner, July 15, 2013).

Total civil penalties of \$50,600 were assessed against the corporate Respondent and \$18,175 against the individual inspectors based on the proportionate percentage of the 355 phony inspections performed by each. Using the formula, a penalty of \$375.00 was calculated per violation.

*In the Matter of Dyre Ave Auto Repair Corp., et al., Respondents,*

Order, September 5, 2013  
DEC Case No. CO2-20100615-12

More OBD II faulty [emission test enforcement](#). See, Matter of 235 St. Nicholas, Inc. Order of Commissioner, September 5, 2013 (above) for the general liability and penalty principles involved. Here, the Respondents were assessed \$82,200 (corporation) and \$29,600 (for two individual inspectors) for 577 non-compliant emission inspections.

*In the Matter of G & J Ready Mix & Masonry Supply, Inc. Respondent*

Order, August 27, 2013  
DEC Case No. CO2-20121011-2

The holder of a State Pollution Discharge Elimination System (SPDES) permit was [found liable](#) for failing to file both an annual discharge monitoring report ("DMR") and an annual certification report ("ACR") for calendar year 2011 for its Queens, New York facility in violation of 6 NYCRR Part 750-2.5(e). Respondent defaulted in the proceeding and was assessed a civil penalty of \$10,000. ([PDF Version 55.35 KB](#))

**Weird News** (Just in time for Halloween!)

### *Massive Molasses Spill Spells Aloha to Honolulu Harbor Fish*

This matter serves as a reminder that water pollution can take forms other than industrial chemical contamination. A leaky molasses pipeline created a [fish kill in the main port of Honolulu, Hawaii](#). In New York, any unauthorized release to a state waterway that is deleterious or injurious to fish or habitat would be a civil and/or criminal violation of the Environmental Conservation Law (ECL). In particular, see ECL §§ 71-0925, 11-0503 and 13-0345 which allow for the assessment of penalties of \$10.00 per fish, in addition to other penalties using ECL Article 17. [Natural Resource Damages](#) ("NRD") could also be assessed by the state under the Section 311 of the federal Clean Water Act (CWA).

### *Zillions of Creeping Crickets Invade Oklahoma*

Severe drought such as that being experienced in Oklahoma creates conditions that allow [crickets to swarm](#) in disgustingly high numbers as the pictures accompanying this story depict. Yuck!

### *Florida Uses Dogs to Sniff Out Giant African Land Snails*

This is [an update](#) to a previous Update item (see Update Issue #4, April 2013) involving a strange invasive species (even by Florida standards).

### *Wild Monkeys Terrorize Florida*

Like biblical plagues, it seems that each month finds the sunshine state under attack by a new invasive species. Erstwhile entrepreneurs thought that tourists would love to see "adorable" imported rhesus monkeys in a theme park setting. But [the monkeys escaped](#), multiplied and various dangers to humans and the environment ensued.

### *Six Clawed Lobster Emerges from the Deep (No, Not a [Roger Corman](#) Movie!)*

A [six-clawed lobster](#) was caught off the coast of Maine. Is it pollution or a natural mutation? Either way, this curiosity calls attention to the [worsening condition](#) of the [stressed east coast commercial lobster fishery](#).

### *Attention All Cryptozoologists! The Bigfoot Map is Here!*

Has there been a [sighting near you](#)? Some of us may recall the [alleged sightings](#) in the southern Adirondacks back in the 1970s. Regardless, report all giant hominids to these folks.

### *The Asian Stink Beetle Has Now Arrived (in California anyway)*

[Asian Stink Beetles](#), I think we would rather have the Bigfoots (see above).

Tags:

[ACR, Adirondack Park Agency, APA, BCP, Bigfoot, Broadwater, Brownfields, Brownfields Cleanup Agreement, CAA, Carnival Cruises, Clean Air Act, Clean Water Act, Compost Facilities, Cryptozoology, CWA, Dam Safety, Dispute Resolution, DMR, EMA, Emission Control Areas, Endangered Species, Lacey Act, Environmental Bond Act, Exxon-Mobil Settlement Fund, Fish Kills, GCEF, Greenpoint Community Environmental Fund, Jon Kaiman, Lake Erie Pollution, Lake Ontario Pollution, LI Storm Recovery, Liquefied Natural Gas, LNG, LNG Terminals, Lobsters, Manganese Groundwater Pollution, Mark Grisanti, Mercury Poisoning, Molasses, NY Environmental Advocates, DEC Enforcement Report, OBD, Onboard Diagnostics, Operation Crash, Ozone Depletion, POTW, Publically Owned Treatment Works, Rhino Horns, Rite Aid, Robert Sweeney, Safeway, Shellfish Permit, Walgreens](#)

## [NY Environmental Enforcement Update, October 2013, #10](#)

### **Enforcement News**

#### *New DEC Audit Policy to be Effective November 18, 2013*

In a major revision of its [enforcement policies](#), DEC initiated a new audit and self-disclosure program that will allow a violator to waive the majority of civil penalties for violations that are discovered and disclosed voluntarily, or discovered during pollution prevention or compliance assistance.

The new Commissioner's Policy ([CP - 59](#)) also offers additional incentives to entities that perform environmental audits and then enter into audit agreements. Entities with a history of non-compliance are ineligible. Certain violations are also excluded from the policy, including recurring violations and those involving criminal activity or serious harm to human health or the environment.

