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Contaminated Property: What a Municipality Can Do

Clifford P. Case*

*Carter, Ledyard, & Milburn

CONTAMINATED PROPERTY: WHAT A MUNICIPALITY CAN DO

Clifford P. Case, III[*]

INTRODUCTION

Municipalities across New York State and across the nation face the problem of dealing with thousands of contaminated properties within their boundaries, many owned by the municipalities themselves.[1] A recent survey of 231 cities conducted by the United States Conference of Mayors found over 21,000 brownfields sites nationwide, ranging from a quarter acre in size to 1,300 acres.[2] The problem is daunting, but local governments are not without recourse. The purpose of this article is to suggest ways in which a municipality may respond to the presence of contaminated property within its jurisdiction. A range of possible approaches--involving litigation, administrative proceedings, local legislation and

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[*] Clifford P. Case, III, Partner and Co-Director, Environmental Practice Group, Carter, Ledyard & Milburn. Thanks to Noah M. Sachs for his assistance in the preparation of this article.

1. *See* Heidi G. Robertson, *One Piece of the Puzzle: Why State Brownfields Programs Can't Lure Business to the Urban Cores Without Finding the Missing Pieces*, 51 RUTGERS L. REV. 1075, 1077 n.1 (1999) ("Estimates regarding the number of brownfield sites range from tens of thousands to nearly 450,000, with some urban areas hosting more than 2,000 sites.").

2. *See* U.S. CONFERENCE OF MAYORS, 3 RECYCLING AMERICA'S LAND: A NATIONAL REPORT ON BROWNFIELDS REDEVELOPMENT 9, 21-26 (Feb. 2000). Eleven cities in New York state are included in the survey, from Buffalo in the west to Glen Cove in the east; they report 6,223 sites, totaling 6,766 acres. *See* Table of Key Findings, *id.* at 21-26.

negotiation--is outlined, along with relevant advantages and disadvantages.

Helping localities deal with the problem of contaminated property is of vital national importance. Remediating these sites will alleviate threats to human health and the environment, bring derelict land back to the tax rolls, create jobs, and offset the pressures for building on greenfields. Moreover, it may relieve pressure from local government representatives to modify or even repeal the environmental legislation that is seen by some in local government as a significant and unjustified constraint on urban redevelopment and renewal.[3]

I. LITIGATION

Whether the property in question is privately or publicly owned, federal and state legislation and the common law provide several possible litigation remedies for municipalities with a contamination problem.

A. Federal Statutes

There are a number of federal statutes that may be used by a municipality against an alleged contaminator. These statutes, summarized below, authorize federal administrative agencies (and in some cases injured parties) to bring court actions to compel compliance and recover certain costs. Additionally, Congress added "citizen suit" provisions to most of the major federal environmental statutes, allowing citizens, in certain circumstances, to bring civil suits in federal district court against polluters or against the Administrator of the U.S. Environmental Protection Agency ("EPA"), in order to supplement enforcement of the federal environmental statutes. Citizen suit plaintiffs, including municipalities, may seek injunctive relief and recovery of civil penalties for violations of the law.

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3. *See id.* at 6 ("Our third annual brownfields report further documents the negative effects of the Superfund law on the nation's cities, as shown by the vast inventories of brownfields throughout America.") (statement of J. Thomas Cochran, Executive Director).

1. Clean Air Act[4]

The Clean Air Act recognizes that air pollution "has resulted in mounting dangers to the public health and welfare."[5] Accordingly, it authorizes federal regulations on air quality, emission controls and a permitting program. Emissions from a contaminated site, or during remediation activities, may be covered. Citizen suits are authorized under the Clean Air Act.[6]

2. Federal Water Pollution Control Act[7]

The Federal Water Pollution Control Act covers a broad range of water pollution issues, including point and non-point sources, toxic pollutants and storm water discharges.[8] Releases of contaminants to ground or surface waters may be covered.[9] It also authorizes a self-monitoring permit program.[10] Citizen suits are authorized.[11]

3. Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")[12]

CERCLA establishes strict joint and several, retroactive liability of facility owners and operators, transporters and disposers for releases of "hazardous substances," a term that is broadly inclusive but does not include petroleum.[13] In addition to citizen suits to enforce the statute,[14] CERCLA authorizes actions to recover clean-up costs from a contaminator.[15] If a plaintiff is itself a potentially responsible party, the law is generally settled now that it must seek

4. 42 U.S.C. § 7401 *et seq.* (1994).
5. *Id.* § 7401(a)(2).
6. *See id.* § 7604(a).
7. 33 U.S.C. § 1251 *et seq.* (1994).
8. *See id.* § 1362(13)(14); § 1342(l)(2).
9. *See id.* § 1314(a)(1)(A).
10. *See id.* § 1342(a)(1).
11. *See* 33 U.S.C. § 1365(a).
12. 42 U.S.C. § 9601 *et seq.* (1994).
13. *See id.* § 9601(14).
14. *See id.* § 9659(a).
15. *See id.* § 9607(a).

contribution and prove the defendant's share of liability, rather than pursuing a direct cost recovery action.[16]

4. Resource Conservation and Recovery Act ("RCRA")[17]

RCRA provides for liability where a party causes an imminent and substantial endangerment to public health or the environment through the release of solid or hazardous wastes,[18] and regulates hazardous wastes from generation through disposal.[19] Citizen suits are authorized.[20]

5. Emergency Planning and Community Right-to-Know Act ("EPCRA")[21]

Created in reaction to the disastrous Union Carbide methyl isocyanate release in Bhopal, India,[22] as well as incidents in this country,[23] EPCRA requires a party using or storing hazardous materials to inform the public of the existence of those materials[24] and create emergency response plans to deal with accidents.[25] Citizen suits are authorized.[26]

6. Toxic Substances Control Act[27]

The Toxic Substances Control Act regulates the manufacture, distribution and sale of chemical substances, and requires testing of

