

Senate and Assembly Pass Superfund Bills

In the last days of the legislative session both the Senate and Assembly passed similar bills to refinance and reform the State’s Superfund program. The bills – S.5694 and A.9120 – contain the following major provisions: (1) enactment of Article 27, Title 14 creating a new brownfield cleanup program addressing both volunteers and “participants” (i.e., responsible parties); (2) creation of environmental easements to ensure the long-term effectiveness of engineering and institutional controls; (3) adoption of a new groundwater protection and remediation program; (4) creation of a new geographic information system containing information on contaminated sites; (5) reform of key components of New York’s superfund program, including expansion of the program to hazardous substance sites and adoption of key liability exemptions and defenses; and (6) funding provisions that call for a significant increase in hazardous waste assessments and other fees. The bill does not contain some of the more controversial provisions that had made agreement on Superfund reform so difficult in the past, including those relating to groundwater cleanup standards, treble damages for refusal to comply with cleanup orders, and state natural resource damages provisions.

The two bills, although identical in most key respects, contain various minor differences that must be resolved before the bills can be sent to the Governor for signature. The current plan is for the Senate to come back and pass the Assembly version of the bill in the fall. Below is a brief summary of key provisions of the legislation.

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Brownfield Cleanup Program

The centerpiece of the legislation is the creation of a Brownfield Cleanup Program, to be set forth in Article 27, Title 14 of the Environmental Conservation Law (ECL). The bill is intended to encourage the voluntary cleanup and redevelopment of brownfield sites using remedies that are “protective of public health and the environment including, but not limited to, groundwater according to its classification” under ECL § 17-0301. The program is available both to “volunteers” (i.e., applicants who purchase a site after the disposal of hazardous waste/petroleum) and to “participants” (i.e., applicants who owned the site at the time of waste disposal or other responsible individuals). However, participants are subject to somewhat more rigorous standards than volunteers. All sites (*Cont’d on Page 5*)

FEDERAL NEWS

EPA Proposes to Delete MEK from List of HAPs

EPA recently proposed to remove methyl ethyl ketone (MEK), also known as 2-butanone, from the list of hazardous air pollutants (HAPs) regulated under Section 112 of the Clean Air Act (CAA). The American Chemistry Council petitioned EPA in 1996 to delete MEK from the HAP list. After determining that the petition was complete, EPA undertook a thorough review of available emissions data and information concerning the environmental and health impacts of exposure to MEK and

solicited input from the public. Based on that review, EPA determined that “there is adequate data on the health and environmental effects of [MEK] to determine that emissions, ambient concentrations, [and] bioaccumulation of deposition of the substance may not reasonably be anticipated to cause adverse effects to human health or adverse environmental effects.” EPA is accepting comments on the deletion proposal until **August 28, 2003**.

EPA Finalizes Public Involvement Policy

EPA recently finalized a policy document to provide guidance to EPA staff on “effective and reasonable” means to involve the public in EPA’s regulatory and program implementation decisions. The policy incorporates seven core elements for effective public involvement:

- Plan and budget for public involvement activities
- Identify the interested and affected public
- Consider providing technical or financial assistance to the public to facilitate involvement

- Provide information and outreach to the public
- Conduct public consultation and involvement activities
- Review and use input and provide feedback to the public
- Evaluate public involvement activities

The policy goes on to provide specific recommendations for accomplishing each of these seven steps. For a copy of the policy use the QUIK-REPLY Form.

CALENDAR OF EVENTS

August 6: Eastern New York Chapter, Air & Waste Management Association, Cruise on the Hudson! Social event only, no speaker. 1:30 - 4 pm \$15.00 per person includes lunch. For space availability call Mark Corey 518/374-5089.

September 5: Capital District Environmental Breakfast Club. 7:30 AM, Holiday Inn Turf, Wolf Road, Colonie. \$12 includes full breakfast. Topic: How to Comply with the new Hazmat Security Regulations: Security Awareness Training and Best Management Practices Report Required for Shippers of Hazardous Materials. Vincent Mercandante, Research and Special Programs Administration, US DOT. For reservations call 518-438-9907 ext. 240 or e-mail bpopolizio@youngsommer.com.