The new policy supersedes the old DEC small business violation disclosure policy ([CP-19](#)) and also generally tracks the existing EPA [audit and violation disclosure policies](#).

#### *DEC Pounds Salt Plant*

In response to an air pollution violation which caused the release of particulates and related opacity violations, a Port of Coeymans plant was [ordered](#) to cease processing rock salt. The plant did not have a state pollution permit and was [ordered](#) to pay a \$4,500 fine, \$3,000 of which will be suspended if the company stops processing salt at the port. Previously, state officials had inspected the plant's combustion unit or furnace, which is used to dry rock salt. The operation emitted a steam and particulate plume that also exceeded state standards for opacity in violation of 6 NYCRR Part 227-1.3(a).

#### *Spotlight on the NYC Department of Environmental Protection (DEP) Environmental Police*

[Graduation ceremonies](#) were recently held for thirty new DEP Environmental Protection Officers (EPO). While not as well-known as the state's other environmental law enforcement agencies, the DEP police protect New York City's drinking water supply and the associated infrastructure of that system in the nine upstate counties that constitute the NYC drinking watershed. This class brings the DEP Police force up to 211 total Environmental Protection Officers (EPO).

The current DEP Police force is a descendant of the Bureau of Water Supply (BWS) Police originally created through legislation enacted in the 1906 Water Supply Act. In 1983, the Bureau of Water Supply became the Department of Environmental Protection and the New York State Legislature revised the New York Criminal Procedure Law to include DEP police officers. In 1999, DEP jurisdiction was extended to include the five boroughs of New York City. The EPO

are fully certified NY police officers and the department has full-time Aviation and Emergency Services Units, Marine and K-9 Patrols, and a Detective Bureau.

### *Wild Boars (not Boors) Banned in NY*

Gov. Andrew Cuomo [signed a bill](#) amending Articles 11 and 71 of the Environmental Conservation Law that outlaws and [criminalizes hunting Eurasian boars](#) a destructive and potentially dangerous animal that can weigh up to 300 lbs. The new law prohibits the hunting, importing, sale and breeding of the boar as well as releasing them into the wild. The legislation will be effective Sept. 1, 2015. It is hoped that the new legislation will prevent the widespread and costly agricultural and environmental damage these creatures have already inflicted in a number of other states.

## **Enforcement People in the News**

A number of experienced environmental professionals who have wielded statewide influence have recently moved on to new positions. The Environmental Law Section wishes them all well in their new endeavors.

- Martin D. Brand has been appointed the [new Director for DEC \(DEC\) Region 3](#), located in New Paltz. As the new regional director, Brand will oversee all agency efforts in Sullivan, Ulster, Dutchess, Orange, Putnam, Rockland and Westchester counties. Prior to his appointment, he spent more than three decades at DEC and worked in many areas including environmental site investigation, remediation and solid and hazardous waste regulations.

- Assistant Attorney General Michael J. Myers, was recognized by the American Bar Association as its [2013 "Environment, Energy, and Resources Government Attorney of the Year Award."](#) Mr. Myers, currently heads the AG's Environmental Protection Bureau's affirmative litigation section in Albany. He was further [recognized by Attorney General Eric Schneiderman](#) as one of the nation's leading air pollution and climate change litigators.

- Governor Andrew M. Cuomo announced the [appointments of Basil Seggos and Anne Tarpinian](#) to his environmental team. Mr. Seggos will serve as Deputy Secretary for the Environment, and Ms. Tarpinian will serve as Assistant Secretary for the Environment.

- [Former DEC Commissioner Peter Iwanowicz](#) is the [new Executive Director of Environmental Advocates of New York](#), effective November 7, 2013. He leaves his current position as an executive with the American Lung Association.

- Robert Rosenthal, the former Assistant Counsel for Energy and the Environment to New York State Governor Andrew Cuomo has [joined the international law firm Greenberg Traurig LLP](#). He joins the Environmental and Energy practices in the firm's Albany office. Prior to joining the Governor's office, Rosenthal spent 16 years at the New York State Attorney General's Office in the Environmental Protection Bureau.

## State Enforcement Actions

### *DEC Felony Fish & Wildlife-Gun-Drug Arrests*

While DEC Environmental Conservation Police routinely defer non-Conservation Law crimes to traditional law enforcement, [this matter](#) is an example when the alleged charges were interrelated and required combined enforcement with the NY State Police. The suspects were arrested on a dozen different charges, including two felony weapons and drug charges including:

- three counts of illegally killing a deer;
- one count each of possessing a pistol while muzzleloader hunting;
- exceeding the bag limit for deer;
- three violations of hunting deer over bait;
- felony criminal possession of a weapon charge;
- felony possession of marijuana;
- unlawful possession of a large capacity ammunition clip; and
- illegally growing marijuana.

### *Four Fishermen Face Spear Fishing Felonies for Taking Striped Bass*

Four Fishermen were [caught by DEC Police](#) with 74 illegally speared striped bass taken in waters off Valiant Rock in Block Island Sound. The suspects were divers using spear guns to shoot the fish in a shallow area east of Gull Island. A search of their boat revealed both tagged and untagged striped bass. Some of the tags were inaccurate as well. New York State Environmental Conservation Law (ECL) forbids the taking of striped bass for commercial purposes by spear as once the fish is wounded it cannot be released if it is undersized as established by limits meant to protect the striped bass fishery.

