REPORT AND RECOMMENDATIONS:

INTERGOVERNMENTAL TASK FORCE
ON CLEANUP OF THE
HASTINGS WATERFRONT

NEIL P. HESS, CHAIR

JUNE, 1993
Honorable Wm. Lee Kinnally, Jr., Mayor
and Board of Trustees
Village of Hastings-on-Hudson
Municipal Building
Hastings-on-Hudson, NY 10706

Ladies and Gentlemen:

It is my pleasure to transmit to you the final report of the Intergovernmental Task Force on Cleanup of the Hastings Waterfront.

The Task Force and its Sub-Committees have been meeting since November of last year to develop a blueprint for action as outlined in your resolution of September 15, 1992.

While recognizing the Village's fiscal constraints, the Task Force proposes a comprehensive strategy to deal with the conditions existing on the waterfront. We believe that the information contained within this report provides decision-makers and citizens with the necessary components to base their actions.

To achieve the ultimate goal of cleanup will require continued commitment and leadership. Your success will ensure a better quality of life for all Hastings residents.

I would like to express my sincere appreciation to the members of the Task Force for their many hours of volunteer service and professional expertise provided to the Village these past nine months. Also to the contributions of Ms. Linda Knies and Ms. Susan Maggiotto as State Assistants to the Task Force.

Respectfully submitted,

Neil P. Hess
Chair
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ON CLEANUP OF THE
HASTINGS WATERFRONT

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# TABLE OF CONTENTS

A. Site Study Area .................................................. A1
   Site Summary Background ...................................... A9

B. Soil Contamination Sub-Committee
   I. Analysis of Legal Options ......................... B1
   II. Regulatory Authorities ............................... B4
   III. Health Hazards ........................................... B4

C. Solid Waste Sub-Committee
   I. Summary .................................................. i
   II. History & Chronology ................................. C1
   III. State Involvement: DEC Action and
        Inaction in Regulating Age Carting ............... C9
   IV. Current and Pending Litigation .................... C12
   V. Unexplored Options/Remedies
      i. legal .............................................. C15
      ii. all other ...................................... C19
   VI. Conclusion ............................................. C21

D. Additional Appendices
   I. Environmental Law in New York ................... D1
   II. CERCLA Liability ...................................... D11
   III. NYSDEC Site Reports ............................... D13
   IV. NYSCEC Priority Ranking .......................... D17
Task Force members conducted a tour of the study area.
Former Age Carting site in building 15 of Harbor at Hastings property.
SECTION A

Site Study Area

Site Summary Background
Figure 4-2: TPHC Contaminated Areas

Legend:
- TPHC Contaminated Areas
- Boring
- Monitoring Well
- EE16 EEMC Boring
- EEW2 EEMC Well
- HB2 EEMC Hand Boring
- SB-3 GTI Boring
- GT-2 GTI Well
- B-2 Olko Boring
- HM6 MP Boring
- MP12 MP Boring
- MW2 MP Well
- SS-1 MP Shallow Sample Location

Harbor at Hastings

Eldon Environmental Management Corp.
IDENTIFICATION OF CONTAMINATED AREA

HARBOR AT HASTINGS

Hudson Environmental Management Corp.

LEGEND

- Boring
- Monitoring Well
- PCB Contamination
- TPHC Contamination
- Test Pit Required

SCALE IN FEET

FIGURE 4-3
SITE SUMMARY BACKGROUND

Mobil Oil

Mobil Oil ceased operations at this facility in 1984. In 1986, they hired Leggette, Brashears & Graham to undertake a contaminants study of the 8.19 acre site. The study revealed both groundwater and soil contamination of ether, chlorobenzene, dyes and hydrocarbons.

Mobil has been designated as a Class 2 site.

Harbor at Hastings (Former Anaconda Site)

Anaconda Wire and Cable Co. shut down its operations in 1976. The site was purchased and split between two property owners - Service Mfg. (10.7 acres) (North) and Hastings Associates (17.8 acres) (South). In 1986 Hastings Associates hired Malcolm Pirnie to undertake an environmental investigation on the site. The study showed the existence of various industrial residues, heavy metals, and PCB’s.

In 1986, both properties were purchased by the Harbor at Hastings Assoc. (Greene & Eisenberg). In 1989, after doing additional testing at both sites, Harbor at Hastings Assoc. submitted the data to NYSDEC. NYSDEC designated the site as Class 2.

In 1991, Harbor at Hastings Assoc. backed off the cleanup and development of the property citing the economy and soft housing market. Since that time they have been in discussions and negotiations with The Atlantic Richfield Company (ARCO). Recently, ARCO has expressed desire to perform a site assessment of the property.

Age Carting

In 1988, Hastings Assoc. submitted a C of O request for Age Carting for a recycling facility for construction and demolition debris. For approximately two years the company operated in conformance with their NYSDEC permit and Village zoning laws. In late 1990 and through 1991, Age expanded
their operations illegally to other buildings, stored materials outside of buildings and allowed increasing accumulations of demolition debris.

In 1990 and 1991, the Village requested DEC intervention to reduce accumulations on the site. After issuing several violations the Village revoked Age’s C of O. The landlord instituted eviction proceedings.

In early 1992, Age was found guilty in Village Court of various zoning violations, were fined $1,500 and ordered to remove all demolition debris by the end of July.

NYS Supreme Court has issued a stay on the local court’s sentence. The Village has joined NYSDEC in a civil suit against Age Carting.

All court cases are currently pending.
SECTION B

Report of the Soil Contamination
Sub-Committee
SOIL CONTAMINATION SUBCOMMITTEE

I. The Subcommittee was asked to prepare an analysis of the legal options available to the Village, which are as follows:

   1) Try to obtain greater attention from the New York State DEC and/or the Federal EPA.

       (a) The DEC has classified both the Mobil and the Harbor at Hastings sites as Class 2 sites under the State environmental cleanup statute. All discussions between Mobil or Harbor and the DEC, which might have resulted in a Remedial Investigation/Feasibility Study ("RI/FS"), have been abandoned or terminated; the discussions initiated by Harbor were no longer required once active consideration of the recent waterfront project ceased.

       The DEC has instead assigned both these sites a Priority III ranking - the lowest possible ranking - because of which the Village cannot reasonably expect any administrative action to be taken absent a reclassification. The DEC has explained that it has resource constraints and enforcement priorities resulting in an inability to address sites not posing a present possible health problem, and has indicated that it would upgrade its Priority for the sites only if there were evidence of human exposure to hazardous substances there. Messrs. Brodsky and Spano were cited as supportive of an approach to the DEC in an Enterprise article on January 22, 1993, but the Task Force should decide whether it is worth the expenditure of resources to determine what the procedures are for obtaining a review within the DEC of the DEC administrative action which resulted in the Priority III listing, and to determine what the arguments would be for a reclassification. The Subcommittee believes it is unlikely that the Village could develop the kind of data which would support evidence of human exposure, and therefore the Subcommittee would not recommend the devotion of substantial time and resources to this effort; however, the possibility of contaminant levels which are "chronically toxic to fish and wildlife," should be explored as well as the presence of contaminants which have affected "designated coastal zone areas," both of which are Priority II criteria. This committee does not have expertise in the area of marine biology and therefore cannot express an opinion regarding the consequences of contaminated groundwater movement into the Hudson River. Two relevant comments can be made, however.
(i) Based upon Hudson River sediment analyses conducted during the past decade by scientists at Columbia University's Lamont-Doherty Earth Institute, it is likely that the impact of PCB's from the Hastings Waterfront site, if any, on the vitality of the Hudson River has lessened with time, as PCB levels in the sediments south of Hastings have declined dramatically.

(ii) Lead concentrations in Hudson River sediments in the northern Hudson River (i.e., far north of Hastings) have declined steadily since the mid-1970's, when the movement toward unleaded gasoline began. However, the lead concentrations of the sediments 10-15 miles south of Hastings have not changed. The Hastings Waterfront site could be one of many sites in the New York Metropolitan region which continue to pollute the Hudson with lead.

It may well be possible to engage the Lamont-Doherty scientists (who have historically received grant support from the Hudson River Foundation) to examine the lead and PCB content of soil sediments immediately north and south of the Hastings site. In this manner, it might be possible to pinpoint the extent to which the Hastings Waterfront site continues to foul the Hudson River. Such date might influence the NYSDEC to upgrade its priority rating of the site, and might also be important to any proceeding which the Village or the Hudson River Fisherman's Association might bring.

(b) The EPA can be formally petitioned to perform an evaluation of both sites to determine whether - singly or together - they should be placed on the Superfund National Priority List. The Subcommittee sees possible significant gain by doing this in terms of forcing remediation action, although dealing with the DEA would be more expeditious. The EPA is required to act and can be sued if it doesn't. The process has opportunity for public participation and grants of funds up to $50,000 are possible for public participation if a site is placed on the Superfund list. The DEC would continue to have enforcement authority and responsibility. The Subcommittee thinks that enhanced DEC participation (I(a) above) would be preferable to dealing with the joint jurisdictional concerns in a DEC/EPA action, but the ultimate outcome of this question depends on whether the DEC can be persuaded to take action. If the answer is no then the option of pursuing a Superfund listing becomes more meaningful and the Subcommittee would then recommend that it be taken. The Subcommittee would also suggest that a consultant be engaged to evaluate the hazard
ranking of the site for Superfund purposes. The result of a Superfund listing would be a RI/FS leading to a remediation.