16. *See* Bedford Affiliates v. Sills, 156 F.3d 416, 423-24 (2d Cir. 1998).
17. 42 U.S.C. § 6901 *et seq.* (1994).
18. *See id.* § 6928(e).
19. *See id.* § 6972(a)(1)(B).
20. *See id.* § 6972(a).
21. 42 U.S.C. § 11001 *et seq.* (1994).
22. *See* Brian Gregg, *Setting Priorities for Phase Three of the Toxic Release Inventory: Trade Secrets or Community Right-to-Know?*, 4 ENVTL. LAW. 943, 945 (1998).
23. *See id.*
24. *See, e.g.*, 42 U.S.C. § 11003 (1994).
25. *See id.* § 11021(c)(2).
26. *See id.* § 11046(a)(1).
27. 15 U.S.C. § 2601 *et seq.*

new chemicals which "may present an unreasonable risk of injury to health or the environment."[28] Citizen suits are authorized.[29]

7. Oil Pollution Act[30]

The Oil Pollution Act makes a "responsible party" liable for removal costs and damages arising from the release of oil, from a vessel or facility, into navigable waters or waters adjoining the coastline.[31] Claims may also be made against the Oil Spill Liability Trust Fund.[32]

B. Citizen Suits

Citizen suits are private actions that seek to compel private parties or the EPA to comply with federal environmental statutes.[33] Congress created the citizen suit provisions of environmental statutes to promote broader enforcement of the laws, and motivate government agencies to bring enforcement actions, by allowing citizens to act as private attorneys general.[34] The requirements for citizen suits are generally similar under all of the major federal environmental statutes, and include the following:

1. Claims Against Violators

Where the citizen suit is against an alleged violator, RCRA demands proof that the defendant is *currently* in violation of a federal environmental standard. Courts dismiss citizen suits that allege only wholly past violations.[35]

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28. *Id.* § 2603(b)(2)(A).
29. *See id.* § 2619.
30. 33 U.S.C. § 2701 *et seq.* (1994).
31. *See id.* § 2702(a).
32. *See id.* § 2712(a)(4).
33. *See* 42 U.S.C. § 11046(a)(1) (1994).
34. *See id.* § 11046(1).
35. *See, e.g.*, ABB Indus. Sys., Inc. v. Prime Tech., Inc., 120 F.3d 351, 359 (2d Cir. 1997) (citing Conn. Coastal Fishermen's Ass'n v. Remington Arms Co., 989 F.2d 1305, 1315 (2d Cir. 1993) where the court dismissed a claim under section 6972(a)(1)(A) because the "claim alleges a 'wholly past' RCRA violation").

2. Claims Against EPA Administrator

A citizen can also sue the EPA Administrator if the Administrator has failed to perform a duty or act that is non-discretionary.[36] For example, the Administrator has been found to have a non-discretionary duty to promulgate certain quality-based water regulations.[37] In the typical contamination clean-up case, a citizen suit will not lie against EPA, because the decision whether or not to order a particular clean-up (or indeed what type of clean-up to order) is left to the discretion of the agency.

3. Notice

Prior to filing a citizen suit, the plaintiff must give notice of the alleged violation to the EPA Administrator, the state in which the violation occurred, and the alleged violator.[38] For example, the Federal Water Pollution Control Act requires 60 days' notice prior to filing a citizen suit.[39] Questions sometimes arise over how specific the notice must be.[40]

4. No Diligent Prosecution

Citizen suits are not permitted if EPA or the state agency is "diligently prosecuting" a civil or criminal action to compel compliance regarding the violation alleged in the complaint.[41] The issue of what constitutes "diligence" in particular circumstances has itself been litigated.[42]

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36. *See* 33 U.S.C. § 1365(a)(2) (1994).

37. *See* Alaska Ctr. for the Env't v. Reilly, 762 F. Supp. 1422, 1427 (W.D. Wash. 1991).

38. *See* 33 U.S.C. § 1365(b)(1)(A) (1994).

39. *See id.*

40. *See, e.g.*, Natural Res. Def. Council v. S.W. Marine Inc., 945 F. Supp. 1330, 1332 (S.D. Cal. 1996).

41. *See* 33 U.S.C. § 1365(b)(1)(B) (1994).

42. *See, e.g.*, EPA v. City of Green Forest, Ark., 921 F.2d 1394, 1405 (8th Cir. 1990); N.Y. Coastal Fishermen's Ass'n v. Dep't of Sanitation, 772 F. Supp. 162, 165 (S.D.N.Y. 1991).

5. Municipality as Person

Statutes authorize any person to bring a citizen suit. It is generally acknowledged that a municipality is a person.[43] In fact, the Federal Water Pollution Control Act specifically defines the term "person" to include a municipality.[44]

C. Federal Issues

A number of issues typically arise in connection with federal statutory claims against an alleged contaminator:

1. Standing

In *Lujan v. Defenders of Wildlife*,[45] the Supreme Court set forth a three-pronged test for standing: (1) actual or imminent "injury in fact" to the plaintiff; (2) causation of the plaintiff's injury by the defendant's conduct; and (3) "redressability," that is, a likelihood that the requested relief will redress the alleged injury. The Supreme Court's decision in *Steel Co. v. Citizens for a Better Env't*,[46] raised doubts whether any citizen plaintiff, including a municipality, could pursue a citizen suit solely seeking the payment of civil penalties to the federal government, but this doubt was erased by the important recent decision in *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*[47] In *Laidlaw*, a 7-2 majority of the Court held that civil penalties can serve as the basis for standing in a citizen suit, because they "encourage defendants to discontinue current violations and deter them from committing future ones . . . ."[48]

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43. *See, e.g.*, Phila. v. Belfield Assoc., 1990 U.S. Dist. LEXIS 14801, *14803 (E.D. Pa. 1990) (noting that both RCRA, 42 U.S.C. § 6903(15) (1994) and CERCLA, 42 U.S.C. § 9601(21) define a municipality as a person).