STATE NEWS

DEC Proposes Comprehensive PBS Enforcement Package

DEC has proposed a draft package of enforcement documents and procedures for use by DEC staff in addressing violations of the Petroleum Bulk Storage (PBS) regulations and related provisions (6 NYCRR 612-614). The package consists of four documents: (1) a DEC Program Policy entitled "Petroleum Bulk Storage Inspection Enforcement Policy"; (2) a standard Notice of Violation; (3) a standard Order on Consent; and (4) a PBS Penalty Schedule.

These documents are summarized below.

Program Policy

The draft policy addresses both the PBS regulations and certain violations of the Navigation Law (in particular, the requirements to report and clean up petroleum spills). Under the policy, where an inspection reveals a PBS violation, the facility owner or operator will be served with a Notice of Violation and a copy of the PBS Inspection Report and may receive an Order on Consent. In setting penalties, DEC attorneys "may be guided" by the suggested penalty ranges included in the policy but have the discretion to increase, decrease or suspend a penalty in accordance with DEC's Civil Penalty Policy. The Program Policy goes on to provide that "Except as expressly set forth herein, any penalties that may attach to an owner as a result of a spill, leak or discharge are unaffected by this Policy" and will be based on the Department's Civil Penalty Policy."

Notice of Violation

The new standardized Notice of Violation (NOV) form consists of a laundry list of possible violations relating to each provision of the PBS regulations, together with fields for the insertion of facility-specific information. Each paragraph includes a brief description of the alleged violation, instructions for achieving compliance, and a deadline for completion.

Order on Consent

The standard Order on Consent generally follows the format of the NOV. It begins with a list of all of the specific requirements applicable to tank owners and operators found in 6 NYCRR 612-614 and other provisions, with each requirement contained in a separate paragraph. The consent order covers all manner of violations, including spills under the PBS program and Navigation Law and water quality standard violations. After summarizing the relevant applicable requirements, the order contains a number of paragraphs describing the nature of the alleged violation(s). This section is followed by a compliance schedule section that includes all applicable requirements and their corresponding compliance requirements and deadlines; although most of these requirements are relatively simple, the section includes a detailed compliance plan for petroleum releases, addressing spill investigation and remediation. The standard provisions are included in an attachment to the Order and address basic consent order requirements such as payment provisions, communications, effective date and duration, access, force majeure, indemnity, modifications, settlement and reservation of rights, among other provisions.

PBS Penalty Schedule

The draft PBS penalty schedule an average penalty for each possible violation an average penalty and, in some cases, a penalty range. The average penalties range from \$100 to \$10,000, with the majority of penalties falling in the \$250/tank to \$1000/tank range. The schedule also includes a list of aggravating and mitigating factors but includes no guidance regarding how such factors should be weighed.

The public comment period closed on June 27, 2003. The draft policy with attachments can be obtained from DEC's web site at: <http://www.dec.state.ny.us/website/ogc/pbsiep.pdf>.

The Environmental Board recently approved revisions to 6 NYCRR Part 325 implementing various notification requirements for commercial lawn application of pesticides found in the New York Environmental Conservation Law (ECL). DEC proposed a version of the regulations in March of last year and a final version was slated for approval by the Environmental Board, however, the regulations were withdrawn from the agenda following objections by the pesticide application industry. The term "commercial lawn application" is defined in the statute and regulations as the application of pesticides to ground, trees or shrubs on public or private outdoor property. This phrase is sufficiently broad to cover virtually any activity involving the application of pesticides to plants outdoors, including common activities such as applying pesticide to an in-ground hornet's nest. The regulations impose various new requirements, several of which may affect employees applying pesticides on their employer's property.

ECL § 33-0905.5 requires every certified pesticide applicator, prior to applying pesticides within or on the premises of any structure, to supply the owner or owner's agents with a written copy of the information from the label of the pesticide being applied; the owner must, in

turn, make that information available to occupants upon request. Additional notification provisions are found in ECL Article 33, Title 10, which requires applicators to enter into a written contract with the owner of the property prior to pesticide application and to provide copies of warnings as part of that contract. In addition, it requires applicators to post markers at the perimeter of the property warning that pesticides have been applied and specifies the style, content and location of those markers.