2) As a totally separate but parallel course of action, the Village could engage counsel to consider the availability of a private right of action under the Federal Resource Conservation and Recovery Act (RCRA), and if it is available, give Notice to potentially responsible parties ("PRPs") (Harbor at Hastings, ARCO and Mobil) claiming that the hazardous waste and solid waste at the site poses an imminent and substantial endangerment under RCRA, and that the Village intends to sue them to abate the endangerment. The cost of the Notice is minor. If the Village were to commence litigation, it would enable the Village to control and emphasize the Village’s perspective, such as (a) treating Mobil and Harbor as one site, (b) treating the endangerment as caused by a combination of hazardous and solid wastes, and (c) the problem being one whose resolution requires the Village’s satisfaction as well as DEC’s. The Village might well also have State common law theories of action which it could plead alongside the Federal action as a matter of pendent jurisdiction.

The Village must be prepared to sue if Mobil and Harbor are unresponsive to the Notice, and the principal downside to suit is the cost. It should be noted, however, that successful citizen plaintiffs under RCRA are authorized to recover their costs and they routinely do. The Subcommittee would again emphasize that this alternative has to be balanced against the possibility of DEC or EPA action, or action by Harbor against ARCO. This Report does not express an opinion on the extent to which Harbor can, in fact, recover over against ARCO or how such a recovery would affect the issues of the type, kind, or quantity of development which might occur on the waterfront. The Subcommittee recommends that a RCRA Notice and suit be considered, and that for this purpose a law firm be engaged to advise on cost, likelihood of recovery, and payment of the other side’s fees if the litigation is unsuccessful.

The Village has been informed that the Hudson River Fishermen’s Association has served a RCRA Notice upon ARCO. We do not know what the litigation strategy of the Fishermen is. If the Task Force recommends that the Village consider a RCRA suit and the Trustees endorse this, the Subcommittee believes that some discussion with the Fishermen regarding a joinder in the Fishermen’s suit as a matter of resource conservation would be appropriate. It may be that the litigation strategy of the two parties will be sufficiently different that joinder makes no practical sense. If the Fishermen do file, the only way
that the Village can effectively protect its interests is by joining or filing its own suit.

3) Condemnation - the Subcommittee was asked to examine the question of liability in the event of condemnation, and concluded that the Village could acquire the property free of liability under Federal law, but not under State law. The Subcommittee does not recommend that the Village in fact consider condemnation, but if it does, it should obtain a formal legal opinion before doing so.

II. The Subcommittee was asked to define the role of other regulatory authorities and the DEC and EPA.

Generally speaking, other authorities' roles are not unimportant, but they are peripheral as regards environmental enforcement. Both DEC and EPA have comparable statutes - clean up sites and recover costs from PRP's, or sue PRP's to get the PRP's to clean up pursuant to an agreed upon course of action (an RI/FS followed by an agreed upon remediation course of action). The preferred course for the authorities, which indeed should be for the PRP targets as well, is to agree with PRP's to have the PRP's do the cleanup, and from the Village's standpoint, this would be a faster course as well. This is because there is a general consensus in industry, supported by the Subcommittee's inquiries, that the actual cost of remediation conducted by government agencies is likely to be higher than those incurred by private parties. Desired auditing, testings and remediation procedures vary, and options are presented which can be resolved differently with different technical and cost results. The DEC would still supervise private cleanup activities. The level of remediation required will ultimately be determined by the specified nature of the use of the land. There are literally thousands of sites across the country where this process of litigation, negotiation, investigation and remediation is going on. Sites on the National Priority (Superfund) List move along slowly but inexorably; movement at other sites often depends on the squeaky wheel theory.

III. Health Hazards

1) General Background: The Hastings Waterfront site has been found to have extensive soil contamination with a variety of hazardous chemicals. Some of the chemicals - particularly lead - are rather widely dispersed across the site, while
others such as PCB's are concentrated in relatively small areas. In some regions, the ground water beneath the site is also contaminated. However, because the general flow of the ground water is toward the Hudson River, and because the ground water is not used for drinking, the risk of human chemical exposure from groundwater appears to be negligible.

When considering human health risks in a residential or recreational area with contaminated soil, it is almost always true that the major driving force behind a cleanup relates to the possibility that small children may incidentally ingest soil. (The notable exception to this rule occurs when a site is contaminated by a substantial quantity of highly volatile chemicals which might be inhaled; this does not appear to the case at the Hastings Waterfront, particularly because most of the site has been inactive for a relatively long time.) Hand-to-mouth activity is normal in young children, typically reaching a peak at age two and declining through age six. The rate at which young children ingest soil has been extensively studied and taken into account by regulatory agencies that have established target soil cleanup levels for chemical contaminants such as lead and PCB's.

Thus, a typical health risk assessment for a site such as the Hastings site will attribute approximately 85% or more of the theoretically predicted chemical exposure (and health risks) to soil ingestion by children. Most of the remaining 15% is attributed to skin contact with soil in children. Usually, only 1% or less of the theoretical chemical exposure is derived from inhalation of vapors or dusts containing absorbed chemicals.

2) The Hastings Sites: It is reasonable to assume that most of the organic chemicals at the Hastings sites (e.g., PCB's and petroleum products) resulted from spills and would therefore largely by confined to the site itself and the groundwater. On the other hand, the heavy metals, which are more widely dispersed throughout the Harbor at Hastings property, probably resulted from the active distribution of ashes and residues of the metallurgical processes as well as from fugitive emissions (i.e., into the air) from the Anaconda plant.

Obviously, fugitive emissions are never confined to a rectangular space, but settle in a more widely dispersed area dictated by the prevailing winds. A photograph appearing in the Summer, 1990, issue of the Hastings Historian (vol. 19, no. 3), published by the Hastings Historical Society, clearly
illustrates this phenomenon at the National Conduit & Cable Co., currently the Harbor at Hastings site. The photo, c. 1905, reveals extensive fugitive emissions heading in a southeasterly direction. Other illustrative photographs obtained from the Hastings Historical Society are appended to this report.

Blood lead concentration in communities living near industrial sites with fugitive emissions have been extensively studied for decades. Typically, although the blood lead concentrations of nearby residents may be somewhat elevated while the factory is in operation, community blood lead concentrations fall precipitously, within months of the cessation of industrial activity. Thus, given that the Anaconda site has not been in operation for more than a decade, it is highly unlikely that clinically significant elevated blood lead concentrations occur in Hastings today as a result of historical operations at the site.

Nevertheless, an issue which deserves the Village’s immediate attention relates to the possibility that there may be some contamination of adjacent residential properties with lead and possibly other metals. The Westchester County Department of Health ("DOH") has been asked to conduct soil lead analyses at surrounding residential properties but, by a letter of April 2, 1993, the Department has recommended that no offsite sampling be conducted because it would not be possible to link offsite levels to onsite contamination. It is our educated guess that such findings would be unlikely to pose a clinically significant source of lead exposure to current residents in the area as compared to, for example, paint in their homes. However, if adjacent residential properties were found to have elevated soil lead concentrations, the New York State DEC would likely assign a higher priority to the Hastings Waterfront site. The April 2, 1993 letter does indicate an interest on the part of the New York State DOH, and the Subcommittee recommends that the Village urge both agencies to act.

In addition, a survey could be conducted to determine the number of employees who currently work on the contaminated site, as several businesses are active there. It is well established in the occupational and environmental contaminants such as lead can be transported from worksites to the home via dust transported on shoes, clothing and other articles.

The Centers for Disease Control has recently recommended blood lead screening for all children under the age
of six. Accordingly, as a routine precaution, the Subcommittee
suggests that the DOH contact those employed at the Hastings
waterfront site to recommend and facilitate blood lead
screening in their children. Also, children under the age of
six living in homes surrounding the waterfront site should also
be considered as candidates for a targeted blood lead
screening. Although routine blood lead screening is rapidly
becoming part of standard "well baby" pediatric care, and
active DOH effort should be encouraged. Evidence of elevated
blood lead concentrations would increase the NYSDEC priority.
In view of DOH’s April 2 response, the DOH may be disinclined
to act.

Should any clinical tests be conducted to determine
whether exposure to chemicals other than lead has occurred?
Because lead is widely dispersed at the site, is likely that
blood lead measurements will serve as a surrogate for other
possible exposures. In addition, the measurement of many of
the other relevant chemicals (e.g. PCB’s) in biological fluids
tends to be less well standardized, extraordinarily costly, and
difficult to interpret because their relationships to adverse
health effects are less well established. Thus, it is not
recommended that any effort be devoted to other clinical tests
of chemical exposure.

3) Specific Contaminants: A Brief Listing

The outline below sketches the major environmental
contaminants at the Harbor at Hastings and Mobil sites.

(a) Soil and Groundwater at the Harbor at Hastings
Site: This summary is based on the October, 1989, report
("Existing Environmental Conditions") presented to the
committee which contains data obtained by Malcolm Pirnie, Inc.,
a reputable environmental consulting firm. Between November,
1986, and August, 1987, soil borings, surface and subsurface
soils, and water from monitoring wells were analyzed for
approximately 140 different chemical parameters, including all
of those on EPA’s priority list. The Malcolm Pirnie analyses
provided a good estimation of the scope and magnitude of the
problem at the Waterfront, although other problems may arise as
the site is further explored.