44. *See* 33 U.S.C. § 1362(5) (1994).

45. 504 U.S. 555 (1992).

46. 523 U.S. 83 (1998).

47. 120 S.Ct. 693 (2000).

48. *Id.* at 706-07.

2. Statute of Limitations

In the case of a citizen suit to enforce the requirements of a federal statute, the statute of limitations will not act as a bar because the violation is continuing. However, where a party brings a cost recovery claim under CERCLA, that claim must be brought within three years after completion of a removal action or six years from commencement (initiation of physical on-site construction) of a remedial action.[49] In the case of a contribution action, the claim must be brought within three years after the date of judgment in the underlying action for cost recovery, or the date of a judicially approved settlement.[50]

3. Abstention/Primary Jurisdiction

Where a defendant has voluntarily entered into a consent decree with a state administrative agency addressing environmental issues, the defendant may argue that the federal courts should abstain from hearing the plaintiff's federal statutory claims because the state administrative agency has primary jurisdiction to deal with such issues. The majority of courts that have considered this issue have found that primary jurisdiction is not applicable to state administrative proceedings.[51] Furthermore, abstention is arguably inappropriate because a federal court proceeding does not necessarily interfere with a state administrative proceeding.[52]

4. Equitable Restitution Under RCRA

Because CERCLA specifically excludes petroleum from its coverage, many plaintiffs have sought equitable restitution under RCRA as an alternative means of recovering petroleum clean-up

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49. *See* 42 U.S.C. § 9613(g)(2)(A)-(B) (1994).

50. *See id.* § 9613(g)(3)(A)-(B).

51. *See, e.g.*, Sierra Club v. Tri-State Generation and Transmission Ass'n, 173 F.R.D. 275, 283 (D. Colo. 1997).

52. *See* White & Brewer Trucking, Inc. v. Donley, 952 F. Supp. 1306, 1313 (C.D. Ill. 1997). *But see* Coalition for Health Concern v. LWD, Inc., 60 F.3d 1188, 1192 (6th Cir. 1995) (holding that withholding of equitable relief because of undue interference with state proceedings is normal).

costs.[53] Recent decisions have cast doubt on whether such claims can succeed. In *Meghrig v. KFC Western, Inc.*,[54] the Supreme Court held that equitable restitution was not available for *past* clean-up costs under RCRA. The Court left open the question whether a plaintiff may seek equitable restitution for *future* clean-up costs under RCRA. Subsequent decisions addressing this issue have reached opposite conclusions.[55]

5. Compliance with National Contingency Plan

In order to succeed on a private cost recovery claim under CERCLA, a plaintiff must establish that the costs sought are consistent with the National Contingency Plan ("NCP"), which requires, among other things, public participation in developing the remediation plan.[56] However, initial investigation and monitoring costs are deemed consistent with the NCP as a matter of law.[57]

D. State Statutes

New York State has a wide range of environmental legislation, but at present only one remediation-related statute that provides a private right of action to an environmental plaintiff.

1. Navigation Law

The New York Navigation Law provides that a person who discharges petroleum is liable for "all cleanup and removal costs

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53. *See* Leo O. Bacher, Jr., *When Oil is Not Oil: An Analysis of CERCLA's Petroleum Exclusion in the Context of a Mixed Oil Spill*, 45 BAYLOR L. REV. 233, 234 (1993) (analyzing the "Petroleum Exclusion").

54. 516 U.S. 479 (1996).

55. *See, e.g.*, Gilroy Canning Co. v. Cal. Canners and Growers, 15 F. Supp.2d 943 (N.D. Cal. 1998); Avondale Fed. Sav. Bank v. Amoco Oil Co., 997 F. Supp. 1073, 1076 (N.D. Ill. 1998), *aff'd*, 170 F.3d 692 (7th Cir. 1999), *cert denied*, 120 S.Ct. 284, 68 U.S.L.W. 3232 (Oct. 4, 1999).

56. *See* Shelley J. Pellegrino, *Consistent Inconsistency: CERCLA Private Cost Recovery Actions and the Community Relations "Requirement,"* 72 WASH. L. REV. 935, 941 (1997) (citing the National Contingency Plan, 40 C.F.R. § 300.700(c)(3)(i)) (1999)).

57. *See* Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 892 (9th Cir. 1986); Gache v. Town of Harrison, 813 F. Supp. 1037, 1046 (S.D.N.Y. 1993).

and all direct and indirect damages . . . ."[58] It has been interpreted by the courts as creating a private right of action in favor of an injured party.[59] An injured party may also file claims against the New York State Environmental Protection and Spill Compensation Fund, established pursuant to the law,[60] and a responsible party incurring clean-up costs is entitled to contribution from other responsible parties.[61] The language of the statute is quite broad; for example, the key word "petroleum" is defined to include "oil or petroleum of any kind and in any form including, but not limited to, oil, petroleum, fuel oil, oil sludge, oil refuse, oil mixed with other wastes and crude oils, gasoline and kerosene."[62] However, as the law is relatively recent, it will take time for the courts to determine the actual breadth of recovery permitted.

E. State Common Law

In addition to statutory claims, municipalities may also assert a number of common law causes of action against an alleged contaminator:[63]

1. Trespass/Damage to Property Value

A party that intentionally commits an act that causes damage to the property of another is liable for damage to that property.[64] The defendant need not intend the result, only the act that caused the result.[65] Contamination can therefore form the basis for a trespass claim.

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58. N.Y. NAV. LAW § 181(1) (McKinney 1999).

59. *See* Wheeler v. Nat'l Sch. Bus Serv., 598 N.Y.S.2d 109, 110 (A.D. 3d Dep't 1993).