The [DEC determined](#) that the total unlawfully harvested striped bass weighed 926.5 pounds and were valued at \$4,632. Note, the ECL allows for Felony criminal charges where the value of the illegally harvested fish exceeds \$1,500. Striped bass are an important and valuable marine resource for both New York's recreational and commercial fisheries. This popularity requires careful management to prevent overfishing.

### *October DEC Region 4 Administrative Enforcement Consent Order*

It was a [busy month in Region 4](#) with eight new administrative consent orders on subjects including storm water runoff, pesticide regulation, air enforcement and mining violations. Of particular interest are cases involving hazardous waste paperwork violations ([Fiber Glass Industries, Order R4-2013-1004-121](#)) and a rare example of a public nuisance air violation as per 6 NYCRR Part 211.2 ([Pan Am Railways, Order R4-2013-0606-77](#)) Once again, it is worth noting that DEC Region 4, is currently the only DEC Region that regularly posts administrative enforcement consent orders and settlements.

### *Attorney General Prevents Crematory Pollution*

The office of Attorney General Eric T. Schneiderman [commenced a civil lawsuit](#) to prevent a Buffalo-area funeral home from reopening its crematory in a residential area. The crematory had had a long history of emitting foul odors, soot, and excessive noise into the local neighborhood. The action was requested by DEC based on the funeral home's attempt to reopen the crematory despite an earlier July 2012 agreement that had originally suspended operations. Community complaints are an important basis for this case. Crematories have traditionally been [heavily regulated](#) operations that require both environmental permits and trained operators.

## **Federal Criminal and Civil Enforcement**

*U.S. v. Riccelli Enterprises, Inc., et al. (NDNY)*

A Syracuse-area trucking company charged by the U.S. Attorney with civil violations of the Clean Water Act (CWA) [agreed to settle](#) and to pay a civil fine of \$50,000.00 and remove an illegal parking lot constructed on the filled in area. The defendants had filled in over 5 acres of federally regulated wetlands and then constructed a parking lot on the parcel. At a minimum, such an endeavor would have required a CWA 404 permit from the [U.S. Army Corps of Engineers](#). They also signed a parallel agreement with the State to pay an additional \$50,000.00 civil penalty for similar state violations.

## **DEC Administrative Hearing Orders and Rulings**

Some highlights of [recent decisions](#):

*In the Matter of Exxonmobil Oil Corporation, f/k/a Mobil Oil Corporation*

Chief ALJ Ruling, October 21, 2013  
DEC Case No. 02-20060731-318

This Ruling explores the ramifications of delay as DEC staff commenced a 2013 action for a 6 NYCRR Part 622.10 Motion for an Order without Hearing for alleged twenty or more year old violations. The underlying allegations included failures to report a 1989 oil spill and to register an underground storage tank in 1993. Both sides contested the facts of the spill and the history of the site. DEC also claimed that it was unaware of the spill until 2005, and that a heavy work load then delayed immediate action. Respondent moved to dismiss on various grounds.

However, the heart of the Ruling addressed whether the passage of time prejudiced the Respondent's defense based on the factors raised in the so-called Cortland test. These were promulgated by the Court of Appeals in Cortland Nursing Home v. Axelrod, 66 NY2d 169, 179 (1985). The factors to be considered are:

- the nature of the private interest allegedly compromised by delay;
- the actual prejudice to the private party;
- the causal connection between the conduct of the parties and the delay;

- the underlying public policy advanced by governmental regulation [66 NY2d 169, at 178].

Upon review of the record, the Chief ALJ held that, at least thus far, Respondent claims of prejudice were unproven and Respondent's motions were dismissed. However, the Ruling also dismissed the DEC Motion as there were (after more than 20 years) substantial issues of fact yet to be determined. The Chief ALJ then wisely concluded by recommending mediation between the parties given the complexity of the history and facts involved.

*In the Matter of Sugar Hill Service Station, Inc., et al.*

Order, October 4, 2013  
DEC Case No. CO2-20100318-12

*In the Matter of Sheridan Garage Corp., et al.*

Order, October 3, 2013  
DEC Case No. C02-20100615-14

In two unrelated cases, the DEC continues its enforcement sweep pursuant to 6 NYCRR 217-4.2 against Respondents operating an official emissions inspection station using equipment and procedures that are not in compliance with Department procedures and standards. Bogus inspections do not test the vehicles' onboard diagnostic ("OBD") systems which are designed to monitor the performance of major engine components, including those responsible for controlling air emissions.

The [Sugar Hill Order](#) held that five phony emission inspections were performed. Respondent and an individual inspector were each assessed a civil penalty of \$1,250. In Sheridan, the parties were assessed \$121,000 in penalties for 680 fraudulent inspections.

Both Orders analyzed the structure of penalties involving OBD inspections using recent prior Orders (see e.g. Jerome Muffler; Matter of Autoramo, Inc., Order of the Commissioner, August 13, 2013 ["Autoramo"]; Matter of New Power Muffler Inc., Order of the Commissioner, July 15, 2013 ["New Power"]).

## **Weird News**

*Cheer Leaders' Car Wash Halted as Environmentally Unsound - Rah-Rah*

A good reminder that [stormwater laws apply to everyone](#), no matter how wholesome the cause.