In Soil:

Metals: Historically, the Anaconda Wire and Cable
Company heated vast quantities of a wide variety of metals to
manufacture their products. Residues and ashes created during
the manufacturing process typically contain the unwanted contaminants of the starting materials, notably heavy metals such as lead, cadmium, mercury, chromium, arsenic, and others. Elevated soil concentrations of some of the heavy metals are widely dispersed across the site, while others such as chromium are restricted to relatively small areas. The toxicity of all of these metals is well established and will not be summarized here. A variety of techniques are available for soil remediation, but in some cases soil removal will be required.

(b) Soil and Groundwater at Mobil’s Tappan Terminal: Based on the summary of the studies by Leggette, Brashears and Graham, Inc., provided to this committee, numerous chemicals need to be considered. The major ones are:

In Soil:

Petroleum Hydrocarbons: These compounds are located primarily in the northern portion of the property.

Dyes: The central portion of the eastern fenceline is contaminated with dyes in a pattern that suggests that the dyes originated on the adjacent property occupied by the Paul Uhlich Co., a specialty dye manufacturer.

Groundwater: Ground water samples near the fence on the eastern border are contaminated with chlorobenzene in a pattern which again suggests origination from the adjacent property occupied by the Paul Uhlich Co. Various others (diethyl ether and isopropyl ether) have been detected in other areas of the site.
MEMORANDUM

DATE: 4-23-93

TO: Members of the Intergovernmental Task Force on Cleanup of the Hastings Waterfront

FR: Rep. Benjamin A. Gilman, Soil Contamination Subcommittee

RE: Information concerning Superfunds monies, EPA involvement, and legal options.

Summary

Superfund, the Nation's program to clean up uncontrolled hazardous waste sites, is now ten years old. During this time thousands of actions have been taken to protect people and the environment from the hazards these sites pose. Some of these actions have been responses to emergencies such as hazardous waste spills, while others have been long term actions to clean up contamination that may have been accumulating for decades.

Our nation's hazardous waste problem first gained widespread attention in the late 1970's. Incidents such as the contamination of Love Canal in Niagara Falls, New York, sparked widespread concern over hazardous waste sites.

In response to this growing concern, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980. This law, commonly known as Superfund, taxed the chemical and petroleum industries and provided broad federal authority to respond to releases or threatened releases of hazardous substances that may endanger public health or welfare or the environment. Over five years, $1.6 billion were collected in a Trust Fund for cleaning up
abandoned or uncontrolled hazardous waste sites. the EPA is responsible for running this program.

On October 17, 1986, the Superfund Amendments and Reauthorization Act (SARA) was signed into law. SARA increased the Trust Fund to $8.5 billion over five years and strengthened EPA's authority to conduct clean-up and enforcement activities. As of March 1990, Congress had appropriated $7.1 billion to the fund, $3.6 billion of which had already been spent on clean-up actions.

Who Pays for Hazardous Waste Site Cleanups?

EPA always tries to make those responsible for contaminating a site pay for its cleanup. This may involve taking legal action to force Potentially Responsible Parties (PRP's) to clean up hazardous sites or to pay back the Federal government. If those responsible cannot be found, or are unable to pay cleanup costs, EPA will cover the costs.

PRPs for a particular site include the site's past and current owner(s) and operator(s), the original hazardous waste generator(s), and the transporters of hazardous waste to the site. PRPs can be individuals, States, localities, or Federal agencies.

What Types of Response Actions are There?

Short-term removal actions address releases or threats of releases which may present an imminent and substantial danger to the public health or welfare.

Long-term remedial actions permanently and significantly reduce the dangers associated with actual or potential releases of hazardous substances that are serious but not immediately life threatening. Remedial responses can be conducted only at sites on EPA's National Priorities List (NPL).

Removal and remedial actions include, but are not limited to:

- Destroying or treating the hazardous substances on site.
- Containing the substances so they can remain on site and present no further threat.
o Transporting the materials to an EPA-approved, licensed hazardous waste facility for treatment, containment, or destruction.

o Treating contaminated ground water, halting further spread of the contaminants, or providing an alternate source of drinking water.
SECTION C

Report of the Solid Waste Sub-Committee
SOLID WASTE SUB-COMMITTEE

I. Summary

By Resolution of the Hastings Village Trustees, adopted September 15, 1992, the Village established an Intergovernmental Task Force on the Clean Up of the Hastings Waterfront. The Task Force was commissioned to "investigate and identify all options available to the Village Government with respect to clean up of the waterfront, removal of the debris and to make recommendations as to future actions... ."

At the Task Force’s organizational meeting on November 17, 1992 the Solid Waste Subcommittee was assigned to investigate remediation of the solid waste left on the Hastings waterfront by Age Carting, a construction and demolition (C&D) transfer station permitted by the New York State Department of Environmental Conservation (DEC) and granted a certificate of occupancy (C/O) by the Village.

The SW Committee meet formally on several occasions as follows:

December 8, 1992: Meet with Village employees and village attorney Brian Murphy of Maroney, Ponzini & Spencer, to discuss pending litigation. Copies of all pleadings were distributed to Committee members;

February 1, 1993: Meet with representatives of Mt Hope Cemetery regarding standards for handling, transporting and disposal of C&D;

March 8, 1993: Work Session;

April 19, 1993: Meet with Michael Elder, Special Counsel the Town of Harrison regarding his experiences on behalf of the Town in a similar situation located on Kennilworth Lane.

In addition to our formal meeting schedule, several members pursued related issues independently and reported their findings back to the Committee.

At first blush the solid waste issue appeared very simple: Age Carting left solid waste at their premises on the waterfront; accordingly, Age should be compelled to (i) assume responsibility for the material and (ii) remove it forthwith. In reviewing all the pending litigation, however, it quickly became clear that the issue was significantly more complex: Age declines to accept responsibility for the waste they brought to the waterfront and continues to resist all affirmative, legal efforts to compel remediation. Solid waste is strictly regulated by New York State,
and efforts to remediate must comply with a voluminous regulatory requirements which make disposal of this volume of material quite costly. During the course of our study the Committee developed a consensus that solid waste, like hazardous waste, is an area best managed by professionals and that any successful plan for resolution of the solid waste crisis created by Age will take considerably more cooperation among the participants - including state and local government agencies - than has been demonstrated to date.

Given the myriad of issues intertwined in the solid waste "problem" on the Village waterfront, many aspects of this citizen's committee report merit further analysis. A citizens's report can elucidate some issues, but it is no substitute for a concerted professional plan of action; such a plan is beyond the scope of our collective resources or expertise. Presented herein is a synopsis of the problem with conclusions and recommendations where we felt competent to render an opinion and the facts warranted a conclusion.
II. History and Chronology

1. Background

The solid waste problem consists of an accumulation of some 80,000 cu yd of construction and demolition (C&D) wastes in the former Anaconda Building 15. As shown in Attachment 1 (a copy of Plate 4 of the draft environmental impact statement [DEIS] prepared for the current property owner, the Harbor at Hastings Associates) this building has an area of 140,800 sq ft. The estimated volume of C&D waste reflects their filling the building to an average depth of more than 15 ft.

Chronology of Problem Development

The volume was accumulated by AGE Carting during operation of a C&D waste transfer station on a portion of the affected site, which it had rented from the Harbor at Hastings Associates. In its operation, AGE Carting violated both its village Certificate of Occupancy (CO) and its New York State Department of Environmental Conservation (NYSDEC) operating permit. As shown in the chronology of this matter in Section 2, below, the NYSDEC issued the operating permit and the Village issued a related temporary CO on 6/30/89.

As early as 11/89 the Village Building Inspector noted stockpiling of wastes beyond permit requirements and issued the first of numerous letters of warning. In 10/90, only after repeated requests by the Village and the intervention of State Senator Spano, the NYSDEC inspected the site to examine the stockpiling of wastes. On 11/19/90, NYSDEC issued the first citation of AGE Carting for operating the station in violation of its permit. On 11/29/90, AGE Carting signed a consent order agreeing to cease the cited violations, and paid a penalty of $1500. Despite further citations by NYSDEC and the village during 1991, and finally revocation of the CO, suspension of the operating permit, and a guilty plea by the AGE Carting principals in Village Court (to violation of its CO and the village zoning), accumulation continued until early 1992, when the transfer station was finally shut down.

The status of the further legal actions indicated in the chronology is reviewed in Section IV of this report. Attachment 2 indicates the names and positions of key individuals representing the parties or agencies involved in this matter.

Technical Analysis of Problem

C&D waste or debris is a non-homogeneous, bulky mixture of wood (plain or treated and/or painted), tree stumps, concrete or other masonry, plaster or gypsum board, plastics, glass, asphalt,
electrical fixtures and other materials resulting from construction or demolition activities. A typical bulk density for C&D debris is 1 ton per cu yd, but this can vary from 0.7 to 1.4 ton per cu yd depending primarily on the relative volume of wood and plastics, which are significantly lighter than other components.

C&D debris cannot be used directly as a quality fill material because of its content of wood and of gypsum plaster or board. In a fill the wood rots resulting in both settlement and in anaerobic conditions. The gypsum in turn can be decomposed by anaerobic bacteria, generating hydrogen sulphide gas. If emitted from a fill even in low concentrations this gas has a characteristic unpleasant rotten egg odor. If trapped and concentrated in closed structures it can be as lethal as cyanide.

The wood and gypsum components cannot be separated effectively if the C&D debris has been crushed. Unfortunately to reduce volume and save on shipping costs, most demolition contractors currently crush the debris with no attempt at removing these components for separate handling. Most of the accumulated volume of C&D waste on the Hastings waterfront has been crushed to the point where separate components are at best barely recognizable.