60. *See* N.Y. NAV. LAW § 179(1).

61. *See id.* § 176(8).

62. *See id.* § 172(15).

63. *See* Peter H. Lehner, *Act Locally: Municipal Enforcement of Environmental Law*, 12 STAN. ENVTL. L.J. 50, 78-79 (1993) (using the provision of the Clean Water Act, 33 U.S.C. §1370, which preserves common law remedies, to illustrate the ability of municipalities to bring claims of trespass, nuisance, negligence and strict liability).

64. *See* Scribner v. Summers, 84 F.3d 554, 558 (2d Cir. 1996).

65. *See id.*; *See also* RESTATEMENT (SECOND) OF TORTS § 158 (1965).

2. Nuisance

There are two types of nuisance claims that may be asserted by a municipality:

a. Private

A defendant is liable for private nuisance where the defendant's conduct causes an unreasonable invasion of the interest in the "private use and enjoyment of land and such invasion is (1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the rules governing liability for abnormally dangerous conditions or activities."[66]

b. Public

Any activity that unreasonably interferes with public use of public real property is a public nuisance.[67] The public right is not absolute but relative, and the interference with public use of a public property for a necessary business purpose is permissible, provided that in relation to the public convenience the interference is reasonable in extent and duration.[68] One is liable for a public nuisance regardless of negligence or fault.

3. Strict Liability

The law dictates that some activities are so abnormally dangerous that any person who engages in those activities is strictly liable for the results.[69] At least one federal court has held that the improper handling and storage of hazardous waste is an abnormally dangerous activity, thus making the defendant strictly liable for any resulting harm.[70]

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66. Copart Indus., Inc. v. Consol. Edison Co., 41 N.Y.2d 564, 569 (Ct. App. 1977) (citation omitted).

67. *See* Hayes v. Brooklyn Heights R.R. Co., 200 N.Y. 183, 186 (Ct. App. 1910).

68. *See* Copart Indus., Inc., 41 N.Y.2d at 568.

69. *See* Spano v. Perini Corp., 25 N.Y.2d 11, 15 (Ct. App. 1969).

70. *See* New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985).

4. Negligence

Negligence is the lack of ordinary care or the failure to use that degree of care that a reasonably prudent person would have used under the same circumstances.[71] Where a defendant acts negligently and the results of the defendant's conduct were reasonably foreseeable, the plaintiff can recover damages for those negligent acts.[72] Violation of a statute is per se evidence of negligence. Releases of contamination causing harm are often the result of negligence.

5. Restitution

"A person who has performed the duty of another, by supplying things or services, although acting without the other's knowledge or consent, is entitled to restitution from the other if: (a) [the person] acted unofficiously and with intent to charge therefor, and (b) the things or services supplied were immediately necessary to satisfy the requirements of public decency, health, or safety."[73] Therefore, one who cleans up contamination resulting from the acts of another may state a claim for restitution.

6. Indemnity

A party who has discharged a duty that is owed by that party but that, as between that party and another, should have been discharged by the other, is entitled to recover the costs incurred in discharging that duty.[74] A clean-up by one of several responsible parties may give rise to an indemnity claim.[75]

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71. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 43 (5th ed. 1984).

72. *See id.* at 281.

73. *See* Chase Manhattan Bank v. T&N PLC, 905 F. Supp. 107, 122 (S.D.N.Y. 1995) (citation omitted).

74. *See* Stanley v. Bertram-Trojan, Inc., 781 F. Supp. 218, 225 (S.D.N.Y. 1991); *see also* KEETON, *supra* note 71, § 51 (5th ed. 1984).

75. *See* City of New York v. Keene Corp., 132 Misc.2d 745, 749 (Sup. Ct. N.Y. Cnty. 1986).

F. State Issues

The following issues may arise in relation to state common law claims against an alleged contaminator:

1. Supplemental Jurisdiction

Federal courts have jurisdiction to hear disputes only when there is a diversity of citizenship among the parties, or a federal question is involved.[76] Most environmental cases are brought in federal court based on federal question jurisdiction created by federal environmental statutes. Where a federal court asserts jurisdiction over such federal claims, that court may also hear any state law claims (statutory or common law) if those claims arise out of the same common nucleus of facts, and hearing those claims would not unnecessarily delay the federal proceeding.[77]

2. Statute of Limitations

Common law claims for injury to property are covered by a three-year statute of limitations.[78] The limitations period begins to accrue when the plaintiff discovered or "through the exercise of reasonable diligence" should have discovered the injury.[79]

3. Measure of Compensatory Damages

Pursuant to New York common law, a party whose property is damaged is entitled to recover the lesser of the cost of repairs or the diminution in that property's value.[80] The clean-up liability imposed on an owner of contaminated property without regard to property value under current law is apparently not taken into account, although there are indications that the courts are beginning to recognize the impact of this liability.[81]

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76. *See* Jackson v. Bank One, 952 F. Supp. 734, 736 (M.D. Ala. 1996) (citing Gully v. First Nat'l Bank, 299 U.S. 109, 112-13 (1936)).

77. *See* 28 U.S.C. § 1367 (1994).

78. *See* N.Y. C.P.L.R. § 214 (McKinney 1999).

79. *See id.* § 214-(c)(2).

80. *See* Jenkins v. Etlinger, 55 N.Y.2d 35, 39 (Ct. App. 1982).

81. *See* Carpenter Tech. Corp. v. City of Bridgeport, 180 F.3d 93, 99 (2d Cir. 1999).