*Wind Turbine Syndrome?*

Some residents of Falmouth, MA claim to be affected by a yet-to-be accepted [wind turbine syndrome](#), first described by Nina Pierpont, a John Hopkins University-trained pediatrician,

whose husband is an anti-wind activist. As the pressure to find alternative energy sources increases, law and medicine will ultimately have to address this issue.

*Chinese City of Harbin Literally Chokes on Its Own Smog!*

Disconcerting news of [China's smog problems](#) is a good reminder of the power of our clean air laws.

*Jellyfish Close Swedish Nuke Plant!*

Do New York's nuclear plants have an [emergency plan for jellyfish](#)?

Tags:

[Air Particulates](#), [Air Pollution](#), [Andrew Cuomo](#), [Anne Tarpinian](#), [Audit](#), [Basil Seggos](#), [Clean Water Act](#), [Crematory](#), [Delayed Prosecution](#), [Emergency Plans](#), [Environmental Advocates](#), [Eurasian Wild Boars](#), [Hazardous Waste Manifests](#), [Jellyfish](#), [Laches](#), [Onboard Diagnostic Systems](#), [Martin D. Brand](#), [Michael J. Myers](#), [Nuclear](#), [NYC DEP Police](#), [NYC Watershed](#), [NYS Attorney General](#), [NYS Fish & Wildlife Law](#), [DEC Commissioner's Policy 59](#), [DEC Region 3](#), [DEC Region 4](#), [OBD](#), [Opacity](#), [Peter Iwanowicz](#), [Public Nuisance](#), [Region 4](#), [Road Salt Plant](#), [Robert Rosenthal](#), [Spear Fishing](#), [Storm water runoff](#), [Stormwater](#), [Striped Bass](#), [Vehicle Emissions Testing](#), [Voluntary Disclosure](#), [Wind Turbine Syndrome](#)

# [NY Environmental Enforcement Update November 2013, #11](#)

## **Enforcement News**

### *AG Recovers Eight Million Dollars for Oil Spill Fund*

Attorney General Eric T. Schneiderman [announced an \\$8.05 million settlement with ExxonMobil Oil Corporation](#), which will reimburse the State of New York for costs incurred by the State's Environmental Protection and Spill Compensation Fund (Oil Spill Fund) for the costs spent to investigate and remediate an oil spill in Ogdensburg known as the Lighthouse Point spill site. The barge dock facility on the Oswegatchie River also contained seven above-ground tanks that stored gasoline, diesel, fuel oil and kerosene, a truck loading rack and 1,500 feet of subsurface pipelines that connected the barge dock facility to the Main Terminal. The spill was discovered in 2001.

### *Energy Company Fined 1 Million for Eagles Killed by Wind Farms*

This is an evolving story that illustrates the clash between traditional (some would say iconic) wildlife protection enforcement and the alternative energy industry. Duke Energy Renewables Inc., a subsidiary of Duke Energy Corp., [pleaded guilty](#) in U.S. District Court in Wyoming today to violating the federal Migratory Bird Treaty Act (MBTA) in connection with the deaths of protected birds, including golden eagles, at two of the company's wind projects in Wyoming. This action is the first ever criminal enforcement of the Migratory Bird Treaty Act for wind projects.

The company was sentenced to pay fines, restitution and community service totaling \$1 million and was placed on probation for five years. The company is also required to apply for an Eagle Take Permit which, if granted, will provide a framework for minimizing and mitigating the deaths of golden eagles at the wind projects.

While this federal enforcement case arose in Wyoming, New York has always taken great pride in restoring and protecting both the [bald](#) and [golden eagle](#) populations. Are New York's wind farms the next enforcement candidates? A regulatory compromise is in the works. So, more on this story next month.

### *DEC Hudson River Oil Spill Drill*

Environmental enforcement is also about education and prevention. Therefore, the [DEC](#) and other state and federal agencies must be lauded for conducting a [mid-Hudson River oil spill drill](#) as part of preparation and training for a coordinated response and improved communication among government agencies in case of a major spill. The likelihood of a major spill has increased recently due to the increased river, rail and pipeline transport of petroleum and natural gas through the Mohawk and Hudson River corridors. The increase is largely due to the

increased oil and gas production in the Midwest. The data was also used to develop a [map of the potential spill impacts](#).

### *Albany Co. Bans Styrofoam Containers*

Albany County became one of approximately 100 communities nationwide to fully or partially [ban the commercial use of styrofoam containers](#). Suffolk County and the City of Glen cover are among the New York communities that already have some form of ban. New York City is also considering a ban. Albany County's ban is qualified so that it extends only to national chains operating in the County that sell prepared food or beverages in styrofoam containers (Dunkin Donuts and McDonalds for example).

### *Inflation Raises EPA Fines*

EPA published its quadrennial [Civil Monetary Penalty Inflation Adjustment Rule](#) which will be effective for all violations incurred after 12/6/13. The [new rule](#) will raise maximum penalties for several air and water pollution statutes. Twenty of the 88 EPA statutory civil penalty provisions will go up under the final rule, with maximum fines going up by as much as \$50,000 for sections of the Clean Water Act, Clean Air Act, Comprehensive Environmental Response, Compensation and Liability Act among others.

