

New York State Bar Association

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Memorandum Regarding Proposed New Title 12 of Article 27 of the Environmental Conservation Law “Cleanup and Abatement of Certain Solid Waste Site and Drinking Water Contamination.”

ENVIRONMENTAL LAW SECTION

Environmental #1

March 27, 2017

S.2008-B; Part II
A.3008-B; Part II

By: BUDGET
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Senate Committee: Finance
Assembly Committee: Ways and Means

On behalf of the Environmental Law Section of the New York State Bar Association, this is to provide comments to the proposed new Title 12 of Article 27 of the Environmental Conservation Law “Cleanup and Abatement of Certain Solid Waste Site and Drinking Water Contamination” contained in Article VII legislation of the proposed 2017-18 Executive Budget.

We understand that the legislation was proposed to provide the New York State Department of Environmental Conservation (“NYSDEC”) and Department of Health (“NYSDOH”) legal authority to respond to contamination of drinking water by substances that are not regulated as hazardous substances (“novel substances”) and have been disposed at sites such as municipal landfills or dumps that ceased operating before 1993 and may not have been closed in accordance with current standards. The bill would, *inter alia*, expressly provide NYSDEC with the authority to investigate old landfills and “novel substance” sites. It would also grant NYSDEC with the authority and funds to mitigate/abate exposure until NYSDEC/DOH have time to assess the novel substance, determine if the substance should be listed as a hazardous substance and then determine if the site should be listed on the Registry of Inactive Hazardous Waste Disposal Sites. We also understand that the NYSDEC believes it does not have authority to address pollutants and containments that are not hazardous wastes.

The Environmental Law Section (“Section”) strongly supports ensuring that the NYSDEC has the legal authority and financing to address threats to drinking water supplies. However, the Section believes that creating a “Superfund lite” program is not necessary and could have serious and unintended consequences in terms of adverse impacts to municipal operations and real estate transactions.

The proposed Title 12 contains broad language that could potentially create liability for any site with fill material that impacts groundwater without the safeguard of defenses for innocent parties that are available under Title 13. As all groundwater in the State of New York is considered potentially drinking water, the proposed Title 12 could stigmatize thousands of fill sites, including not only commercial but also residential properties, and make financing extremely difficult.

The Section believes the best way to ensure NYSDEC has the authority to spend funds to address threats to drinking water without placing a source of drinking water contamination on the Registry is to amend Title 13 so that NYSDEC has the same kind of authority that the federal Environmental Protection Agency (“EPA”) has under 42 U.S.C. 9604 to conduct short-term response actions. Under 42 U.S.C. 9604(a)(1)(B), EPA may respond to the release or substantial threat of release of “any pollutant or contaminant” that may present an “imminent and substantial danger to the public health or welfare.”

Another alternative could be to amend the Landfill Closure Funding of the Environmental Protection Fund. Environmental Conservation Law 56-0403 currently provides state assistance to eligible municipalities to help pay for municipal landfill closure projects undertaken after April 1, 1993. This could be amended to provide funding to eligible municipalities to help pay for investigations and remediation of pre-regulatory landfills.

Finally, rather than create an entire new program and risk its adverse unintended consequences, the NYSDEC could employ some of its existing authority to respond to threats to drinking water. There follows a list of Environmental Conservation Law (“ECL”) authorities that NYSDEC may use to address threats to drinking water:

- ECL § 03-0301(1)(i) - “Provide for prevention and abatement of all water, land and air pollution including, but not limited to, that related to hazardous substances, particulates, gases, dust, vapors, noise, radiation, odor, nutrients and heated liquids;”
- ECL § 03-0301(1)(m) - “Prevent pollution through the regulation of the storage, handling and transport of solids, liquids and gases which may cause or contribute to pollution;”
- ECL § 03-0301(2)(g)- “Enter and inspect any property or premises for the purpose of investigating either actual or suspected sources of pollution or contamination or for the purpose of ascertaining compliance or noncompliance with any law, rule or regulation which may be promulgated pursuant to this chapter;”
- ECL § 17-0101- “It is declared to be the public policy of the state of New York to maintain reasonable standards of purity of the waters of the state consistent with public health and public enjoyment thereof . . . and to that end require the use of all known available and reasonable methods to prevent and control the pollution of the waters of the state of New York.;”
- ECL § 17-0303(2)- “The department shall have administrative jurisdiction to abate and prevent the pollution of waters of the state in the manner herein provided in accordance with the classification of waters adopted by the

