

Governor Signs Chemical Security Bill

At the end of July, Governor Pataki signed an anti-terrorism bill known as the “Anti-Terrorism Preparedness Act of 2004” (A. 11723). The bill imposes security requirements on certain facilities that are determined to pose risks to the public during an unauthorized release of hazardous substances, including the preparation of vulnerability assessments and yet-to-be-determined measures mandated by DEC based on recommendations from the State Office of Homeland Security, a new state office established by this law. In addition to the chemical security provisions, the law creates new terrorism-related felonies, extends the statute of limitations for certain offenses, increases the penalties for existing terrorism-related offenses, and expands the availability of hazardous material training to first responders, among other provisions.

The bill calls on the Director of the State Office of Homeland Security, in consultation with DEC, the New York State Department of Health (DOH) and possibly representatives from industry and colleges/universities, to develop a list of toxic or hazardous substances that, at minimum, includes hazardous substances listed under 6 NYCRR Part 597, the State’s chemical bulk storage (CBS) program and then identify facilities which “pose risks to the public should an unauthorized release of such hazardous substances occur.” The list of hazardous substances is due within six months of enactment, or around January 2005. Designated facilities may be required by the Office to prepare a vulnerability assessment of the security measures

they have undertaken to prevent and respond to unauthorized releases of hazardous substances. This assessment will be reviewed by the Office which may make recommendations for improvements.

Beginning June 1, 2005, the Director of the Office of Homeland Security must make regular reports to the governor, key members of the legislature, the Commissioners of DEC and DOH, and the chief executive officer of the affected facility reviewing the security measures being taken, assessing their effectiveness, and making recommendations for changes. DEC then has the discretion to require that these recommendations be implemented by the owner or operator of the storage facility under review. In addition, the Office of Homeland Security can review other audits and reports relating to security at designated facilities, including spill prevention reports and risk management plans. The bill includes various provisions intended to protect the confidentiality of the reports. *(Cont’d on page 3)*

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FEDERAL NEWS

EPA Extends SPCC Plan Deadlines

On August 11, EPA extended by 18 months the deadline for amending Spill Prevention, Control and Countermeasures (SPCC) plans to address changes required by EPA in its July 2002 revisions to the SPCC regulations. Under the extension, existing facilities have until February 17, 2006 to amend their plans to conform to the new rules; The deadline for implementation of those changes to has been extended to August 18, 2006. Previously filed requests for extensions from the original August 18, 2004 deadline for completing plan

amendments are invalidated by EPA's rulemaking. Facilities that require an extension beyond the new deadlines must submit a request for an extension of time pursuant to 40 CFR § 112.3(f).

The original proposal called for extending the deadlines for plan amendment/implementation by 12 months. Several commenters suggested that additional time would be useful and EPA agreed. The final rulemaking can be obtained from the August 11, 2004 Federal Register at: www.epa.gov/fedrgstr.

EPA Proposes All Appropriate Inquiry Standards

In late August, EPA proposed standards for conducting "all appropriate inquiries" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The proposed rule establishes standards for conducting all appropriate inquiries into the previous ownership, uses and environmental conditions at a site for purposes of satisfying certain liability releases under CERCLA.

In 1986, Congress amended CERCLA to create an "innocent landowner" defense to strict liability. The new provision established a defense from CERCLA liability for persons who could demonstrate that they "did not know and had no reason to know" prior to purchasing a property that any hazardous substance that is the subject of a release or threatened release was disposed of on, in or at the property. To demonstrate that they had "no reason to know" the property was contaminated, the person was required to undertake prior to purchase "all appropriate inquiries" into the previous ownership and uses of the property consistent with good commercial or customary practices. Congress amended the CERCLA statute again in 2002, this time adding protections from CERCLA liability for "bona fide purchasers" and "contiguous property owners". The 2002 Amendments required EPA to develop regulatory standards for "all appropriate inquiries" and set out basic criteria for the standards. Pending development of the standards, Congress established

the American Society of Testing and Materials (ASTM) Standard E1527-97, "Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process" as an interim standard effective January 11, 2002.

The proposed rule would apply to any person who seeks protection from CERCLA liability as an innocent landowner, bona fide purchaser or contiguous landowner; it also applies to state, local and tribal governments that receive certain federal brownfield grants. Below is a brief summary of key provisions of the proposed rule:

Responsibility. The inquiry must be performed by an "environmental professional" with qualifying education and experience. Some work can be performed by individuals under the supervision of an environmental professional.