4. Preemption

Certain state law claims may be pre-empted by federal law.[82] Recently, the Court of Appeals for the Second Circuit, continuing what appears to be a trend, held that a property owner's state law restitution and indemnification claims against former lessees and sublessees for recovery of costs incurred in the course of an environmental clean-up of property were pre-empted by CERCLA.[83]

G. Recovery of Litigation Expenses

A municipality that prevails in an environmental lawsuit may be able to recover all or some portion of its litigation expenses from the contaminator.[84] These expenses may include attorney and expert witness fees. The right to recover these expenses depends on the underlying basis for the claim.[85]

1. Federal Statutes

Federal environmental statutes such as CERCLA, RCRA and EPCRA provide that a prevailing plaintiff in a citizen suit is entitled to recover its reasonable litigation expenses.[86] Additionally, attorneys' fees for legal services in connection with the identification of other potentially responsible parties (but not ordinary litigation expenses) may be recovered as CERCLA response costs.[87]

2. State Statutes

The New York Navigation Law provides that a party that discharges petroleum is liable for "direct and indirect" costs of

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82. *See* Bedford Affiliates v. Sills, 156 F.3d 416, 426 (2d Cir. 1998).

83. *See id.* at 429-30.

84. *See, e.g.*, 33 U.S.C. § 1365(h) (1994).

85. *See* La. Pac. Corp. v. Asarco Inc., 24 F.3d 1565, 1582 (9th Cir. 1994); *see also* Dash Point Vill. Assoc. v. Exxon Corp., 937 P.2d 1148, 1152 (Wash. Ct. App. 1997).

86. *See, e.g.*, 42 U.S.C. § 9659(f) (1994).

87. *See* Key Tronic Corp. v. United States, 511 U.S. 809, 820 (1994).

clean-up.[88] Two appellate level courts in New York have construed this provision of the statute to authorize the award of reasonable litigation expenses to a prevailing plaintiff.[89]

II. ADMINISTRATIVE REMEDIES

Both the New York State Department of Environmental Conservation ("DEC") and the New York State Department of Health ("DOH") have statutory responsibility for managing threats to public health, safety and the environment from the release of hazardous materials,[90] and EPA typically allows the state to handle such matters. As between DEC and DOH, DEC usually acts to order specific clean-ups under the Environmental Conservation Law ("ECL"), in consultation with DOH.

A. The Municipal Role

Except in cases of emergency, DEC tends to negotiate Orders on Consent with responsible parties providing for the investigation and remediation of contaminated sites over time.[91] Municipalities can seek to become formally or informally involved in the administrative proceedings conducted pursuant to such Consent Orders, and obtain the right to notice and the right to comment at each stage of the proceeding, not just when DEC proposes its remedial plan at the end.[92] The opportunity for such involvement,

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88. *See* N.Y. NAV. LAW § 181(5) (McKinney 1999).

89. *See* Strand v. Neglia, 649 N.Y.S.2d 729, 731 (A.D. 3d Dep't 1996); Gettner v. Getty Oil Co., 701 N.Y.S.2d 64, 66 (A.D. 2d Dep't 1999).

90. *See* N.Y. ENVTL CONSERV. LAW § 27-1313(1)(a) (McKinney 1999); N.Y. PUB. HEALTH LAW § 1389-b(1)(a) (McKinney 1999).

91. *See, e.g.*, N.Y. State Dep't of Envtl. Conservation v. O'Neill, 709 N.Y.S.2d 280, 281 (A.D. 4th Dep't 2000) (enforcing a consent order between DEC and appellant, who had agreed to pay a fine and present a remediation plan that called for drainage of a composting facility); *In re* Matter of Raphael Riverso v. Town of Clarkstown, 664 N.Y.S.2d 337, 338 (A.D. 2d Dep't 1997) (reaffirming a DEC consent order in which Clarkstown agreed to shut down a landfill it operated for more than 30 years and to clear the site of all hazardous health and environmental conditions).

92. The author's firm has represented the City of Newburgh, New York in connection with one such proceeding involving municipal property (including underwater Hudson River lands) contaminated by a

while crucial decisions are being made about the nature and scope of the investigation of contaminated sites, the characterization of the contaminants that are found and the risks that they present, is of key importance in bringing the proceeding to a successful conclusion from point of view of the municipality and its citizens.[93]

B. The Nature of the Process

Contaminated sites are typically investigated, and remedial alternatives for them are evaluated, in phases collectively termed the remedial investigation/feasibility study ("RI/FS") process. The remedial investigation is the mechanism for collecting data to characterize site conditions; to determine the nature of the waste; to assess risk to human health and the environment; and to conduct treatability testing as necessary to evaluate the potential performance and cost of the treatment technologies that are being considered. The latter also supports the design of selected remedies.[94] The feasibility study, on the other hand, is "the mechanism for the development, screening, and detailed evaluation of alternative remedial actions."[95]

DEC's practice is to permit a responsible party (usually, the respondent signing a Consent Order) to designate (and pay for) a consulting firm to carry out and then submit the actual RI/FS to DEC. DEC will then produce a proposed remedial action plan based on the consultant's submission that will, following a public hearing, be made final and incorporated into a Record of Decision ("ROD").[96] Because the responsible party's financial interest lies in completing a clean-up as quickly and inexpensively as possible,

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former gas plant manufacturer. *See In re* Central Hudson Gas & Elec. Corp., Order on Consent No. D3-0001-95-06 (1995).

93. *See, e.g.*, N.Y. PUB. HEALTH LAW § 1389-(b)(2) (McKinney 1999).

94. *See, e.g.*, 40 C.F.R. § 300.430(d)(1)-(2) (1999) (providing "[t]he purpose of the remedial investigation (RI) is to collect data necessary to adequately characterize the site for the purpose of developing and evaluating effective remedial alternatives.").

95. EPA, GUIDANCE FOR CONDUCTING REMEDIAL INVESTIGATIONS AND FEASIBILITY STUDIES UNDER CERCLA § 1, at 6 (1988).

96. *See* NYS DEC, RECORDS OF DECISION FOR REMEDIATION OF CLASS 2 INACTIVE HAZARDOUS WASTE DISPOSAL SITES, Organization and Delegation Memorandum No. 89-05 (1989).

there is a danger that the remedial investigation may not generate sufficient information to assess risks accurately and that the range of remedial alternatives considered in the feasibility study will be insufficiently broad.[97] The participation of an affected municipality can help to bring these problems to the attention of DEC and alleviate this danger.