### *PA Uses Strict Liability for Environmental Crimes*

The Pennsylvania Attorney General recently [applied the strict criminal liability provisions](#) of that state's Solid Waste Management Act (SWMA) in the prosecution of an oil and gas operator. The SWMA provides for felony prosecution using strict liability principles. There are also similar provisions in other Pennsylvania environmental laws, including that state's Clean Streams Law and Air Pollution Control Act. While most New York criminal environmental laws do not provide for strict liability prosecutions per se, this trend may impact cross-border pollution enforcement especially if the hydraulic fracturing is permitted in New York.

### *Water Runoff Drums up Fines Along the Mohawk*

A Cohoes, New York scrapyards [paid a \\$5,000 administrative penalty](#) for allowing polluted water to escape during heavy rains this spring into the Mohawk River. The company also agreed to revamp its storm water management plans and will test runoff water according to a consent order entered with the DEC. \$20,000 in penalties was suspended pending compliance with the terms of the Order. DEC inspectors saw polluted water from the scrapyards discharging into a drainage area along Interstate 787 that ultimately drained into the nearby Mohawk River. This appears to be a growing category of sector enforcement by the agency.

### *Illegal Striped Bass - A New Pizza Topping?*

DEC charged a Babylon restaurant owner with [four ECL Article 11 Misdemeanors](#) for illegally possessing and selling over 60 pounds of striped bass. Environmental Conservation Officers

(ECOs) had observed an employee bringing a large striped bass into the restaurant via a back lot. A subsequent inspection of the pizzeria discovered more untagged striped bass stored in restaurant coolers.

Illegal commercialization of the fishing stock, not only depletes the species, but is also unfair to those commercial fishermen who comply with [the law](#). If found guilty, ECL Article 71 allows for criminal fines of up to \$5,000 or one year in jail for each misdemeanor.

### *Instagram of Captured Deer Leads to Instant Capture of Deer Snatchers*

In a foolish use of social media, several men recorded and posted via Instagram their [capture and interference](#) with wild white-tailed deer fawns on eastern Long Island. The post was then spotted by an alert tipster who called DEC. All state wildlife is protected under New York State law and it is illegal to capture an animal without an appropriate permit issued pursuant to ECL Article 11. The men face charges brought by DEC in Riverhead Town Justice Court. The violations were investigated subsequent to a call to the DEC's tip line which can be used to report illegal activities at 1-877-457-5680 or 1-800-TIPP-DEC.

### *25 Years of Seized Ivory Destroyed*

Those that follow this blog know that the prosecution of the illegal ivory trade is a state, federal and international enforcement priority. But, what happens to the ivory seized in these actions? Eventually, the objects are destroyed by the US Fish & Wildlife Service. Recently, approximately [six tons of ivory held by the agency were pulverized to create awareness](#) of this black market trade. Sadly, this is estimated to be only a small fraction of the total amount of illegal ivory still in the stream of worldwide commerce.

## **Enforcement People in the News**

### *Robert F. Cross*

Robert F. Cross, the commissioner of Albany's Department of Water and Water Supply, is [retiring](#) at the end of December after 17 years. Many may also remember Bob as a former DEC assistant commissioner appointed by former Governor Mario M. Cuomo. The Environmental Law Section wishes Bob well after 35 years in public service with the state and the City of Albany.

## **Federal Criminal and Civil Enforcement**

### *US v. Palmer (NDNY)*

Defendant was [sentenced](#) to six months of home detention and two years of probation for a felony violation of the Clean Air Act, [42 U.S.C. § 7413\(c\)](#), related to the illegal removal and disposal of asbestos. He was also ordered to pay a criminal fine of \$25,000 and to perform 50

hours of community service. The Defendant owned a plant that contained more than two thousand feet of friable asbestos insulation which he tried to renovate, without filing a notification with the EPA, using unlicensed individuals to perform asbestos removal that did not wet the asbestos or properly dispose of the asbestos at a state-approved landfill.

By comparison, under New York State law, the same activity would most likely have been prosecuted for the unlawful release of a hazardous substance pursuant to ECL § 71-2710, et seq. (with the precise crime dependent on the relevant culpable mental state and the quantity released). Unlike federal law, New York environmental law (the "ECL") does not provide for a felony air violation crime.

*U.S. v. Slattery (EDNY)*

Frequent readers will recognize that the Update continues to follow the aftermath of "Operation Crash," the initiative to prosecute the illegal trade in Black Rhino horns and other illicit animal artifacts. Here, Defendant, an Irish national, [pleaded guilty](#) to conspiracy to violate the Lacey Act in relation to illegal rhinoceros horn trafficking which carries a maximum penalty of five years in prison. Under the terms of his plea agreement, any proceeds from the illegal trafficking are to remain in the United States to be forfeited or used for the potential criminal fine. In the plea agreement, the Defendant admitted that the conspirators traveled throughout the United States to illegally purchase and sell endangered rhinoceros horns.

## **DEC Region 4 Administrative Orders**

It is worth noting that currently DEC Region 4, is the only DEC Region that [regularly posts administrative enforcement consent orders and settlements](#). However, this data can be a useful window into the agency's enforcement policies statewide.

*In the Matter of Provincial Contractor Services*

Order, November 13, 2013  
R4-2013-1011-125

Respondent was [assessed](#) a \$1,000 administrative penalty for transporting regulated waste (asbestos mixed in construction and demolition materials) without a permit in violation of 6 NYCRR Part 364.

*In the Matter of Applied Ecological Services*

Order, November 6, 2013  
R4-2013-1009-123

Respondent was [assessed](#) a \$2,000 administrative penalty for the failure to follow usage directions and supervise the application of pesticides in violation of various sections of 6 NYCRR Part 325.