The property owner has explored with a potential contractor the possibility of separating an acceptable quality fill from the accumulated C&D debris left by AGE Carting. The subcommittee understands that no agreement was reached even on a pilot test.

The proposed Revisions/Enhancements to New York State’s Solid Waste Management Regulations (6 NYCRR Part 360), issued for public review in October 1992 contain an entire new Subpart 360-16, CONSTRUCTION AND DEMOLITION DEBRIS PROCESSING FACILITIES. The comment period has ended, and the final revised/enhanced version of the regulations is expected to be issued shortly. The proposed new Subpart 360-16 places tight restrictions on what waste characteristics a processing facilities can accept, and on what can be done with the processed output. Facilities will be permitted to accept only recognizable, uncontaminated, nonpulverized C&D debris, and C&D screenings (material passing the screen) cannot be used for landfill daily cover, nor will NYSDEC consider a petition for any other beneficial use determination unless the initial screening occurs prior to any pulverization. This appears to preclude disposal of already pulverized C&D anywhere but in an approved C&D landfill or some even more tightly regulated landfill (where tipping fees would be even higher).

Cost Analysis

At present tipping fees at C&D landfills range from $10 per cu yd to $20 per cu yd, with the highest fees applicable to waste that has already been pulverized. The closest such landfill to Hastings is on Route 110 on Long Island, a haul estimated at over 60 miles. Designated C&D landfills can accept only clean wastes. Any
contamination with industrial or hazardous wastes could require shipment to landfills even more distant and with tipping fees ranging upward from $60 per cu yd.

Haul costs to the nearest C&D landfill are estimated to be at least $.60 per cu yd - mile (one way distance) or $36 per cu yd for the estimated haul. If transportation to more remote landfills is required, haul costs could be well over $100 per cu yd.

Based on the unit costs indicated above, disposal of the volume of C&D waste now accumulated on the Hastings waterfront would cost at least $4,480,000. If any significant volume proves to be contaminated, requiring longer hauls and higher tipping fees for disposal, the cost could be several fold more.

Even if the C&D is not contaminated, its cleanup cost, while only a fraction of the estimated cost for cleaning up soil contamination at the waterfront, will still represent a significant further obstacle to feasible redevelopment of the site. Since haul costs will represent the major fraction of the overall costs to remove the accumulated C&D wastes, the only way the obstacle is likely to be reduced is if an alternative C&D landfill is set up at a location much closer to Hastings.

2. Chronology (Sources in reference documents are cited as [3:2] where second number is page or pages unless otherwise identified. Sources in 5: are cited individually.)


9/6±/88 Defendants granted a temporary CO. (6A:2)

6/1/89 Harbor at Hastings confirmed Age Carting lease of 12,000 sq ft in Bldg 15 (2 Exhibit 1)

Note: This area (also cited in (2:1)) is far below what actually was used. Engineers Report (2 Exhibit 3) for the permit application cites 72,000 sq. ft and building dimensions of 250 x 300 = 75000 sq ft. Actual building size is 220 x 640 = 140,800 sq ft.

6/13/89 Agreement (letter proposal accepted by Village) for Age Carting to receive recyclable materials from Village (2:Exhibit 3 Attachment)

6/30/89 DEC permit for operating transfer station for construction and demolition debris (w/ not to exceed 10% municipal waste) (2:Exhibit 2) referencing Engineers Report dated March 1989 by Edward Cassidy, P.E. as revised 6/9/89 (2:Exhibit 3)
From 6/30/89 to 6/91
Village issued various temporary Certificates of Occupancy (COs). (2:2)

11/89 to 6/91
Village Building Inspector noted quantities of construction and demolition debris grossly excess of 1500 c.y. permit allowance and issued numerous letters of warning. (6A:N. P. Hess deposition: pp 2-3)

10/90
Senator Spano, Mayor MacEachron & Engr. Ajay Shah of DEP inspected site to alert DEC to problem of stockpiling waste. (5:Ltr from Senator Spano to Commissioner Jorling dtd 4/29/92)

10/25/90 and 11/19/90
DEC Citation of the Fuccis for Operation of Transfer Station in Violation of and Permit Condition 1. (6B: Exhibit C; 5:Hastings Interoffice Memo: M. Gennarelli & N. P. Hess dtd 11/4/91)

11/26/90
DEC ltr indicating conditions to be met to correct cited permit violations (6B:C).

11/29/90
Consent Order on 11/19/90 citation - $1500 civil penalty paid. (5:Hastings Interoffice Memo: M. Gennarelli to N. P. Hess dtd 11/4/91)

12/5/90
CO expired/was renewed. (5:New York Times 3/31/92)

6/19/91
NYSDEC cited defendants Edward Fucci and Gregory Fucci for operating a solid waste facility outside permit limits. (6B: Exhibit E)

8/13/91
Consent Order on 6/19/91 citation -- $2000 fine plus (6B: Exhibit F)

1. Correction of storage outside Bldgs/containers by 7/31/91
2. Reduction of volume - report in & out by 10th of each month (until permit compliance
3. Added fines of $100 & $50/day for non-compliance w/above terms 1 & 2

2/22/91
Village Citations for unenclosed storage and for use of buildings w/o valid COs. (6A: Exhibit I) and (5:Hastings Interoffice Memo: M. Gennarelli to N. P. Hess dtd 11/4/91)

10/11/91
Fuccis again cited by NYSDEC. (6B:9)

10/11/91
Temporary C.O. of AGE automatically revoked for violation of permit noted by DEC on same date.
10/23/91  DEC: Notice to cease violation/Demand for Payment of Stipulated Penalty (5: Ltr from DEC Region 3 Director Ralph Manna to E. and G. Fucci)

10/23/91  DEC notice of intent to suspend permit (2:Exhibit 6).

11/6/91 to 12/2/91  Village filed accusatory instruments. (6A: Exhibit J)

12/11/91  Pretrial conference between the Court (Village), Deputy Village Prosecutor, defendant and his attorney, and an Assistant DA for County of Westchester (who was then prosecuting DEC violators), as well as representatives of Village and DEC. (2:4)

12/11/91  Guilty plea in Village Court to six counts of zoning violations of Village. (3:2) Following plea, matter adjourned to 1/13/92 for preparation of Pre-Sentence Memorandum and cleanup plan. (6A:N. P. Hess Deposition, p. 5)

Between 12/11 and 12/19/91  Defendants submitted proposed mitigation and cleanup plan for consideration of Board of Trustees - based on four years of operation to provide revenue for cleanup. (2:4-5)

12/19/91  Meeting on plan w/DEC. DEC rejected 4-yr schedule. Defendants spoke of line of credit which would finance $350,000 immediate cleanup. Defendants given until 1/7/92 for new plan. Village Prosecutor agreed to request Village Court for 2-wk adjournment on sentencing. (2:4-5)

12/9/91 to 1/10/92  84 truckloads entered site. 22 truckloads left site (total estimated accumulation with this addition: 50,000 cu yd.) (2:5)

1/3/92  DA’s Office surrendered to the DEC prosecution of the 10/11/91 violation of ECL. (4:3)

1/14/92  Summons & Complaint (Ref. 1) cites local laws violated.

1/15/92  Order to show cause why an order should not be made and entered herein (State Supreme Court) enjoining and restraining defendants from operation (Ref. 6A also 2:Exhibit 7). This references the above Summons & Complaint and includes as backup the deposition affidavit of Neil P. Hess dated 11/14/92 which traces history of local violations since Nov. 1989.) Court appearance required 2/3/92 (presuming service upon

-5-
defendants by 1/21/92).

1/21/92 Presentencing memorandum submitted to Village Court on behalf of Village (Ref. 3).

1/27/92 DEC wrote Village Court recommending terms for conditional discharge of sentencing. (5: Ltr from J. Jiudice to Justice McElroy)

1/28/92 Sentencing. Fines 6 violations @ $250. Conditional discharge for a year. Remedy violations by 7/31/92. 6 Consecutive 15-day jail sentences if violations not remedied. (Defendant’s Attorney took exception). (Ref. 3)

2/4/92 DEC advised State Court of withdrawal of DA’s office from prosecution of Gregory Fucci, that cleanup requirement was imposed by Village Court (rather than by agreement) and that if conditions not met, Environmental Control Law (ECL) violation would be prosecuted further. (4:3-5

3/92 Age Carting sued Village for $3M for depriving Age of due process. (5: The Enterprise, 6/19/92, p. 28)


4/2/92 Motion for preliminary injunction denied by decision/order of State Supreme Court. (Ref. 4)

4/92 Letter from Senator Spano to Commissioner Jorling urging DEC action on matter. Press release as to content of letter. (5:)

5/1/92 State Attorney General’s Office filed formal DEC complaint against Age Carting and the Fucci brothers. (5: The Enterprise, 6/19/92, p. 28) The verified amended complaint is Ref. 6B.