The regulations address the written contract and visual notification requirements in more detail. Further, the proposal clarifies certain elements of the statute as applied to application of pesticides by employees on employer premises. In particular, the regulations require certified employees to provide the property owner with a copy of the pesticide label or a written copy of information on the label at least 24 hours prior to the commercial lawn application. The owner must then provide any "occupant" of the property with a copy of that information upon request.

The regulations take effect on January 1, 2004. For a copy of the regulations, visit DEC's web site at <http://www.dec.state.ny.us/website/dshm/pesticid/325amend.htm>.

DEC Proposes Draft PM2.5 Guidance

DEC has extended the deadline for submitting comments on its draft fine particulate matter guidance, entitled *Assessing and Mitigating Impacts of Fine Particulate Matter Emissions*, until July 14. The guidance establishes a procedure for evaluating the impact of fine PM until the new National Ambient Air Quality Standard for PM2.5 is fully implemented. Under the procedure, if primary PM10 emissions from a project are 15 tons per year or more, the

project sponsor must analyze secondary PM emissions and model PM2.5 impacts. If this analysis shows that emissions exceed certain thresholds, the project is assumed to have a significant adverse impact and the sponsor must prepare an Environmental Impact Statement (EIS). The guidance raises concerns because of the relatively low applicability thresholds and because of the difficulties associated with the analysis and modeling it requires.

Superfund Legislation (*Cont'd from Page 1*)

listed on the State Inactive Hazardous Waste Disposal Site Registry, including Class 1 and Class 2 sites, are eligible for the program until July 1, 2005; however, the applicant must be a volunteer not a participant. After that date, Class 1 and Class 2 sites will be ineligible for the brownfields program.

Individuals seeking to participate in the brownfields program must submit an application on a form provided by DEC that includes information sufficient for DEC to assess the reasonably anticipated future use of the site. Approval of the application would result in a brownfield cleanup agreement. Provisions in this agreement include payment of state costs, dispute resolution, indemnification of the state, termination of the agreement by the state, exemption of the applicant from the requirement to obtain state or local permits, a statement that DEC shall not consider the applicant a site operator based solely on execution of the agreement, a requirement to prepare one or more work plans, a requirement to prepare a community participation plan, and a waiver by volunteers of future claims against the oil spill fund as a result of entering into the brownfield agreement.

In conducting the remedial investigation, the applicant must characterize the nature and extent of contamination at and/or emanating from the site and must also prepare a qualitative exposure assessment to determine the extent of exposure to humans, fish and wildlife. This investigation would serve as the basis for DEC to determine if the site poses a significant threat. If yes, and the applicant is a volunteer, DEC must bring an enforcement action against the responsible parties at the site and, if necessary, undertake a program to remediate any off-site contamination.

The criteria for selecting the appropriate remedy are set forth in ECL § 27-1415. The first eight criteria correspond to those set forth in the federal Superfund program and 6 NYCRR Part 375. In addition, the applicant must consider various additional criteria for purposes of assessing the current, intended and future use of the site. Under this section "in all cases, the target risk of residual contamination at a site

shall not exceed an excess cancer risk of one in one-million for carcinogenic end points and a hazard index of one for non-cancer end points, although DEC can approve less stringent targets under certain circumstances. To assist in the remedy selection process, DEC will develop regulations creating a "multi-track approach". The tracks differ depending on the applicable cleanup standards (generic vs. site-specific) and whether the applicant will be relying on institutional or engineering controls. As part of these regulations, DEC must develop generic tables of contaminant-specific remedial action objectives for soil addressing unrestricted, commercial and industrial uses. These tables must be updated every five years. The statute also specifies the type of information required where a remedy includes engineering/institutional controls and requires the site owner to retain a licensed professional engineer or other acceptable professional to certify annually that these controls are adequate. Once remedial activities at the site have been completed, the applicant must submit a final engineering report to DEC. If DEC accepts the report, it will issue a "certificate of completion" to the applicant. The certificate may be revoked or modified for various reasons, including "good cause". The certificate of completion will include a covenant not to sue; however, the covenant is subject to reservations of rights relating to various circumstances, including the discovery that the remedy is no longer sufficiently protective, noncompliance with the agreement, a change in environmental standards upon which the remedial work plan was based which renders the remedy insufficiently protective, and other similar events. In addition, the applicant is not released from federal natural resource damage claims.