C. How Clean is Clean?

The crucial question in most remediations is the degree to which the site should (or can) be cleaned up to pre-existing conditions. In DEC's words, "[t]he cleanup goal of the Department is to restore inactive hazardous waste sites to predisposal conditions, to the extent feasible and authorized by law. However, it is recognized that restoration to predisposal conditions will not always be feasible."[98] The degree to which resources are to be devoted to clean-up will depend upon such factors as the risk of harm to human health and the environment caused by the contamination, the uses to which the contaminated site and surrounding properties are put, both at present and in the future, and the likelihood of exposure of the public.[99]

D. Developing and Evaluating Remedial Alternatives

DEC outlines a five-step process for developing remedial alternatives:

> 1. Develop remedial action objectives specifying the contaminants and media of interest, and exposure pathways . . . . 2. Develop general response actions for each medium of interest that may be taken to satisfy the remedial action objectives . . . . 3. Identify volumes or areas of media to which general response actions might be applied . . . . 4. Identify and screen the technologies

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97. *See* Scott C. Whitney, *Superfund Reform: Clarification of Cleanup Standards to Rationalize the Remedy Selection Process*, 20 COLUM. J. ENVTL. L. 183, 189 (1995) (revealing the most effective remedial alternatives in conducting a feasibility study).

98. NYS DEC, Determination of Soil Cleanup Objectives and Cleanup Levels, Technical and Administrative Guidance Memorandum #4046, at 1 (Jan. 24, 1994) [hereinafter TAGM #4046].

99. *See id.*

> applicable to each medium of interest to eliminate those technologies that cannot be implemented technically . . . .
> 5. Assemble the selected representative technologies into appropriate alternatives.[100]

Preference is given to "remedies that permanently reduce the toxicity, volume, or mobility of the hazardous substances, pollutants or contaminants, and to remedies using alternative treatment technologies . . . . In order to eliminate the significant threat to public health and the environment, the Department believes it is important to implement permanent remedies wherever practicable."[101]

For the evaluation of remedial alternatives that have been developed, DEC prescribes seven criteria: "(i) Compliance with New York [standards, criteria and guidance]; (ii) Protection of human health and the environment; (iii) Short-term effectiveness; (iv) Long-term effectiveness and permanence; (v) Reduction of toxicity, mobility and volume; (vi) Implementability; and (vii) Cost," in that order.[102] The views of the community and of the public at large (and thus of the municipality and its officials) must also be solicited and considered throughout the process.[103] To comment effectively on technical issues, the municipality must obtain appropriate expert assistance.

E. Effects of Other Laws and Programs

The clean-up decision is not made in a vacuum, but is significantly affected by other federal, state and local policies and programs. These are termed by the DEC, standards, criteria and guidance ("SCGs") that must be taken into account in evaluating

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100. NYS DEC, SELECTION OF REMEDIAL ACTIONS AT INACTIVE HAZARDOUS WASTE SITES, Technical and Administrative Guidance Memorandum #4030, at 5 (Sept. 13, 1989, revised May 15, 1990) [hereinafter TAGM #4030].

101. *Id.* at 1-2.

102. *Id.*

103. *See id.* at 19. *See also* EPA, *supra* note 95 § 1, at 5 ("Section 117 of CERCLA (Public Participation) emphasizes the importance of early, constant, and responsive relations with communities affected by Superfund sites . . . ."); § 1, at 9, § 2, at 12, § 3, at 27-28, § 4, at 27, § 5, at 12, § 6, at 13-15.

remedial alternatives[104] and that a municipality can cite in commenting on and critiquing proposed alternatives. Some examples include:

1. Coastal Zone Management Act[105]

In this statute, Congress established federal policy "to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone . . . ."[106] State coastal zone management programs are to provide, *inter alia*, for public access to the coasts for recreation, and assistance for deteriorating urban waterfronts and ports.[107]

2. Waterfront Revitalization of Coastal Areas and Inland Waterways[108]

Coastal areas covered by this state law include Long Island Sound and the Hudson River as far north as the federal dam at Troy. A basic purpose of the law is to "encourage the restoration and revitalization of natural and man-made resources" and "facilitate public access for recreational purposes."[109] Local waterfront revitalization programs are to be adopted by municipalities.[110] Consistency is required between such local programs and state actions, and among state actions and policies.[111]

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104. NYS DEC, TAGM #4030, *supra* note 100, at 9 ("It is to be pointed out that if an alternative does not meet the SCGs and a waiver to the SCGs is not appropriate or justifiable, such an alternative should not be further considered."). The limited grounds for waiver are set forth in EPA, *supra* note 95 § 1, at 4.

105. 16 U.S.C. § 1451 *et seq.* (1994).

106. *Id.* § 1452(1).

107. *See id.* § 1452(2)(D)-(E).

108. N.Y. EXEC. LAW § 910 *et seq.* (McKinney 1999).

109. *Id.* §§ 912(4), 912(6).

110. *See id.* § 915(1).

111. *See id.* § 912(9).