5/6/92 (Erroneously dated 5/6/91) Asst DA affirms he was present at meeting of 12/11/92 & it was his position at the time that as result of guilty plea Gregory Fucci would be offered an A.C.D. (Adjournment in Contemplation of Dismissal) for the ECL violation if the sentence included a cleanup schedule acceptable to Village, defendant, DEC and the Court. (4:3)

5/18/92 Village DPW noted no improvement in site conditions. (5:Hastings Interoffice Memo M. Gennarelli to N. P. Hess)

6/4/92 Age Carting filed for bankruptcy. (5:The Enterprise, 6/19/92, p. 28)
6/92 Village joined suit by State AG for DEC. (5: The Enterprise, 6/19/92, p. 28)

7/8/92 Supreme Court issued stay of execution of sentence imposed by Village Court pending defendants appeal. (Ref. 4)

7/29/92 Engineering consultant advised Harbor Associates it was better not to wet down contents of Building 15. (5: Ltr O’Brien and Gere to P. M. Eisenberg)

8/6/92 Village requested Harbor Associates to investigate structural integrity of Building 15 walls under load of debris. (5: Letter N.P. Hess to P. M. Eisenberg)
Reference Documents & Date:

1. Summons & Complaint - Village vs. Edward Fucci, Gregory Fucci and Age Carting filed 1/14/92, (Index 794-92) NYS Supreme Court by the Village

2. Presentence Memorandum, dated 1/21/92, by Maroney, Ponzini and Spencer, Village Counsel

3. Transcript: Presentence Conference and Sentencing 1/28/92 Hastings Village Court

4. Supreme Court Order - Stay of Execution of Sentence 7/8/92

5. Information Packet for Committee 11/17/92 Village Managers Office

6A. Supreme Court: Order to Show Cause 1/15/92 (Also included as Exhibit 7 to 2. above.)

6B. Supreme Court: Verified Amended Complaint 6/22/92 (NYSDEC)
Plate 4

Existing Buildings and Use of Mill
Buildings During Anaconda Period

THE HARBOR AT HASTINGS
Hastings-On-Hudson, NY

Parish &韦纳 Inc., 感谢客  

ATTACHMENT 1
AGE CARTING MATTER
IDENTIFICATION OF INDIVIDUALS

Village

Neil P. Hess                        Village Manager
Marco Gennarelli                    Building Inspector
Michael McElroy                     Village Justice
Maroney, Ponzini and Spencer       Village Counsel
        Brian D. Murphy           Deputy Village Prosecutor
        Robert J. Ponzini        Village Attorney
George Gevas                         Fire Inspector

NYSDEC - Region 3/New Paltz - District Office/White Plains

Cesar Manfredi                      Regional Water Engineer
Ajay J. Shah                        White Plains Solid Waste Engineer
Margaret E. Duke                    Regional Permit Administrator
Ralph Manna                         Regional Director
Richard Gardner                    Regional Solid Waste Engineer
Joyce Jiudice                       Assistant Regional Attorney
William E. Steidle                  Permit Administrator
Margaret E. Duke                    Permit Administrator
Alice McCarthy                     Division of Enforcement
Earl T. Washburn                    Enforcement Officer
Robert O'Conner                     Inspector
Ben Rosen

Westchester County

Elizabeth Hendrick                  Director Division of Environmental Health
Christopher Shaw                   Assistant District Attorney

NYSDEC - Albany

Ms Ann DiBarberi
AGE Carting (Related firm A.N.E. Recycling Corp paid fines for AGE)

Edward A. Fucci, Sr. 
Gregory Fucci
Edward Cassidy
Solomon Abrahams
Charles V. Martabano

Vice President, Owner
President, Owner
Engineering Consultant
Attorney - Counsel
Attorney

Harbor at Hastings

Philip Eisenberg

Principal & Attorney

State Courts

Justice V. Gurahian
Justice James R. Cowhey

Supreme Court: Order to Show Cause
Supreme Court: Stay of execution

NYS Attorney General's Office

Louise Robach

Prosecutor - Civil Case vs AGE
III. State Involvement: DEC Action and Inaction in Regulating Age Carting

DEC involvement in the case of Age Carting began in 1989, when the agency issued a permit to Edward and Gregory Fucci to operate a solid waste management facility at Building #15, One River Road in Hastings-on-Hudson. Although the permit contained no maximum level of allowable waste, it did specify that no waste could be stored on-site for more than ten days.

Within a year, it became clear that Age Carting was in substantial violation of the conditions of the permit, since DEC estimated that approximately 40,000 cubic yards of material were on-site by August of 1990.

DEC was asked by local elected officials and the Village to inspect the site, and determined that Age and the Fuccis were in violation of the State Environmental Conservation Law and NYCRR Part 360 regulations.

DEC’s initial response was to seek to work out an accommodation with Age Carting. On November 29, 1990 DEC allowed Age to enter into an Order of Consent, in which Age admitted violation of the Part 360 regulations and agreed to pay a $1,500 fine. The Order also required Age to submit a schedule for clean-up of the facility.

Despite the continued build-up of waste at the site following the Consent order, it was not until June of 1991 that DEC issued a notice of violation. Two months later, on August 13th, DEC allowed Age to enter into a second Order of Consent. This second order required a $2,000 civil penalty, removal of all debris stored outside buildings, and monthly progress reports on overall cleanup. The Order also specified a $50 a day fine for failure to comply.

Age failed to meet the conditions of this second Order of Consent, but it was not until October 23, 1991 that DEC issued a notice to cease violation and levied fines of $6,000 a day for continued violation. DEC also issued notice of intent to suspend Age Carting’s license to operate the facility.

On June 22, 1992 the New York State Attorney General filed an action in State Supreme Court, before Judge Matthew Coppola, to compel the Fuccis to comply with the consent order and to recover civil penalties specified under the order. This action remains unresolved.
RECOMMENDATIONS

The history of DEC enforcement of environmental regulations with regard to Age Carting illustrates four significant issues in which corrective measures should be taken for the future.

1: New York State should require surety bonds for solid waste transfer facilities:

DEC had two basic choices when the substantial nature of Age Carting’s violation of its permit became clear. One choice was to move expeditiously to revoke Age’s permit and close the operation down. The second was to seek remediation while allowing Age to continue operating. Neither option clearly protected the public’s interest. Immediate permit revocation may have caused Age to abandon the site, leaving the materials behind. Continued operation could have resulted in Age’s continued violation of the permit, with no good faith effort to reduce the build-up of materials.

Age represented that it would remediate the excessive storage, but that it needed to continue operating in order to have necessary cash flow to pay for disposal of material already on-site.

As it turned out, Age ignored the conditions of two consent orders requiring disposal of the material, then abandoned the site once the permit was eventually revoked.

A surety bond would have given the State the means to pay for clean up and disposal regardless of which option had been chosen to bring about compliance with the permit conditions. This would have given DEC greater flexibility in requiring immediate compliance with the terms of the permit, plus the means to assure that clean-up would take place at no cost to the public if the owners failed to adhere to the State’s directive.

The Committee recommends that New York State require all operators of solid waste facilities be required to post a surety bond sufficient to pay for disposal of estimated maximum concentrations of materials.

2: New York State should enact criminal penalties for illegal disposal or dumping of solid waste.

Under current State law there are no meaningful criminal penalties for deliberately violating permit requirements of a solid waste facility. Given the enormous cost of remediating the damage caused by Age’s violations, plus the potential severe environmental consequences, criminal penalties are clearly in order.
Criminal penalties for the principals of corporations or enterprises that violate permits would certainly act as deterrent in cases such as that of Age Carting. Senator Nicholas Spano, who is Vice-Chairman of the Legislative Commission on Solid Waste Management, has previously drafted legislation that would require criminal penalties. The Senator, who represents Hastings-On-Hudson, has pointed out that it was the case of Age Carting that prompted him to draft this bill. The legislation would allow for a $50,000 fine and Class E felony imprisonment penalties for illegally disposing of more than 70 cubic yards of waste twice in a five year period. This penalty would clearly have applied to the principals of Age Carting.

3: New York should provide adequate staff supervision of solid waste facilities

DEC, by its own admission, lacks adequate staff to provide optimal supervision of transfer stations. DEC supervision should consist of at least one site visit per week, as well as verification of where waste is coming from, and where it is being sent. Had such supervision been in place for Age Carting, it would have become evident early on that Age was taking large amounts of materials in, while sending little material out for eventual disposal. It would have become evident that Age was operating an illegal above-ground dump, rather than a transfer station. One option may be to increase the licensing fees so as to offset the cost of increased DEC staff time for inspections.

4: All refuse disposal/transfer station permits should have maximum on-site storage levels specified.

Age Carting’s DEC permit to operate a transfer station contained no maximum level of on-site storage. The permit required only that materials be moved out within a specified period.

The amount of material stored on a site should be made a condition of permits for two reasons. First, each site has a threshold for storage, beyond which the constraints of the site may result in adverse environmental consequences. Second, the lack of a clear permitted on-site volume makes it more difficult to promptly identify wilful permit violations such as those which occurred on the Age Carting site.
IV. Current and Pending Litigation

The subcommittee reviewed all the pending litigation precipitated by Age Carting's occupation and subsequent abandonment of ±80,000 cu. yds of construction and demolition debris on the waterfront. Various actions, legal and administrative, have been undertaken by New York State, the New York State Department of Environmental Conservation (DEC) and the Village. A synopsis of past and pending litigation is as follows:

<table>
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<tr>
<th>DATE</th>
<th>VIOLATION</th>
<th>ACTION TAKEN</th>
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<tbody>
<tr>
<td>Nov 19, 1990</td>
<td>NYS 360 Permit</td>
<td>Nov 29 DEC fined AGE Carting $1,500 for violation of its permit and ordered AGE to &quot;devise a plan and timetable&quot; for full compliance</td>
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<tr>
<td>June 19, 1991</td>
<td>NYS 360 Permit</td>
<td>Aug 13 DEC fined Age $2,000 and imposes compliance schedule</td>
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<tr>
<td>Aug 15, 1991*</td>
<td>Hastings Zoning §§313.13 (S/W) &amp; 404 (CO)</td>
<td>Cases marked with a &quot;*&quot; denote enforcement action undertaken by the village against Edward Fucci. On December 11, 1991 Fucci pled guilty to all 6 counts; on January 28, 1992 defendant sentenced as follows: $1,500 &amp; conditional discharge incl remediation of the site. Appeal pending; execution of sentence stayed pending appeal.</td>
</tr>
<tr>
<td>Sept 10, 1991*</td>
<td>Hastings Zoning §§313.13 (S/W) &amp; 404 (CO)</td>
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<tr>
<td>Sept 11, 1991*</td>
<td>Hastings Zoning §§313.13 (S/W) &amp; 404 (CO)</td>
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Jan 15, 1992 Order to Show Cause by Village  Complaint alleges numerous violations of Village Code; seeks injunctive relief

June 1992 Civil Complaint by NYS Atty Gen  NYS alleges numerous violations State and local law; seeks injunction and remediation

Actions marked "*" were superseded by accusatory instrument filed Dec 11, 1991 alleging violation of Village Code §313.2; defendant pled guilty to all Village Code charges on December 11, 1991.
Defendant Edward Fucci’s criminal conviction for violation of the Village Code is on appeal; defendant’s sentence was stayed pending resolution of the appeal.