*In the Matter of Lawn Dawn*

Order, November 6, 2013  
R4-2013-0712-94

Respondent was [assessed](#) a \$3,200 administrative penalty for the failure to follow label instructions for protective clothing, to have an applicator's signature and the number of applications in a commercial contract in violation of various provisions of 6 NYCRR Part 325.

*In the Matter of Wever Petroleum*

Order, November 4, 2013  
R4-2013-1011-126

Respondent was [assessed](#) a \$1,000 administrative penalty for the nuisance and unpermitted air release of propane at its facility in violation of 6 NYCRR Part 211.1 and ECL Article 19.

*In the Matter of Ed Derosia*

Order, November 4, 2013  
R4-2013-0814-103

Respondent was [assessed](#) a \$1,500 administrative penalty for various violations of an Article 15 permit issued for the reconstruction of a portion of a stream including the failure to remove dredged materials, implement erosion controls and the construction of an unplanned culvert.

## **DEC Administrative Hearing Decisions and Orders**

*In the Matter of H & S Repair Corp.*

Order, November 1, 2013  
No. CO2-20130325-01

A [default judgment](#) was issued pursuant to 6 NYCRR 622.15 for a violation of ECL 27-2303(1) and 6 NYCRR 360-12.1(c), for failing to submit an annual report for the year 2010 for the vehicle dismantling facility it operates at 127-27 Willets Point Boulevard, Corona, New York. The Commissioner also ruled that the dissolution of the business after the violation has no bearing on the proceeding (see Business Corporation Law §§ 1006[a][4] & [b] and 1009; Matter of Quadrozzi Concrete Corp. , Order of the Commissioner, June 17, 2013, at 1-2).

*In the Matter of Reliable Heating Oil, Inc.*

Decision and Order, October 30, 2013  
No. R2-2012-1116-725

This matter involves an unfortunate incident that happens more often than one might think. In effect, the Respondent fuel supplier negligently delivered 150 gallons of fuel to a homeowner's basement rather than the intended fuel tank in violation of Navigation Law (NL) §§ 173, 175 and 176, and 17 NYCRR 32.3 and 32.5. Respondent also failed to report the spill and to take steps to contain the discharge. Finally, Respondent [defaulted and was assessed](#) an administrative penalty of \$30,000.00.

*In the Matter of 906 Eagle Avenue Housing Development Fund Corporation*

Order, October 27, 2013  
No. PBS 2-601106NBT

*In the Matter of Palushaj Properties, LLC.*

Order, October 27, 2013  
No. PBS 2-268690NMW

Frequent readers will recognize that the DEC staff is serious about enforcing petroleum tank registration requirements even for new owners who must re-register the tank within 30 days of the transfer of ownership or violate 6 NYCRR 612.2. In [the 906 Eagle case](#), the failure to register a tank for 15 years, in combination with a default for the failure to answer netted Respondent a \$10,000 penalty. In [the Palushaj case](#), the Respondent's attempt to mitigate by filing the delinquent registration paid off with a reduction of the penalty to \$8,000 (also for more than five years of violation).

*In the Matter of Buffalo China, Inc.*

Order, October 27, 2013  
No. 525-2012DK

In another default action, Respondent was [assessed](#) a \$1,500, administrative penalty for the failure to file a complete and accurate annual gas well report for the 2009 production year for its West Seneca gas well in violation of ECL 23-0305(8)(f) and 6 NYCRR 551.2. The tardy report was eventually received by DEC in 2012.

## **Weird News**

*Faux CIA Agent Rips Off EPA and the Taxpayer*

An EPA employee [plead guilty](#) for taking fraudulent and phony leaves from work that he attributed to his other job as a "CIA agent." Apparently, someone accepted this excuse.

*Monkeys Multiply in India*

Desperate to [quell the out-of-control monkey population](#), India has engaged American experts to use contraception to curb these destructive creatures. This is another abject lesson about the dire consequences of wildlife mismanagement.

### *Scientists Kill Oldest Living Thing to Find its Age*

This item will make you feel sorry for "Ming" the poor Icelandic clam sacrificed in the name of science. At the time of his demise, [Ming the Clam](#) was a hale and hearty 507 years old. RIP.

### *Solar Power Plant Fries Migratory Birds*

If the eagle killing wind farm item at the beginning of this post did not illustrate the clash between wildlife and alternative energy, then certainly [this item does](#). Even the mirrors used to reflect sunlight for passive solar power generation generate enough heat to injure and kill birds that get close enough to be affected.

Tags:

[1-800-TIPP DEC](#), [6 NYCRR Part 211](#), [6 NYCRR Part 325](#), [Asbestos](#), [Attorney General](#), [Black Rhinoceros Horn](#), [CAA](#), [Civil Monetary Penalty Inflation Adjustment Rule](#), [Clean Air Act](#), [CWA](#), [Deer](#), [Environmental Crimes](#), [Eric T. Schneiderman](#), [Gas Well Regulations](#), [Hotline](#), [Hudson River Oil Spills](#), [Ivory](#), [Migratory Bird Treaty Act](#), [Navigation](#), [NY Navigation Law](#), [NY Oil Spill and Compensation Fund](#), [DEC](#), [Operation Crash](#), [Petroleum Storage Tank Registration](#), [Rhino](#), [Robert F. Cross](#), [Stormwater](#), [Storm Water Management](#), [Strict Liability](#), [Strict Liability Environmental Crimes](#), [Striped Bass](#), [Styrofoam Ban](#), [Tank Registration](#), [White Tail Deer](#), [White-tailed Deer](#), [Wind Farms](#)

## [NY Environmental Enforcement Update December 2013, #12](#)

### **Enforcement News**

#### *Greene Co. Sewer Hook Up Ban lifted after 10 years*

In an example of DEC enforcement discretion, the [agency lifted](#) its 10 year moratorium on new connections to the Town of Cairo's wastewater treatment plant. The Town won this reprieve by making required improvements to its wastewater treatment facilities to increase flow at the plant to accommodate new development in the town.