3. Hudson River Estuary Management Act[112]

This law specifically targets the Hudson River estuary, which includes "the tidal waters of the Hudson River, including the tidal waters of its tributaries and wetlands from the Federal Lock and Dam at Troy to the Verrazano Narrows."[113] Under it, DEC has issued an overall Management Plan and various Action Plans with increasingly specific requirements. An objective of the management plan is to "[a]bate or remediate existing sources of pollution entering the Hudson estuary such as sediments, contaminants and pathogens."[114] The 1998 Action Plan includes as one relevant priority (among many) to "[p]romote clean up and appropriate reuse of contaminated sites along the Hudson estuary."[115]

4. River Classifications and Standards[116]

DEC classifies water bodies within the state and establishes what the "best usages" of those water bodies should be.[117] Usages include drinking water supply and primary or secondary contact recreation and fishing; some waters are stated to be suitable for fish propagation and survival.[118] The statute provides that the "discharge of . . . wastes shall not cause impairment of the best usages of the receiving water as specified by the water classifications at the location of discharge and at other locations that may be affected by such discharge."[119]

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112. N.Y. ENVTL. CONSERV. LAW § 11-0306 (McKinney 1999).

113. NYS DEC, 1998 HUDSON RIVER ESTUARY ACTION PLAN, at 1 (Dec., 1998).

114. *Id.* at 113.

115. *Id.* at 67.

116. N.Y. COMP. CODES R. & REGS. tit. 6, § 701 (McKinney 1999).

117. *See, e.g., id.* § 701.7.

118. *See id.* §§ 701.2, 701.3(a), 701.4(a), 701.5(a), 701.6(a), 701.7, 701.8, 701.9.

119. *Id.* § 701.1. For classification of the waters of the Lower Hudson River drainage basin, see N.Y. COMP. CODES R. & REGS. tit. 6, § 855-865 (McKinney 1999); for classification of the waters of the Lower East River and Long Island Sound, see N.Y. COMP. CODES R. & REGS. tit. 6, § 935; 936 (McKinney 1999).

5. Freshwater and Tidal Wetlands Protection[120]

Both freshwater and tidal wetlands are accorded special protection under state law. "[A]ny form of pollution . . . which substantially impairs" a regulated freshwater wetland requires a permit,[121] and "[w]here any freshwater wetlands have been damaged or endangered by pollution or are subject to pollution," the DEC is required to "take all appropriate action to abate the pollution."[122] Similar provisions cover tidal wetlands.[123]

F. Municipal Ordinances and Local Laws

The policies and programs of municipalities reflected in their local legislation are considered SCGs by DEC.[124] A municipality thus possesses the ability to influence the course of a DEC-administered clean-up through the use of its legislative powers. Such local laws can also, of course, influence land use and the remediation of contaminated property directly. Examples of local legislation in this category include the following:

1. Zoning

Zoning may "weed out" abandoned uses, and prohibit or establish stricter standards for new instances of disfavored uses.[125] It can also establish special districts entitled to higher than normal levels of protection.

2. State Environmental Quality Review Act ("SEQRA") Procedures

Municipalities may broaden the actions that are considered "Type I" actions ordinarily requiring preparation of an environmental impact statement, or designate areas within their boundaries "critical environmental areas," so that the potential

120. N.Y. ENVTL. CONSERV. LAW §§ 24-25 (McKinney 1999).
121. *Id.* § 24-0701(2).
122. *Id.* § 71-2307.
123. *See id.* § 25-0401(1).
124. *See* TAGM #4030, *supra* note 100, at 6.
125. *See* O'Brien v. Town of Fenton, 653 N.Y.S.2d 204, 206 (A.D. 3d Dep't 1997).

impact of "Type I" or unlisted actions under SEQRA becomes a relevant area of environmental concern requiring special evaluation.[126] A critical environmental area may present a benefit or threat to human health.[127]

3. Wetlands Protection

In addition to the protection for both freshwater and tidal wetlands provided for under state law,[128] municipalities have the authority to establish their own programs.[129]

4. Historic Preservation

Protection of landmark buildings and districts under local law can limit actions by state or federal agencies that could adversely affect those landmarks.

5. Local Waterfront Revitalization Programs

These programs, the review and acceptance of which is coordinated by the New York Department of State, trigger the consistency reviews mentioned earlier.

6. Viewshed Protection

Local ordinances to protect significant vistas are relatively new, but have been adopted by a number of municipalities.[130] In at least some instances, their adoption is required by the New York Department of State as a condition for acceptance of Local Waterfront Revitalization Programs.[131]

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126. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.14(g) (McKinney 1999).

127. *See id.* § 617.14(g)(1)(i).

128. *See, e.g.,* N.Y. ENVTL. CONSERV. LAW §§ 24, 25 (McKinney 1999).

129. *See* Drexler v. Town of New Castle, 62 N.Y.2d 413, 420 (Ct. App. 1984).

130. *See* Countryman v. Schmitt, 673 N.Y.S.2d 521, 523 (Sup. Ct. Monroe Cnty. 1998); *see, e.g.*, Harvey K. Flad, *Country Clutter: Visual Pollution and the Rural Roadscape*, 553 ANNALS AM. ACAD. POL. & SOC. SCI. 117, 127 (1997).

131. *See* N.Y. EXEC. LAW § 915(2) (McKinney 1999).

7. Mini-Superfund Laws

Under the New York State Constitution, local governments may adopt local laws relating to "[t]he government, protection, order, conduct, safety, health and well-being of persons or property therein."[132] This authority extends to laws requiring clean-up of contaminated sites. Municipalities outside of New York have adopted such laws, which have survived preemption challenges under CERCLA,[133] and such laws should pass muster in New York as well.[134]

III. BUILDING AN EFFECTIVE CASE

Whether a municipality is litigating, participating in an administrative proceeding, or making a record necessary to justify or support legislation, it must establish an effective factual and technical basis for its actions. Among the tools available are the following:

A. Historical Research

Evidence regarding a responsible party's historical practices, and in particular, evidence that a responsible party's historical practices contributed to contamination, is of value in two areas: helping to prove causation, and demonstrating the intentionality of the party's acts or the party's negligence for those causes of action that require such proof. Experts with knowledge of the historical practices of a particular industry can provide invaluable assistance in preparing

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132. N.Y. CONST., art. IX, § 2(c)(10); *see also* N.Y. MUN. HOME RULE LAW § 10(1) (McKinney 1999).