Scope of inquiry. The regulations include and expand on the list of statutory criteria for satisfying the "all appropriate inquiry" standard. These activities include: (1) interviews with past and present facility owners, operators and occupants; (2) reviews of historical sources to determine previous uses; (3) searches for recorded environmental cleanup liens; (4) reviews of federal, state and local governmental records; (5) visual inspections; (6) specialized knowledge or experience on the part of the defendant; (7) the relationship of the purchase price to the value of

the property; (8) commonly known or reasonably ascertainable information about the property; and (9) degree of obviousness of the presence of contamination. Several of these activities can be performed by the purchaser or landowner; however, the bulk of the inquiries must be completed by the environmental professional or someone working under the supervision of the professional. The regulations establish objectives and performance factors for assessing whether the all appropriate inquiries standard has been satisfied as well as addressing so-called “data gaps” (lack of or inability to obtain information required by the standards).

Format. The results of the all appropriate inquiries review must be documented in a written report that includes an opinion of the environmental

professional as to whether the inquiries conducted identified conditions indicative of releases or threatened releases of hazardous substances on, at, in or to the property as well as data gaps that affect the ability of the professional to render an opinion. The professional must sign the report and declare on the signature page that he/she meets definition of environmental professional and that the work was performed in accordance with the all appropriate inquiries regulation.

The proposed rule was developed under a negotiated rulemaking process and is expected to be the subject of considerable comment. EPA is accepting comments on the proposed rule until October 25, 2004. The proposal is available from the August 26, 2004 Federal Register at: www.epa.gov/fedrgstr.

STATE NEWS

Chemical Security Law *(cont'd from Page 1)*

This new law could potentially affect any facility that stores chemicals listed in 6 NYCRR Part 597. While it is expected that attention will focus, at least initially, on facilities that store relatively large quantities of chemicals or that pose a particular risk because of their location or other factors, the law includes no minimum quantity for on-site storage of hazardous materials; in fact, the facility does not even need to be regulated under the CBS program. Also, the legislation includes no risk threshold so that any potential risk associated

with the release of hazardous chemicals is theoretically enough to trigger review even if the risk is unrelated to terrorist acts, there are no criteria defining or limiting the scope of security improvements that can be required and the bill contains no procedural measures for implementing or challenging security improvements or for enforcing the requirements.

A copy of the legislation can be obtained at: <http://assembly.state.ny.us/leg>, or use the QUIK-REPLY Form.

Draft Brownfield Guidance Available

DEC has published several draft documents implementing the technical assistance grant (TAG) program under the State’s Superfund and Brownfield Cleanup Programs (BCP). TAGs of up to \$50,000 will be offered to eligible community groups to enable them to obtain independent technical assistance in interpreting information about sites being remediated under the state Superfund program or BCP. To be eligible, groups must be incorporated as not-for-profit

corporations and be comprised of individuals from the community affected by the site. Documents available for review include DEC’s draft TAG Guidance Handbook, the TAG Application, TAG State Assistance Grant Contract, with schedules, and various other contract-related documents. The public comment period closed September 10, 2004. Copies of the documents can be obtained from DEC’s web site at: www.dec.state.ny.us/website/der/bcp/index.html.

Emission Inventory Data Available

DEC has made available for review emission inventory data collected by the state as part of a region-wide effort to address regional haze. New York State is a participant in the Mid-Atlantic and Northeast Visibility Union (MANE-VU), a group comprised of 12 states, several Indian nations, and various federal agencies that have joined together to address regional haze issues in the Northeast. Under the regional haze rule adopted by EPA in 1999, states must implement measures designed to reduce emissions of pollutants such as sulfur dioxide and particulate that contribute to regional haze. As part of that effort, states must inventory

their emissions of key pollutants from various sources (point, area, nonroad and onroad) both to assist in identifying possible sources of emission reductions and in assessing the success of efforts to address regional haze. DEC recently made its emission inventory information available for review. This information can be accessed by visiting the August 11, 2004 Environmental Notice Bulletin at: www.dec.state.ny.us/website/enb2004 and viewing the various web sites identified in the Notice. Information about the MANE-VU effort can be obtained at: www.manevu.org.

Legislature Amends 2003 Brownfield Law

During the August session, the New York State Legislature amended key provisions of the Superfund reform and brownfield cleanup law enacted last year. The bill (S.7726/A.11802) exempts hazardous waste generated during site remediation activities from the onerous hazardous waste surcharges adopted last year and includes numerous other changes intended to clarify key provisions and correct various errors and omissions. Some of the key changes are described below.

contains no deadline) and requires that notice of complete brownfield applications be provided to residents both on and adjacent to the site.

Definitions. (1) A new term “contaminant” has been added to the law, encompassing both hazardous waste and petroleum. The term generally is used in place of the terms “hazardous waste and petroleum” or other similar terms; (2) the term “brownfield site” has been revised to include interim status facilities under the Resource Conservation and Recovery Act (RCRA) and oil spill sites subject to so-called “Stipulation Agreements”; (3) the term “brownfield site remedial program” has been revised to clarify that such programs may include innovative technologies (with DEC approval).