The two civil actions commenced by New York State and the Village have been consolidated and are in discovery. These cases have no set schedule and ultimate resolution depends on the parties’ strategic maneuvers as well as the judge’s interest in moving the case toward resolution.

The history in this matter is indicative similar situations around the State and reveals a pattern clear in retrospect: as violations become apparent, local officials gradually increase an enforcement initiative and gradually realize that their local Code does not provide sufficient incentive to motivate a truly recalcitrant violator. Upon the realization that local code enforcement alone is inadequate, victims seek increased pressure and typically institute civil litigation. Age Carting fits this model all too well.

Conclusions/ Recommendations:

The penalties associated with violation of local Codes are typically an insufficient incentive to motivate a truly recalcitrant violator, such as Age. Regrettably, penalties for violation of State law are equally impotent against a savvy carter, such as Age. Any inference that local code enforcement is inefficient or ineffective is, however, unfair and completely unwarranted: it is precisely the lack of success at the local level that makes subsequent enforcement action (in this case the companion civil cases now pending in Supreme Court) more compelling.

Given the State Court’s historic reluctance to impose jail for environmental offenses, the local justice court prosecution holds little prospect of providing either the necessary public catharsis or an effective remedy for the harm caused. There is no evidence that the local court prosecution was anything less than professional; again, the gradual realization that officials are dealing with a miscreant, as opposed to a less culpable "technical" violator, are perceptions clear in retrospect which tend to color later analysis of the prosecution.

The two civil actions (by both the Village and NYS) seek a remedy that, in retrospect, could have been instituted earlier and more aggressively: compelling a clean up. As stated above, these cases are in discovery and ultimate resolution rests with the court.

The Village should consider and weigh instituting various unexplored federal court actions which would compel a clean up and attempt to recover costs. Unlike a state action, a federal court action will move significantly faster.
There are a broad array of legal options that either can be invoked directly by the Village of Hastings or which the Village can press other governmental agencies to consider. Although the Village's prime objective is to get the solid waste removed, it is worth remembering that incidental punishment of those responsible for the mess can also serve an important public function. It could be a valuable deterrent for Hastings to develop a reputation as a municipality that does not let polluters and lawbreakers "get away with it." It also has often been the case in other settings that environmental or workplace polluters have apparently been motivated to act, and/or to discover resources that enable action, more by the prospect of criminal sanctions than by prolonged civil or administrative proceedings.

The following table attempts to lay out the options that this Subcommittee has identified and to briefly describe their potential outcomes. Several appear promising. The Subcommittee has concluded, however, that consultation with experienced and knowledgeable attorneys who specialize in the field of solid waste regulation and abatement would be highly advisable to obtain more detailed assessment of the cost-benefit ratio of these options.

It is also worth noting that even though the New York State Department of Environmental Conservation (DEC) has repeatedly decried the "toothlessness" of the solid-waste violation sections of the Environmental Conservation Law (ECL), the penalties for those provisions, had they been enforced at the daily maximum possible rate of $7500/day since December 1991, would have amounted to a considerable sum -- at least $3,750,000. This March, in New York State Development Corp. v. New York State DEC, the DEC obtained a $1 million fine against the individual operator in a solid waste violation case in Queens.

Finally, the involvement of public officials such as Senator Spano, Assemblyman Brodsky, and legislator Abinanti could be very helpful in focusing the attention of government agencies on this problem and the need to mobilize every possible tool to remove this debris.

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<tr>
<th>Option</th>
<th>Objective</th>
<th>Advantages</th>
<th>Disadvantages</th>
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<tbody>
<tr>
<td>1. Await outcome of DEC/Village civil action against Age Carting and Fuccis.</td>
<td>Injunction compelling removal (probably unenforceable) and/or damages for cost of removal (probably noncollectible).</td>
<td>No additional research, etc., except on assets of Fuccis.</td>
<td>Not clear how valuable any remedy is against these defendants; waste of additional $20,000 or more in legal fees?</td>
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<td>Option</td>
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<td>2. Village prosecute new zoning code violations, e.g. §§313.12, 313.13, against landowner.</td>
<td>Motivate landowner either to clean up or pursue its remedies against Age Carting more aggressively; generate minor revenue for Village.</td>
<td>Relatively easy to prosecute and prove; may be prerequisite to injunctive action against landowner under Zoning Code.</td>
<td>Remedies limited to power of Village Court and Village Zoning Code penalties of $250/day.</td>
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<tr>
<td>3. Village either asks Attorney General to bring, or brings on its own, action for public nuisance against landowner; or action for private nuisance, strict liability for abnormally dangerous activities, and/or negligence, against landowner.</td>
<td>Injunction compelling removal by landowner; compensatory damages, if any, for harm to Village interests as a result of landowner's conduct (e.g., impact on use of Village park).</td>
<td>Landowner, if motivated, more likely to clean up than Fuccis? Legal theory and factual proof already well-developed; no need to establish scienter or intent; N.Y. state holds landlords with knowledge liable for unlawful use or trade; see N.Y. R.P.L. §231(2); e.g., State v. Rock, 147 Misc. 2d 231, 555 N.Y.S.2d 584 (Saratoga Cty. Sup. Ct. 1990).</td>
<td>More civil litigation, with attendant cost and delay; municipality cannot bring action on its own for nuisance which has damaged private property of its citizens, but can bring action if damage to health of its citizens or damage to its own property or to &quot;public ways.&quot;</td>
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<tr>
<td>4. Village amends local law to create &quot;superlien&quot; or utilize existing county superlien law to supersede mortgagor's right.</td>
<td>Ensure that Village civil claim, if brought, against landowner for clean-up takes precedence over mortgage payments.</td>
<td>May be of more generalizable use than for just this situation.</td>
<td>May require additional research for legislation.</td>
</tr>
<tr>
<td>5. Housing and Community Renewal Regulations §§1153.1, 2254.1: owner's obligation to demolish or secure building or structure which is imminent danger to life and safety as a result of structural instability, fire, explosion or other hazardous situation; if building vacant over 60 days, owner required to remove all combustible waste.</td>
<td>Knowing violation punishable by fine of $1,000/day and up to one year of jail. Order directing removal of building/abatement of condition (N.Y. Exec. Law §382).</td>
<td>May be applied for by municipal officer or any aggrieved person.</td>
<td>No obvious disadvantage.</td>
</tr>
<tr>
<td>6. Ask N.Y. Comm. of Health to bring prosecution to abate nuisance under Public Health Law §1300-a (abatement of noisome or unwholesome substances on or near route of public travel); local board of health to order removal of nuisance pursuant to P.H.L. §1303(3).</td>
<td>Misdemeanor conviction, fine of at least $100, or at least 3 months, up to 6 months, of jail. Order of removal.</td>
<td>Note: under P.H.L. §1307, if Health Dep't gets judgment for expense of removal of nuisance pursuant to order of local board of health, can cause property to be sold to satisfy its lien and lien takes precedence over all other creditors except state of New York.</td>
<td>No obvious disadvantage.</td>
</tr>
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<td>7. Ask DEC to use its summary abatement power under ECL §71-0301 against landowner.</td>
<td>Commissioner's order to abate &quot;condition or activity&quot; immediately, with civil penalty of $2500 plus $500/per day of noncompliance.</td>
<td>Immediate order to landowner to abate, with no more than 15 days to hold summary hearing (although enforcement and appeals can take much longer). Note: Subcommittee told that columns of building containing debris may be near collapse, that debris may actually be holding building up -- relevant to &quot;imminent danger&quot; standard.</td>
<td>DEC's proven reluctance to act aggressively on this site; must prove either &quot;imminent danger to health or welfare of people&quot; or &quot;is likely to result in irreversible or irreparable damage to natural resources&quot; -- the former standard may be met by fire/explosion hazard, the latter by danger to river if debris collapses into it.</td>
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<tr>
<td>8. Village brings action in federal court against all PRPs (including landowner; Age insurers?), under RCRA §7003 and CERCLA §107.</td>
<td>Recovery of clean-up costs necessary and consistent with the National Contingency Plan, including costs of investigating and monitoring contaminated site; civil penalties of up to $25,000/day.</td>
<td>No scienter requirement for unauthorized storage, or lack of required records -- strict liability for civil violations; statutory attorney fees; probably faster than state court, since little discovery required to establish liability; personal, individual liability of, e.g., partners of landowner, shareholders and officers of corporate defendants under CERCLA.</td>
<td>Must prove waste is hazardous under CERCLA/ RCRA definitions (less stringent than state) -- &quot;imminent and/or substantial endangerment&quot; probably satisfied by fire/explosion hazard. Village must invest in clean-up that meets federal standards of &quot;cost-effective, permanent solution, protective of human health and the environment.&quot; Village must invest in substantial legal costs.</td>
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<tr>
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<td>10. Criminal prosecutions against landowner under state ECL, e.g.:</td>
<td>Sentences requiring clean-up and/or restitution of clean-up costs plus substantial penalties, e.g.: Misdemeanor conviction with sentence of not less than 3, not more than 6, months; also fine of $250/day and civil penalty of $500/day (§§71-4001, 4002)</td>
<td>Att. Gen. may enforce with or without DEC (§71-2727(2))</td>
<td>Need to enlist cooperation from Att. Gen. and at least to some extent from DEC.</td>
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<tr>
<td>N.Y. ECL §71-3501 (keeps noisome substances near route of public travel on land or water) and/or</td>
<td>Violation; fine of $2500/day plus civil penalty of $5000 (per day?) (§71-2703) plus injunction against continuation of violation</td>
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<tr>
<td>ECL Art. 27, Titles 3 and 7: Solid waste disposal and operation of facilities for disposal of C&amp;D in violation of permit or order (with criminal negligence or recklessness) and/or</td>
<td>Class D felony: Fine of up to $150,000 plus civil penalty of $25,000 plus $25,000/day, plus injunction against continuing violation, plus cost of lawful disposal (§71-2721)</td>
<td>§71-2719 presumption of knowledge that material is hazardous if defendant in possession of more than 50 pounds of acute hazardous waste or 15,000 pounds of hazardous waste</td>
<td>Need to establish that solid waste is hazardous under ECL §71-2702 and DEC regulatory definitions (6 NYCRR §370: i.e., material that is &quot;ignitable, corrosive, reactive or toxic&quot;); would require more extensive sampling and testing; but does include &quot;waste oils&quot;</td>
</tr>
<tr>
<td>N.Y. ECL §§71-2709 (knowing possession of aggregate weight of hazardous waste in excess of 15,000 pounds or reckless possession of aggregate weight of more than 25,000 pounds) and/or</td>
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<tr>
<td>N.Y. ECL §§71-2715, 71-2717 (2' unlawful dealing in hazardous waste: aiding and abetting unlawful possession or disposal of hazardous waste, or conduct that provides opportunity or means for unauthorized possession or disposal).</td>
<td>Class A misdemeanor: Fine of up to $25,000, civil penalty of $25,000 plus $25,000/day, plus injunction against continuing violation, plus cost of lawful disposal.</td>
<td>Att. Gen. may enforce with or without DEC (§71-2727 (2)).</td>
<td></td>
</tr>
</tbody>
</table>