133. *See* Fireman's Fund Ins. Co. v. City of Lodi, 41 F. Supp.2d 1100, 1108 (E.D. Cal. 1999).

134. Preemption will occur only where there is a conflict with state law, or where state law occupies the entire field. *See* Jancyn Mfg. Corp. v. County of Suffolk, 71 N.Y.2d 91, 96 (Ct. App. 1987); Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia, 51 N.Y.2d 679, 683 (Ct. App. 1980). The only example known to the author of such a "mini-Superfund" law in New York is the "Environmental Protection and Abandoned Industrial Property Reclamation Law" adopted by the Village of North Tarrytown (now the Village of Sleepy Hollow) in 1993 to deal with the proposed closure of a major industrial facility (on file with author).

for litigation and understanding an adversary's position, as well as providing persuasive trial testimony. Documentary proof is sometimes available in the records of government agencies, from private sources, from industry trade associations, and in the party's own records, available through discovery. It should not be assumed that poor waste handling practices were the norm or the industry standard in the past.

B. Expert Witnesses

There is a broad range of experts available in environmental proceedings. For instance, in a recent federal litigation involving historic and continuing contamination of municipal property, experts were retained in the following areas: geology, hydrology, hydrogeology, contaminant fate and transport, engineering, risk analysis, property valuation, chemical analysis, damages assessment, and historical industrial practices.

C. Chemical and Physical Analysis

Advances in technology can be very useful in presenting an effective case. For instance, chemical "fingerprinting" can help to identify the sources of migrating contamination. Also, computer graphics can be extremely useful when explaining to a judge, a jury or an agency how a contaminated site "works," that is, how contamination moves from one point to another through the soil, ground water and bedrock.

IV. DIRECT ACTION BY MUNICIPALITIES

In some situations, the municipality may desire to act directly to clean up sites, especially "orphan" sites where no viable private owner exists, perhaps using federal or, especially, state funds.[135] A problem that has held back many municipalities from taking this approach, in addition to insufficient funding, is the threat of liability under federal or state law for excessive clean-up costs.[136]

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135. *See* 42 U.S.C. § 9604(d)(1)(A) (1994); *see also* N.Y. ENVTL. CONSERV. LAW § 56-0503(1) (McKinney 1999).

136. *See* RECYCLING AMERICA'S LAND: A NATIONAL REPORT ON BROWNFIELDS REDEVELOPMENT, *supra* note 2, at 9, 11.

However, while CERCLA's strict liability regime normally captures all present owners of contaminated facilities even if they are without blame, municipalities benefit from special protective provisions, at least under some circumstances.[137] The Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996[138] establishes the validity and effectiveness of EPA regulations that protect municipalities acquiring ownership or control of property through "involuntary acquisitions or involuntary transfers," which include "circumstances in which the government involuntarily obtains ownership or control of property by virtue of its function as sovereign," or through "acting as a conservator or receiver pursuant to a clear and direct statutory mandate or regulatory authority."[139]

The difficulty is that the exact scope of these regulations has yet to be clearly determined. Do they apply only when title vests in a municipality automatically, without any act on the municipality's part? Or do they apply when a municipality exercises its rights to acquire property, as through tax foreclosure? What about condemnation by the municipality? Until these issues are resolved, municipalities will be hesitant to rely upon EPA's regulations for protection, except in very limited circumstances.

The present situation for New York municipalities is worse under state law than under CERCLA, since there are no exemptions from liability for a property owner under the state's hazardous waste site remediation law, New York's equivalent to CERCLA.[140] While a number of observers have advocated adding CERCLA's exemptions to state law,[141] no such changes have yet been adopted (and even if they were, the limited nature of the municipal exemption under CERCLA makes it a less-than-ideal solution). The situation is exacerbated for New York municipalities by the

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137. *See, e.g.*, Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, Pub. L. No. 104-208, § 2501-2504 (1996).

138. *See id.*

139. 40 C.F.R. § 300.1105(a)(1)-(2) (1999).

140. For CERCLA exemptions, see 42 U.S.C. § 9601(20)(D) (1994) (municipalities); 42 U.S.C. § 9607(b)(3) (innocent parties).

141. *See* SUPERFUND WORKING GROUP, *Recommendations to Reform and Finance New York's Remedial Program* 36-37 (June 2, 1999), *available at* http://www.dec.state.ny.us/website/der /remrpt.html (last visited Dec. 1, 2000).

fact that under the 1996 Clean Water/Clean Air Bond Act and DEC's implementing regulations, a municipality must take title to a contaminated site, thus taking on all the risks of ownership, before it can obtain state funds.[142] Insurance may be a remedy in some circumstances,[143] as may a third-party indemnity, if a viable indemnitor can be located. In any situation where an unprotected property acquisition is contemplated, a complete and rigorous pre-acquisition site investigation is essential to limit risk.

CONCLUSION

Municipalities have a wide array of remedies available to assist them in addressing the problem of contaminated property within their boundaries, whether owned by the municipality itself or by third parties (or even "orphan" property). These remedies include a variety of federal and state causes of action, and the ability to participate effectively in state administrative proceedings. Moreover, local legislation can affect clean-ups favorably, both directly and indirectly through the state administrative clean-up process. Until the rights and liabilities of municipalities as owners of contaminated property are clarified under both state and federal law, however, municipalities should move with great caution in acquiring contaminated properties that they do not already own.

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142. *See* N.Y. ENVTL. CONSERV. LAW § 56-0101(7) (McKinney 1999); N.Y. COMP. CODES R. & REGS. tit. 6, § 375-4.3(a)(1) (McKinney 1999).

143. *See* Lorelie S. Masters, *After the CGL: New Coverage for Environmental Liability and Loss,* 39 CHEM. WASTE LITIG. REP. 739 (Apr. 2000).