Brownfield site cleanup agreement. The bill requires that the brownfield site cleanup agreement include a description of the boundaries of the real property subject to the agreement and requires the applicant to waive claims against the State of New York under the Navigation Law and the Environmental Protection and Spill Compensation Fund upon executing the site cleanup agreement (rather than upon receipt of a certificate of completion).

Brownfield application review and approval. The bill requires DEC to provide a written determination whether any application is complete within 10 days of receiving missing information requested by the Department (the current law

Remedial investigation/feasibility study/selection of remedies/citizen participation. The bill: (1) clarifies that volunteers must perform a qualitative exposure assessment regarding contamination emanating from the site (by comparison, participants must conduct a full investigation/characterization of such contamination); (2) requires DEC to notify individuals on the site contact list when it determines that a site poses a significant threat; (3) requires 45-day (rather than 30-day) notice of a decision that a site does not pose a significant threat and that the volunteer will not be required to remediate offsite areas; (4) clarifies that DEC and the applicant are expected to cooperate/consult on key notices; and (5) clarifies

appropriate/inappropriate uses of technical assistance grants to citizens groups.

Certificate of completion. The bill (1) clarifies that certificates of completion may be transferred to an applicant’s successor; (2) specifies that certificates of completion must be recorded with the appropriate county clerk consistent with the Real Property Law (currently, the law requires that the notice of covenant not to sue be recorded); and (3) requires the applicant to make significant progress toward completion of proposed development of a site within five rather than three years. It also clarifies that provisions requiring substantial progress do not apply to Track 1 – unrestricted use sites.

Fees. The bill amends the hazardous waste surcharge provisions adopted in 2003 and set forth in ECL § 72-0403 to exempt hazardous waste generated under various remedial programs. In particular, the bill exempts wastes generated: (1) under a contract for (or with the approval of DEC) under the Navigation Law; (2) under a court or administrative order issued under the federal or state Superfund law; (3) voluntarily without expectation of compensation under ECL § 27-

1321; (4) under a RCRA corrective action permit or order; (5) under a brownfield site cleanup agreement; (6) under an environmental restoration project state assistance contract; or (7) under a contract with DEC or with DEC’s approval or pursuant to an order issued by DEC, EPA or a court relating to cleanup activities other than under the state or federal Superfund program. The bill also excludes universal wastes from the hazardous waste surcharge. Finally, the bill expands the remedial waste exemptions under the pre-2003 hazardous waste fee (ECL § 72-0402) and special assessment (ECL § 27-0923) provisions.

Other changes made include: (1) requiring DEC to make split samples available to site owners when on-site sampling is done; (2) changing reference to contaminants “migrating from” to “emanating from” a site at various places in the brownfield law to clarify that there must be an on-site source of contaminants; and (3) clarify and broaden key provisions of the brownfield real property tax credit program.

As of August 31, the Governor had not signed the bill into law. A copy may be found on the NYS [Assembly web site at: http://assembly.state.ny.us/leg.](http://assembly.state.ny.us/leg)

CALENDAR OF EVENTS

October 1: Capital District Environmental Breakfast Club 7:30 am, Holiday Inn Turf, Wolf Rd. Colonie. Topic: Standards of All Appropriate Inquiry. Speaker: Kevin M. Young, Young, Sommer...LLC. \$12 pre-registered, \$14 day of event. 518/438-9907 ext. 240 or e-mail bpopolizio@youngsommer.com

October 13: Mohawk Valley Environmental Information Exchange Monthly Meeting. Topic: Finding Environmental Information on the Internet. Speaker: Vicki Schlierer, Young, Sommer..LLC. Radisson Hotel, Genesee St, Utica. 7:30 am. \$10-12 includes breakfast. For reservations email davep@mvatc.net.

QUIK-REPLY FORM

For more information on the topics in this issue, fax or mail this form to: Vicki Schlierer, Regulatory Affairs Paralegal, Young, Sommer...LLC, Five Palisades Drive, Albany, NY 12205. Fax: (518) 438-9914.

Name: _____

Title: _____

Company: _____

Address: _____

City, ST, Zip: _____

Phone: (____) ____ - _____ Fax: (____) ____ - _____

Please send the following:

Chemical Security Law

Reservations for the Capital District Environmental Breakfast Club, Holiday Inn Turf, Wolf Road, Colonie, NY **October 1, 2004**

_____	Registration (includes full breakfast buffet)	\$12.00
_____	Binder update	\$5.00

Please make your reservation no later than **October 1, 2004**. Fax your reservation to 518/438-9914; call Betsy Popolizio at 518/438-9907 ext. 240; or email bpopolizio@youngsommer.com. Cancellations will be accepted until September 27, 2004. No refunds or credits given after that time. To help us plan, please make a reservation. **The registration fee will be \$14.00 for walk-ins.**