Objective Sentences requiring clean-up and/or restitution of clean-up costs plus substantial penalties, e.g.: Misdemeanor conviction with sentence of not less than 3, not more than 6, months; also fine of $250/day and civil penalty of $500/day (§§71-4001, 4002) Violation; fine of $2500/day plus civil penalty of $5000 (per day?) (§71-2703) plus injunction against continuation of violation Class D felony: Fine of up to $150,000 plus civil penalty of $25,000 plus $25,000/day, plus injunction against continuing violation, plus cost of lawful disposal (§71-2721) Class A misdemeanor: Fine of up to $25,000, civil penalty of $25,000 plus $25,000/day, plus injunction against continuing violation, plus cost of lawful disposal.
V. Unexplored Options/Remedies: All Nonlegal

a. IN REM FORECLOSURE

The subcommittee has been advised that the subject property is currently in arrears for payment of Town and Village taxes. It has therefore been suggested that In Rem Foreclosure proceedings be instituted. The Town of Greenburgh has, in fact, commenced such proceedings according to the Town Attorney.

Hastings Village Manager Neil Hess advises that the Village cannot presently institute such proceedings due to local time notification requirements. The Village could join the Town in approximately one year in a further attempt to collect back taxes.

b. DISPOSAL OPTIONS

The Village of Hastings is located in Region III as defined by the New York State Department of Environmental Conservation. The DEC has mandated that landfill sites operated by municipalities receiving municipal waste be closed by June 1, 1993. Once these sites are closed a "closure plan" must be filed with the DEC. This plan details the methods proposed by the site’s owner for providing a suitable ground cover over the site. DEC requires that there be a minimum of 2'-0" cover of soil over the waste materials. DEC has advised this subcommittee that, under certain circumstances, C&D material can be used for contouring and topographic adjustments. The closure plans are prepared for each site by local Civil Engineering Consultants retained by each site owner.

It is suggested that municipalities within perhaps a fifty mile radius be surveyed to ascertain if a closure plan is being prepared by a consultant for their municipal waste sites. The consultant should then be contacted to determine if outside cover materials will be required. It will be necessary to screen the C&D materials currently at the waterfront in Hastings to separate the soil from the other waste material. If the Consultant deemed the soil material useable, an agreement to truck the material to be site could then be negotiated. Disposal of the remaining material (lumber, drywall, concrete, masonry, etc.) would then be necessary. Obviously, substantial funds for trucking, screening and possible tipping fees would be required.

Typical examples include the following:

1. TOWN OF CROTON This landfill is closed for municipal waste. Closure operations are underway and will require at least one year’s work, according to the contractor, Briarwood Contracting Corporation of Yonkers. Approximately 30,000 to 50,000 cubic yards of soil will be used at the site.

2. TOWN OF RHINEBECK This landfill has closed and a closure plan is currently being prepared. According to DEC, no
decisions have been made as to types and locations of soil cover materials that are proposed to be used in the operation.

3. **ULSTER COUNTY RESOURCE RECOVERY**  This quasi-public agency operates three landfill sites in Ulster County. The sites are presently open and are, in fact, receiving C&D materials from Westchester. The sites are scheduled to close within several weeks. However, closure operations will still be required.

**COMMENTS AND CONCLUSIONS**

1. While the Village of Hastings should pursue all available legal options, we do not believe that a foreclosure action will necessarily enhance the Village's position as regards the removal of the C&D materials.

2. We recommend that appropriate legal action be undertaken that would allow the Village to have the right to enter the property for purposes of processing and removing the materials. Clearly, the primary responsibility for undertaking the removal process lies with the property owner and/or tenant. Their inability or unwillingness to pursue such options should not further delay the Village in finding a solution to the problem.

3. The Village should retain the services of a competent Consultant regularly engaged in environmental matters to explore possible sites needing substantial quantities of ground cover as part of a closure plan. The Consultant could also prepare estimates of cost, contract documents and supervise the removal process. Sites in Region III or other adjacent regions should be included. Further, since there are no interstate prohibitions for moving C&D waste materials, sites in southern Connecticut and Northern New Jersey should be included in the search.
VI CONCLUSIONS/RECOMMENDATIONS

The S/W Committee could not reach a consensus on a single recommended plan of action regarding a remedy for disposal of the solid waste at this juncture; as stated above, solid waste disposal, like many specialties, is an area best managed by professionals. Although the Committee has considerable experience and expertise, the complexity of this particular situation was overwhelming for a "citizens committee."

The need for the Village to take some affirmative action is, however, clear and unarguable. Accordingly the Committee recommends the Village undertake the following two-prong approach: (1) Give Age Carting and Mr. Eisenberg an absolute, non-negotiable deadline (6 months to a year) to remove the waste from the waterfront (let them attempt to resolve their problem); and (2) simultaneously interview and prepare to employ outside counsel experienced in environmental enforcement/cleanup. If the deadline for compliance is not met, commence a federal court clean-up action against all responsible parties. The Village will have to bear the cost of employing Special Counsel, but this expense may be recoverable.
SECTION D

Additional Appendices
I. Introduction

When it comes to cleaning up old hazardous waste sites, the national Superfund program seems to get all the attention. But virtually all 50 states have now created their own hazardous waste cleanup programs. Some of these state "superfund" initiatives were originally aimed at generating matching funds needed to secure federal monies for National Priority List (NPL) sites within their borders. In recent years, however, many states have made major financial commitments to the cleanup of non-NPL sites. While only 1,200 sites around the country have made their way onto the highly competitive NPL, it is estimated that there are an additional 32,500 non-NPL sites that may require some cleanup attention.

There is no easy way to assess the capabilities of the state superfund programs. One obvious measure of their potency is financial resources. According to a 1990 U.S. Environmental Protection Agency (EPA) survey, the total unobligated "superfund" balance in all 50 states is approximately $699.4 million; an additional $1.729 billion in bonds has also been authorized for new projects. But observers point out that even this enormous reserve will be insufficient to cleanse all of the potentially dangerous sites. As a result, many states are pushing for responsible parties to pay up front the costs of remediation at non-NPL sites and are resisting spending their own monies unless absolutely necessary. In the end, then, the ability to oversee cleanup work by responsible parties may be a better gauge of the overall competence of many state programs.

Even at NPL sites, state superfund programs cannot be evaluated solely in fiscal terms. Increasingly, the states are providing technical and legal support for federal projects. In many cases, state engineers are the first on the scene to investigate potential hazardous waste sites and nominate them to the NPL. Sometimes state attorneys take the lead enforcement role at federal sites.