Improvements included plans to reduce inflow and infiltration, management of high wet weather flows, and fixing existing filters.

#### *Thermostat Recycling Bill Signed 12/19/13*

This [legislation \(S.1676A/A.8084\)](#), which was sponsored by both environmental committee chairmen (Senator Mark Grisanti and Assemblyman Robert Sweeney), will require thermostat manufacturers to collect and safely dispose of mercury-containing thermostats, a [major source of mercury](#) in the waste stream. The effective date of this new law is July 1, 2014.

#### *Proposed Federal Rule Would Allow Some Eagle Deaths by Wind Farms*

The Obama administration is now moving toward [finalizing a rule](#) that would allow wind farms to kill bald and golden eagles under certain conditions. The proposed Interior Department rule extends the length of the permits that allow farms to "unintentionally" kill the eagles without penalty from five to 30 years. The rule would authorize the "non-purposeful" killing of eagles in exchange for the adoption of eagle conservation guidelines. This action comes soon after federal enforcement against wind farm operators for the deaths of golden and bald eagles during operations.

### **Enforcement People in the News**

#### *Law Enforcement Director Peter Fanelli Retires*

After 32 years of service, [Peter Fanelli retired](#) from his position as the Director of the DEC Division of Law Enforcement ("DLE"). "Pete" served in many positions with DLE and finished his distinguished career as the supervising officer of the state's Environmental Conservation Officers. Always generous with his time, he appeared as a panelist at one of the Environmental Section's recent Legislative Forums. The Section wishes him well in retirement.

#### *Beverly Kolenberg of EPA Passes Away*

The Environmental Law Section extends its condolences to the family and friends of [Beverly Kolenberg](#). At the time of her death, she had served for 28 years with the United States Environmental Protection Agency where she was Assistant Regional Counsel at the time of her passing. At EPA, she specialized in CERCLA litigation and was a leader of the team that was instrumental in closing the ten year old litigation following the 9/11 attack on the World Trade Center.

## **Federal Criminal and Civil Enforcement**

### *Canadian Arrested for Money Laundering in Connection with Illegal Importation and Trafficking of Narwhal Tusks*

A Canadian man was [arrested](#) December 19, 2013 in St. John, New Brunswick, Canada, on an extradition warrant requested by the United States for money laundering crimes related to the illegal importation and illegal trafficking of narwhal tusks. Narwhals are arctic dwelling whales with a single large tusk that is subject to the legal restrictions against the [world ivory trade](#).

### *Natural Gas Fracker Pays Penalties, Remediation Costs for Clean Water Violations in West Virginia*

While not a NY-based action, a recent settlement between the federal enforcers and Chesapeake Appalachia LLC, a subsidiary of Chesapeake Energy, may set the benchmark for future enforcement involving the fracking industry. The Department of Justice and the EPA [settled CWA violations](#) with the company, the nation's second largest natural gas producer. Chesapeake will pay a \$3.2 million penalty and spend an EPA-estimated \$6.5 million to restore 27 sites damaged by unauthorized discharges of fill material into streams and wetlands. It will also comply with federal and state water protection laws at the company's natural gas extraction sites in West Virginia. Many of the violations involved hydraulic fracturing ("fracking") operations.

### *Rhino Horn Smuggler Pleads Guilty in New Jersey to Wildlife Trafficking Crimes (Multiple Federal Jurisdictions)*

The owner of an antique business in China [pleaded guilty](#) to organizing an illegal wildlife smuggling conspiracy involving the smuggling of 30 rhinoceros horns and numerous objects made from rhino horn and elephant ivory from the USA to China. The ivory objects are valued at \$4.5 million.

### *New York Antiques Dealer Sentenced to 37 Months in Prison for Wildlife Smuggling (SDNY)*

A New York antiques dealer, was [sentenced in SDNY federal court](#) to 37 months in prison for conspiracy to smuggle Asian artifacts made from rhinoceros horns and ivory and violate wildlife trafficking laws.

## **DEC Region 4 Administrative Orders**

It is always worth noting that DEC Region 4 is currently the only DEC Regional office that [regularly posts all administrative enforcement consent orders and settlements](#). However, this data can be a useful window into the agency's enforcement policies statewide.

*In the Matter of Red-Kap Sales*

Order, December 17, 2013  
R4-2013-1112-136

Respondent [violated regulations](#) at 6 NYCRR 230.2 (f)(4) by failing to connect and ensure proper operation of the stage I vapor collection and control system during the gasoline fuel delivery. Penalty: \$2,500.00.

