

Governor Pataki Signs Superfund Reform Bill

On October 9, Governor Pataki visited the former Bossert manufacturing site in Utica to sign the controversial bill to refinance and reform the State's Superfund Program. The law creates a formal brownfield program to address the cleanup of contaminated properties like the Bossert site. "This is an historic day for New York State, and it is with great pleasure that I sign this bill. The programs and initiatives contained in this legislation illustrate the direct link between environmental health and fiscal stability," Governor Pataki said.

The new program establishes procedures and standards for cleaning up brownfield sites, defined by the statute as "real property, redevelopment or reuse of which may be complicated by the presence or potential presence of a hazardous waste, petroleum, pollutant, or contaminant." Also established are application procedures and standards, criteria for cleanup agreements, work plan requirements, remedial program requirements, citizen participation requirements, and standards for completion, covenants not to sue, reopens and change of use.

In addition to the new brownfield law, the new law implements other changes to New York's Superfund program, including: (1) creation of environmental easements to ensure the long-term effectiveness of engineering and institutional controls; (2) adoption of a new groundwater protection and remediation program; (3) creation of a new geographic information system containing information on contaminated sites; (4) 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; (5) funding provisions that call for a significant increase in hazardous waste assessments and other fees; (6) provisions targeted at encouraging municipal brownfield cleanups; and (7) brownfield tax credits.

Brownfield Cleanup Program

The new law creates a Brownfield Cleanup Program, to be set forth in Article 27, Title 14 of the Environmental Conservation Law (ECL). The program is available to both "participants" (i.e., responsible parties) and "volunteers" (everyone else, including individuals who acquired the property (*cont'd on next page*)

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after disposal activities occurred. Participants are subject to more rigorous standards than volunteers. The list of hazardous waste sites eligible to participate in the program includes sites contaminated with petroleum or hazardous wastes, with certain exceptions. Those exceptions include sites on the National Priorities List, sites subject to certain enforcement actions or cleanup orders, and Class 1 and 2 sites on New York's inactive hazardous waste disposal site registry. Volunteers that own Class 2 sites are eligible to participate until July 1, 2005.

Individuals seeking to participate in the brownfield program must submit an application on a form provided by DEC that includes information sufficient for DEC to assess the applicant's eligibility and the reasonably anticipated future use of the site. The statute sets forth deadlines/procedures for determining whether the application is complete, notifying the State's oil spill fund to determine whether the applicant is a responsible party, soliciting public comment, and notifying the applicant concerning approval/disapproval of the application. It also lists mandatory and discretionary criteria for rejecting brownfield applications. Once an application is accepted, the next step is the execution of a brownfield cleanup agreement. This agreement will address, among other things, payment of state costs, 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.

The new law sets forth the requirements/procedures for preparing and approving a remedial investigation work plan. Volunteers must investigate and characterize on-site contamination and conduct an exposure assessment for off-site contamination while participants must investigate and characterize both on- and off-site contamination. The applicant must then prepare a report summarizing its findings. If the report shows that the site poses a significant threat, DEC will require the person responsible to conduct an off-site investigation and/or remediation or will undertake those activities itself, if a responsible party cannot be located.

The remedial work plan must address on-site

contamination; in addition, participants must remediate off-site contamination, unless liability results solely from ownership or operation of the site subsequent to disposal/discharge. The law specifies the number of remedial alternatives that must be considered for different types of sites and sets forth criteria for selecting the appropriate remedy. 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 additional criteria for assessing the current, intended and future use of the site.

To facilitate the remedy selection process, DEC must develop regulations creating a "multi-track approach" for the remediation of contamination. 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.

DEC must also prepare a citizen participation handbook and applicants are required to develop citizen participation plans. The law also authorizes DEC to issue citizen participation grants to not-for-profit corporations for use in obtaining help understanding site conditions and the remedies proposed to address those conditions.

Once remedial activities at the site have been completed, the applicant must submit a final engineering report to DEC containing information specified in the statute. 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 a number of reservations of rights 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. The applicant is not released from federal natural resource damage claims.

The legislation also establishes a new law addressing environmental easements necessary to ensure the performance of maintenance, operation

and monitoring requirements and to restrict future uses of land consistent with agreed-upon engineering and institutional controls. The law sets forth procedures and standards for establishing and recording environmental easements and for ensuring DEC review of activities on lands subject to such easements. DEC must develop regulations specifying the form of environmental easements.

Groundwater Protection and Remediation Program

This new program acknowledges that contaminated groundwater cannot always be restored to its classified use while emphasizing the legislature's intent to protect groundwater. 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. With respect to brownfield sites, where cleanup is being undertaken by a volunteer (rather than a participant), the statute specifies that DEC is responsible for remediating any off-site groundwater contamination at sites determined to pose a significant threat unless a responsible party can be found.