- department pursuant to section 17-0301 and in accordance with standards, criteria, limitations, rules and regulations and permit conditions adopted, promulgated or applied by the department pursuant to title 8 hereof;”
- ECL § 17-0303(4)(g) – “Conduct such investigations as may be deemed advisable and necessary to carry out the intents and purposes of the provisions of this article listed in subdivision 1 of this section;”
 - ECL § 17-0303(4)(h) – “Settle or compromise, with the approval of the attorney general, any action or cause of action for the recovery of a penalty under the provisions of this article listed in subdivision 1 of this section as he may deem advantageous to the state;”
 - ECL § 17-0303(4) (i) – “Perform such other and further acts as may be necessary, proper or desirable, to carry out effectively the duties and responsibilities prescribed in the provisions of this article listed in subdivision 1 of this section;”
 - ECL § 17-0303(5)- It shall be the duty and responsibility of the department to:
 - ECL § 17-0303(5)(a) – “Encourage voluntary cooperation by all persons in preventing and abating pollution of the waters of the state;”
 - ECL § 17-0303(5)(b) – “Encourage the formulation and execution of plans by cooperative groups or associations of municipalities, industries, and other users of the waters who, severally or jointly, are or may be the source of pollution in the same waters, for the prevention and abatement of pollution;”
 - ECL § 17-1101. Existing rights and remedies preserved. “It is the purpose of titles 1 to 11, inclusive, and title 19 of this article to provide additional and cumulative remedies to abate the pollution of the waters of the state and nothing herein contained shall abridge or alter rights of action or remedies now or hereafter existing, nor shall any such provisions or any act done by virtue of such provisions, be construed as estopping the state, persons or municipalities, as riparian owners or otherwise, in the exercise of their rights to suppress nuisances or to abate any pollution now or hereafter existing;”
 - ECL § 27-0916(1) – “The department shall have authority to clean up or return to its original state any area where hazardous wastes were disposed, possessed or dealt in unlawfully in violation of section 27-0914 of this article. For the purpose of this section "the original state of the area" shall mean the reasonably ascertainable condition of the property immediately prior to the unlawful act or if impracticable to determine such condition, the cleanup or restoration shall be done in a manner to restore the area to a reasonably sound environmental condition;”
 - ECL § 71-0301 - Summary abatement;
 - ECL § 71-0501- applies to original sections carried over from pre-1970 conservation law;
 - ECL § 71-0505 - Suits and prosecution (for ECL § 71-0501);
 - ECL § 71-0509 - Costs in actions by the people (for § 71-0501 and presumably title 13);
 - ECL § 71-0523 - Power of the department to settle or compromise an action (§ 71-0501);
 - ECL § 71-2307 - Abatement of pollution (wetlands);

- ECL § 71-1701 et seq. - ENFORCEMENT OF PROVISIONS DERIVED FROM PUBLIC HEALTH LAW;
- Section 71-1709 - NYSDEC has authority to issue subpoenas, serve the respondent with an order requiring certain action or the cessation of certain activities immediately or within a specified period of less than fifteen days whenever because of danger to the public health it appears prejudicial to the interests of the people of the state to delay action for fifteen days;
- ECL § 71-1927(1)- Enforcement of titles 1 through 11 inclusive and title 19 of article 17;
- ECL §71-1929 - Like the description which follows in the next bullet (regarding violations of solid waste management requirements), DEC may enjoin violations of water-related requirements pursuant to this provision;
- Section 71-2703(1)(b)(i) - In addition to its ability to assess penalties, suspend or revoke permits, etc., DEC has the power to enjoin the continuation of a violation of solid waste management requirements through the traditional administrative hearing process; and,
- ECL § 71-2727 - Enforcement of articles 27 and 71 of this chapter.