*In the Matter of Cooperstown Brewing*

Order, December 16, 2013  
R4-2013-1004-119

Respondent's site's subsurface disposal system [discharged to the surface](#) in violation of the conditions of the former owner's SPDES permit in violation of ECL Section 17-0803. Penalty: \$4,000.00, with \$2,000 payable and \$2,000 suspended.

*In the Matter of Springer's Inc.*

Order, December 16, 2013  
R4-2013-1004-120

Respondent [operated an unregistered petroleum bulk storage \("PBA"\) tank](#) and failed to make hazardous waste determinations in violation of a number of provisions of 6 NYCRR Parts 612, 613, 614 and 371. Penalty: \$10,400, with half payable and half suspended.

*In the Matter of Amsterdam Printing & Litho*

Order, December 9, 2013  
R4-2013-1004-122

Respondent [violated](#) five hazardous waste handling and related administrative regulations as per 6 NYCRR Parts 372 and 373. Penalty: \$7,100.00.

*In the Matter of Ronald Schaefer*

Order, December 9, 2013  
R4-2013-1105-133

Respondent [violated](#) the discharge limitations of a SPDES waste water discharge permit on 16 occasions. Penalty: \$58,000.00 with \$12,000 payable and \$46,000 suspended.

*In the Matter of Lawrence Eckhardt*

Order, December 6, 2013  
R4-2013-0820-109

Respondent [violated](#) 6 NYCRR Part 608.2, for disturbing the bed and bank of a stream by placing fill without an ECL Article 15 permit. Penalty: \$1,000.00.

*In the Matter of Terry Jacobs*

Order, December 5, 2013  
R4-2013-1106-134

Respondent [violated](#) 6 NYCRR Part 663.4(31) for constructing a small dock in a freshwater wetland without a permit. Penalty: \$500.00.

*In the Matter of Shelter Enterprises*

Order, November 26, 2013  
R4-2012-1029-101

Respondent committed [three violations](#) of sections of 6 NYCRR Parts 201-1.7 and 211.11, for operating and air emissions violations for volatile organic compounds ("VOC") and the hazardous air pollutant ("HAP") pentane emissions. Penalty: \$33,000.00, payable in seven installments.

## **DEC Administrative Decisions and Orders**

*In the Matter of U.S. Energy Development Corporation*

Ruling of the Chief ALJ (on Discovery Requests),  
DEC No. R9-20111104-150, December 11, 2013

In an interesting [discovery Ruling](#), the Chief ALJ explored the Office of Hearing's authority to govern the schedule and issuance of third party subpoenas under 6 NYCRR Part 622 and the ECL as opposed to the broader discovery authority found in CPLR Article 31. The Chief ALJ ruled that respondent shall serve discovery demands and subpoenas directly on a third party state agency in accordance with all applicable rules including, but not limited to, ECL 3-0301(2)(h) and 6 NYCRR 622.7(b).

The Ruling also addressed the circumstances under which the administrative agency has the power to issue subpoenas versus a court's authority under CPLR Section 2307. The Ruling stated that this CPLR Section does not apply citing *Matter of Irwin v Board of Regents of Univ. of State of N.Y.*, 27 NY2d 292, 296 [1970]). "Instead, the Department's statutory grant of the subpoena power is examined to determine a party's entitlement to issuance of a subpoena (see *id.* at 297; *Matter of Moon v New York State Dept. of Soc. Servs.*, 207 AD2d 103, 105 [3d Dept 1995])."

*In the Matter of 428 East 157th Street HDFC*

Order No. PBS 2-601195NBT, November 27, 2013

The Department's Motion for a Default Judgment was granted and Respondent was [ordered to pay](#) a penalty of \$10,000.00 for the failure to register a petroleum bulk storage ("PBS") tank in violation of 6 NYCRR Part 612.2.

*In the Matter of Grand Concourse East HDFC (1007 Grant Avenue)*

Order No. PBS 2-601185NBT, November 27, 2013

The Department's Motion for a Default Judgment was granted and Respondent was [ordered to pay](#) a penalty of \$10,000.00 for the failure to register a petroleum bulk storage ("PBS") tank in violation of 6 NYCRR Part 612.2.

## **Weird News**

*Wind Farms Weaken Hurricanes?*

A [serious scientific presentation](#) at the annual meeting of the American Geophysical Union raised the idea that there may be positive impacts of large wind farms in decreasing hurricane intensities while also harvesting the potential energy of these storms.

*Electric Car Owner Charged with Theft of Juice*

A [new environmental crime](#)? We will have to wait and see.

Tags:

[Administrative Settlements](#), [Assemblyman Sweeney](#), [Beverly Kolenberg](#), [Clean Water Act](#), [Climate Change](#), [CWA](#), [DEC](#), [Disaster](#), [DLE Director](#), [Eagle deaths](#), [Eagles](#), [Electric Car](#), [Electricity Theft](#), [EPA](#), [Fracking](#), [Fracking Enforcement](#), [Hurricanes](#), [Hydraulic Fracturing](#), [Ivory Smuggling](#), [Mark Grisanti](#), [Mercury Thermostats](#), [Mitigation](#), [Narwhal](#), [Natural Gas](#), [PBS](#), [Peter Fanelli](#), [Petroleum Bulk Storage](#), [Rhino Horn](#), [Robert Sweeney](#), [Senator Grisanti](#), [Takings](#), [Tusk Ivory](#), [USEPA](#), [Waste Water Treatment](#), [Wind farms](#), [WWTP](#)