Superfund Revisions

The new law also contains major revisions to the State's Superfund program, set forth at ECL Article 27, Title 13. The definition of hazardous waste under ECL § 27-1301 has been revised 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." To implement the change, ECL § 27-1315 deems the state's inactive hazardous waste site regulations revised to include the new definition of hazardous waste.

The new law also includes various liability exemptions and defenses intended to bring the state Superfund program in line with the federal program. Among other things, it excludes from liability lenders who hold evidence of ownership but do not participate in site management and municipalities that acquire property involuntarily. Affirmative defenses are established for environmental threats caused by an act of God or act of war as well as for so-called innocent purchasers. Standards of "appropriate inquiry" are established for the innocent purchaser defense.

To pay for Superfund cleanups, the law establishes hazardous waste special assessments to be paid by generators of hazardous waste as shown on the insert on the following page. In addition, a surcharge of \$6,000 will be levied for hazardous wastewater generated in quantities greater than or equal to 15 tons per year. These fees are in addition to the annual hazardous waste generation fee already established. An additional \$6,000 fee will be levied against facilities that generate 15 tons per year or more of hazardous wastewater. If more than 90 percent of the amount of hazardous waste or hazardous wastewater generator is recycled, the surcharges would be levied on the net quantity of hazardous waste generated. In addition, the legislation doubles the registration fees for petroleum bulk storage facilities. The new fees are as follows:

<u>Combined storage capacity at facility</u>	<u>5-year fee</u>
>1,000 to 2,000 gallons	\$100
>2,000 gallons to <5,000 gallons	\$300
5,000 gallons to <400,000 gallons	\$500

The legislation contains other provisions, many of which are targeted at encouraging municipalities to clean up contaminated sites. These include: (1) changes to the rules governing allocation of funds under the Clean Water/Clean Air Bond Act designed to make it easier to participate, including increasing the amount of state assistance and allowing municipalities to use federal or other state assistance to fund their share and eliminating the requirement that municipalities share any profits with the state when properties are sold; (2) creation of a state assistance program for designated "Brownfield Opportunity Areas"; and (3) adoption

of a brownfield redevelopment tax credit available to individuals, corporations and others who clean up brownfields.

A copy of the law can be found on the New York State Assembly website at www.assembly.state.ny.us.

DEC Proposes Policy on the Use of Environmental Management Systems

DEC recently proposed a Commissioner Policy that sets forth the manner in which Environmental Management Systems (EMS) and other environmental performance improvement tools will be incorporated into NYSDEC programs. This policy identifies the use of EMSs and other environmental performance improvement tools as effective ways to improve compliance within the regulated community and to diminish the environmental impact resulting from both regulated and non-regulated activities. The policy also authorizes the development of programs including an Environmental Leadership Program to encourage the development of EMSs, the use environmental performance improvement tools in the Department's enforcement program; and the use of EMSs in NYSDEC operations.

The policy defines an EMS as "a set of management processes, procedures, and auditable performance objectives that allows a facility to analyze, control, and reduce the environmental impact of its activities, products, and services while maintaining full compliance with environmental requirements." Examples of environmental performance improvement tools defined in the policy include environmental compliance audits, environmental compliance systems, and environmental enhancement systems.

This policy would apply to the NYSDEC's regulatory programs and to the exercise of its enforcement discretion in administrative and civil enforcement programs only, not in criminal actions. For a copy of the proposed policy, visit DEC's website at www.dec.state.ny.us/website/ppu/ems/index.html or use the QUIK-REPLY form. Public comment will be accepted until November 7, 2003 and should be sent to: John M. Vana, New York State Department of Environmental Conservation, Division of Environmental Permits, 625 Broadway, Albany, NY 12233-1750.

Hazardous Waste Surcharges

<u>Tons of Hazardous Waste Generated</u>	<u>Fee</u>
at least 15 and ≤25	\$4000
> 25 and ≤ 50	\$9000
> 50 and ≤75	\$14,000
> 75 and ≤100	\$19,000
>100 and ≤550	\$24,000
>500 and ≤ 1000	\$80,000
>1000 and ≤ 2000	\$85,000
> 3000 and ≤ 5000	\$110,000
> 5000 and ≤ 10,000	\$135,000
>10,000	\$360,000

DEC Finalizes Industrial Rag Policy

DEC recently finalized a Program Policy entitled "Regulatory Status of Laundered Industrial Rags & Soiled Clothing," (DSH-HW-03-09). This Program Policy supercedes and replaces TAGM 3031, and allows qualifying shop towels, industrial rags, and soiled clothing to be sent to an industrial laundry (or laundered on-site) as non-hazardous waste when certain specific conditions are met. A draft version of this Program Policy was public noticed in the ENB on November 20, 2002. The final Program Policy was changed slightly from the draft to address public comment. Specifically, clarifying language was added to make it clearer that absorbent materials identifiable as towels, rags, or clothing qualify for the Program Policy, and that the presence of free liquids is permissible under the Program Policy provided that both USDOT-compliant containers are used and no free liquids were initially present.