Groundwater Protection and Remediation Program

This new program, set forth at ECL Article 15, Title 31, acknowledges that contaminated groundwater cannot always be restored to its classified use while emphasizing the legislature's intent to protect groundwater for its classified use. It goes on to require DEC to develop a strategy to address contaminated groundwater. The strategy includes: (1) collecting information on contaminated

groundwater and incorporating it into the Department's newly created geographic information system and (2) developing, in conjunction with the Department of Health, a strategy to address long-term remediation of groundwater contamination and to protect groundwater from future contamination. The statute lists the criteria to be considered in developing the strategy, together with the procedures for approval and regular updates.

Superfund Revisions

Hazardous Substances

Consistent with previous proposals, the bill revises the definition of hazardous waste under ECL § 27-1301 to include both hazardous waste under the State's hazardous waste laws and substances listed in ECL § 37-0103 (the chemical bulk storage program). This revision extends the scope of the state's inactive hazardous waste remedial program to so-called "hazardous substance sites."

Liability Exemptions/Defenses

Consistent with earlier versions of the bills, lenders who hold indicia of ownership but do not participate in site management and municipalities that acquire property involuntarily are excluded from liability. Affirmative defenses for environmental threats caused by an act of God or act of war as well as for so-called innocent purchasers are established, as well as requirements for "appropriate inquiry" for purposes of the innocent purchaser defense. Various other provisions of ECL Article 27, Title 13 have been revised as follows: (1) the statute requires counties to conduct new surveys to identify inactive hazardous waste sites within their boundaries and to update that information in an annual report to DEC; (2) the statute contains various changes to the provisions governing the state's inactive hazardous waste disposal site

registry; (3) the statute authorizes DEC to exempt individuals implementing remedial programs from the requirement to obtain state and local permits provided the applicant satisfies all substantive requirements; (4) consistent with the brownfield program discussed above, provisions have been added specifying the information required in conjunction with remedial work plans that include institutional/engineering controls as well as requiring annual certifications concerning the ongoing effectiveness of those controls.

Funding

Superfund cleanup would be paid for by a mixture of general funds and industry fees. Among other things, the bill adopts the controversial increases in hazardous waste special assessments contained in several earlier versions. The "hazardous waste program surcharges" range between \$4,000 (for generators of between 15 and 25 tons per year of hazardous waste) to \$360,000 (for generators of greater than 10,000 tons per year of hazardous waste). An additional \$6,000 fee will be levied against facilities that generate 15 tons per year or more of hazardous wastewater. Where a generator recycles more than 90 percent of the amount of hazardous waste or hazardous wastewater, the surcharges would be levied on the net quantity of hazardous waste generated. In addition, the bills increase the registration fees for petroleum bulk storage facilities.

As stated above, the Senate passed a slightly different version of the bill. It is expected that, in the fall, the Senate will return and pass the Assembly version which will then go to the Governor for signature. For a copy of the bill, go to the Assembly bill search page at <http://assembly.state.ny.us/leg/>, search by bill number, and enter a9120.

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:

EPA Public Participation Policy

Reservations for the Capital District Environmental Breakfast Club, Holiday Inn Turf, Wolf Road, Colonie, NY **September 5, 2003**

_____ Registration (includes full breakfast buffet) \$12.00

_____ Binder update (*See note below*)
(including copies of Federal Register pages) \$ 5.00

Please make your reservation no later than September 2, 2003. 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 2, 2003. No refunds or credits given after that time, even if you do not show up at the meeting. To help us plan, please make a reservation. **The registration fee will be \$14.00 for walk-ins.**

Changes to Environmental Breakfast Club Binder Updates

If you are a regular attendee at either the Capital District Environmental Breakfast Club or the Mohawk Valley Environmental Information Exchange, chances are you are familiar with the "binder update" which provides a summary of recent federal and state environmental regulatory changes. Up to now, we have been providing copies of the first page of the federal register notice with these updates. Since the Federal Register is easily available on the Internet, beginning September 2003, we will provide at *no charge* the summary table (which is also available on our website at www.youngsommer.com), but if you need the federal register pages it must be ordered in advance at a charge of \$5.00 per copy. If you have any questions or comments about this new policy, please call Vicki Schlierer at 518-438-9907 ext. 229.