For a copy of the policy and responsiveness summary, use the QUIK REPLY form. DEC has stated that the policy will be made available on its website at www.dec.state.ny.us/website/dshm/hzwst.htm.

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FEDERAL NEWS

EPA Finalizes UST Inspection Standards

EPA's Office of Underground Storage Tanks (OUST) has announced revised performance standards for evaluating "significant operational compliance" or SOC, by owners and operators of underground storage tanks. Operational compliance with the federal regulations means a facility not

only has the required leak-prevention and leak-detection equipment but also that the equipment is in use, functioning, and properly maintained. States and EPA regions report UST program measures to OUST on a semiannual basis. From 1997 through 2000, EPA used two measures to track compliance with the UST regulations: "Number of UST Systems Equipped to Meet the Requirements for Upgrading" and "Number of UST Systems Equipped to Meet the Requirements for Leak Detection". While these measures served a valuable purpose as EPA prepared for the 1998 upgrade deadline, after the deadline passed EPA began to shift its focus to ensuring and measuring operational compliance. EPA's first approach to measuring operational compliance depended on

voluntary submissions from states and was generally based on best professional judgment. Since that time, EPA has refined performance measures several times and ultimately convened a working group to advise EPA on developing the new SOC guidance. The work group set forth the most significant elements of operational compliance in two inspection matrices, one relating to release detection and the other to release prevention. These inspection documents were field tested twice in 16 states and found to be of value in determining whether a UST facility is in "significant operational compliance with release detection and release prevention (spill, overflow, and corrosion protection) requirements". The new matrices were disseminated to the EPA Regional Offices and States on September 30 and will be used by state and federal inspectors performing facility inspections. For more information and a copy of the matrices, see EPA's web site at <http://www.epa.gov/swerust1/cmplastc/soc.htm> or use the QUIK-REPLY form.

CALENDAR OF EVENTS

- Nov. 7:** Capital District Environmental Breakfast Club 7:30 am, Holiday Inn Turf, Wolf Rd. Colonie. Topic: Brownfield Development: The Union College Initiative. Speaker - Dean S. Sommer, Esq., Young, Sommer...LLC. \$12 pre-registered, \$14 day of event. 518/438-9907 ext. 240 or e-mail bpopolizio@youngsommer.com
- Nov. 12:** Mohawk Valley Environmental Information Exchange Monthly Meeting. Topic: Environmental Management Systems; Speaker: Bob Geary, Barton & Loguidice. Radisson Hotel Utica Center- 200 Genesee St. Utica (Across from the State Office - Building- Park in the garage free) Meeting Format: Buffet Breakfast 7:30 - 8:00AM - Program 8:00 - 9:30 AM \$10-12 includes breakfast. For reservations email davep@mvatc.net.
- Nov. 19:** Eastern NY Chapter, Air & Waste Management Association Monthly Meeting. 12:00 noon, Holiday Inn Turf, Wolf Rd. \$15.00. Topic: NSR/PSD Update Speaker: Robert Sliwinski, NYSDEC Division of Air Resources. For reservations email Janis Fallon jef@woh.com
- Dec. 5:** Capital District Environmental Breakfast Club JOINT MEETING with the Air & Waste Management Association. 7:30 am, Holiday Inn Turf, Wolf Rd. Colonie. Topic: New Source Review Reform: Applying the Recent Changes. Speaker - Douglas Schultz, GE Power Systems. \$12 pre-registered, \$14 day of event. 518/438-9907 ext. 240 or e-mail bpopolizio@youngsommer.com

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:

DEC Industrial Rag Policy

EPA Underground Storage Tank Inspection Matrices

DEC Proposed EMS Policy

Reservations for the Capital District Environmental Breakfast Club, Holiday Inn Turf, Wolf Road, Colonie, NY **November 7, 2003.**

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

Please make your reservation no later than **November 3, 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 November 3, 2003. No refunds or credits given after that time., even for no-shows. To help us plan, please make a reservation. **The registration fee will be \$14.00 for walk-ins.**