N.Y.'s SUPERFUND PROGRAM

(continued from page 129)

Additionally, state officials are often left with the long-term task of monitoring NPL sites once cleanup activities have finished. A few states have even begun to challenge EPA’s selection of cleanup remedies at NPL sites on the grounds that they fail to meet more stringent state environmental standards.5

This two-part article examines New York State’s “superfund” program. This installment will lay out the statutory and regulatory evolution of the state’s program and provide a snapshot of overall cleanup efforts to date. Part two will examine New York’s enforcement strategies against responsible parties and take a closer look at the type of remedial work underway at more than 300 state hazardous waste sites. Readers interested in the step-by-step process of the state’s remedial program are urged to review the August 1989 issue of this newsletter.6

II. Legal Background

A. Statutory Authority

New York’s first legal foray into the problem of hazardous waste site cleanup came in 1979. In that year, the State Legislature passed the “Remedial Treatment of Inactive Hazardous Waste Sites Act.” This law, commonly referred to as Title 13, mandated that DEC maintain a registry of every “known” hazardous waste site in the state.7 The new law also gave the state Department of Environmental Conservation (DEC) the authority to order “responsible parties” to remediate an inactive hazardous waste site if it posed a “significant threat to the environment.”8 If a responsible party fails to obey an order, or if responsible parties can not be located, DEC may develop and implement site cleanups on its own.9 In the event DEC conducts the cleanup work, the statute allows DEC to recover the costs from the responsible parties.10

Under a separate 1979 law, the state Department of Health (DOH) was given the authority to set in motion short-term emergency cleanups where it declares a condition “dangerous to life or health.”11 This statute allows the DOH to either directly order a responsible party to initiate a cleanup action or request that DEC undertake its own remedial program.12 Under a 1982 amendment to Title 13, DEC was also granted the power to conduct emergency cleanups— in this case, where hazardous wastes present an “imminent danger of causing irreversible or irreparable damage to the environment.”13 Although the 1982 amendment was not crystal clear, it apparently also gave DEC broad authority to implement a “complete” state-funded remedial project at a site whenever it would be “cost-effective” to do so.14

The most important change in 1982 was the creation of a “hazardous waste remedial fund.” Its primary objective was to finance emergency cleanups and long-term remediation projects at sites where responsible parties could not be identified or refused to cooperate with state officials.15 The law also provided monies for initial site identifications and investigations, as well as for the non-federal share of cleanups at NPL locations.16 The remedial fund was paid for by fees assessed on the generation and disposal of hazardous waste.17

The 1982 law also charged DEC with listing all inactive hazardous waste sites in New York according to five classifications:

1. Causing or presenting an imminent danger of causing irreversible or irreparable damage to the public health or the environment — immediate action required;
2. Significant threat to the public health or environment — action required;
3. Does not present a significant threat to the public health or environment — action may be deferred;
4. Site properly closed — requires continued management.
5. Site properly closed, no evidence of present or potential adverse impact — no further action required.18

A separate provision of the 1982 law mandated that DEC develop a statewide remedial plan for all hazardous waste sites that would, among other tasks, document “field investigations of high priority sites,” assess the effects of
sites on the “health, environment and economy of the state,” and estimate the “costs of remedial action for sites included in the plan.”

Recognizing that the original fund fell short of its revenue goals, the Legislature passed a new law in 1985 that increased existing assessments and fees on the generation and disposal of hazardous waste. The law also included a 2.1/2 cent per barrel surcharge on the “transfer” (onloading or offloading between facilities or vessels) of petroleum in the state and doubled the existing hazardous waste program fees paid by industry. These industry sources provided approximately $22 million per year. For the first time, taxpayer funds were also added. The Legislature appropriated $8 million from the state’s general fund, providing a total of $30 million per year for the state’s superfund program. Another provision in the 1985 amendments created a program in which the state would initially provide up to 75 percent of the remedial design and construction costs at a municipally owned site.

With growing recognition that even more money was needed to clean up the state’s hazardous waste sites, the State Legislature passed the 1986 Environmental Quality Bond Act (EQBA), which authorized the sale of $1.2 billion in bonds for hazardous waste remediation projects. The EQBA was approved by 66 percent of New York voters. The EQBA also laid out several conditions necessary to clean up the sites, including a 75 percent contribution towards remedial projects. The EQBA further reduced the proportion of the state’s cleanup efforts paid by hazardous waste-producing industries. The original 1982 remedial fund relied on a 100 percent contribution from industries, the theory being that “polluters pay.” Under the 1985 changes, industry contributed roughly 80 percent of the monies to the state fund and the taxpayers chipped in 20 percent. The EQBA legislation specified that industry and petroleum fees would pay only 50 percent of the debt service on the bonds, and the general fund would pay the remaining 50 percent.

B. Proposed Legislation

Since 1986, there have been no major amendments to the existing statutory program. For the past several years, however, a handful of significant proposals have been introduced into the State Legislature. One item in 1991 was an Assembly bill to expand the scope of the remedial program to cover sites contaminated with “hazardous substances;” only sites with “hazardous wastes” (a narrower category) are now covered under the state law. Another Assembly bill floated this year sought to increase public input in the superfund program by mandating that DEC draw up a citizen participation plan to provide for public review and comment prior to each critical decision point in the remedial process. A separate piece of Assembly legislation would define the term “responsible party” under Title 13 to include current owners or operators, generators, disposers, transporters and any other person “responsible according to applicable principles of statutory or common law liability.” This bill also provided a so-called “innocent purchaser” defense, which exists under the federal superfund program. Proposed DEC regulations provide for an almost identical definition of a “responsible party,” but do not include the “innocent purchaser” defense.

On the Senate side, the primary legislative proposal in the last few sessions has been to create “apportioned” liability at hazardous waste sites. Under this approach, responsible parties would be responsible for remedial costs only in proportion to their share of the contamination at the site. Additional Senate proposals in 1991 included the creation of an advisory committee to make recommendations on what constitutes a “significant threat” and a provision to limit liability for mortgagees, fiduciaries and political subdivisions of the state.

The Governor’s Office — at the urging of DEC — has promoted its own legislative package. The Governor’s most recent “Program Bill” touched upon some of the same issues raised in the Assembly proposals, such as the “hazardous substances” expansion and public participation requirements. In addition, the Governor’s proposed legislation sought to enhance DEC’s enforcement powers by providing treble damages for violating administrative orders, clarifying what constitutes “recoverable expenses” from responsible parties, and creating greater access to suspected waste sites.

C. DEC Regulations and Statutory Implementation

Since the beginning of the superfund program, DEC has run into obstacles trying to implement the statutory scheme. One problem has been DEC’s attempt to define what constitutes a “significant threat” to the environment. In 1987, the Department promulgated regulations that laid out specific criteria to be looked at in making a “significant threat” determination. However, in 1989, the New York Court of Appeals struck down these regulations as too broad because they allowed the Commissioner of DEC to make a finding of “significant threat” when wastes either “actually or potentially” posed a threat to the environment or public health. The Court of Appeals’ decision in Superfund Coalition v. DEC, declared that “more than the mere presence of hazardous waste — which is always potentially hazardous — must be proven before a ‘significant threat’ declaration under the regulatory scheme can be justified.”

The invalidation of DEC’s regulations, however, has not greatly disrupted the operation of the state program. DEC has continued simply to rely on the statute itself to provide it with authority to list sites and to make a determination of a “significant threat.” Site owners have not challenged DEC’s actions, apparently because they are eager to get
their properties removed from the registry and do not want to slow this process through litigation. 36

Still, DEC has recently proposed a new set of regulations for the superfund program that would once again spell out the definition of this all-important phrase. Among the conditions that would constitute “significant threat” are the contravention of surface or groundwater standards, an adverse effect upon endangered or threatened species, a significant bioaccumulation of contaminants in flora or fauna, or the likelihood of hazardous wastes triggering a fire or explosion. 37 However, the draft regulations also allow a determination of a “significant threat” based on “any other factor that the Commissioner deems appropriate.” 38 According to one assessment, this provision “seems no less vague than those provisions struck down in 1989.” 39

Another statutory trouble spot for DEC has been its long-standing policy to list sites on the state registry before a finding of “significant threat” is made. While DEC is often pressured to list suspected hazardous waste dumps, it does not always have sufficient information accurately to classify these sites. As a result, many sites have been lumped into a DEC-created category of “2a” — in its words, a “temporary classification assigned to sites that have inadequate and/or insufficient data for inclusion in any of the other classifications.” In fact, for much of the program’s history the majority of the sites on the state’s registry have been listed in this “temporary” 2a category.

The proposed DEC regulations do not even acknowledge the existence of the 2a classification. But in supporting documents for the proposal, DEC defends its use of the 2a category on the grounds that it would be “arbitrary and capricious” to include such sites in any definitive classification. 40 Still, the 2a category has come under fire from several different fronts. The State Superfund Management Board — a statutorily created oversight committee of governmental officials, industry representatives and citizens — has called on DEC to complete all 2a site investigations “as expeditiously as possible.” 41 One environmental organization, the Citizens Environmental Coalition, has been more emphatic. It has proposed that sites should be allowed to languish in Class 2a only for a maximum of six months. The Coalition asserts that out of 1,142 Class 2a sites listed on the state registry in 1983 and 1984, only 299 had been investigated and reclassified by 1990. It also points out that the majority of 2a sites turn out to present a significant environmental hazard once they are investigated thoroughly. Its research shows that from 1984 to 1989, approximately 64 percent of the Class 2a sites reclassified were moved into the Class 2 category. 42

Other observers of the program — particularly those in the legal community — have pointed out that there can be severe financial consequences for listed sites. An appearance on the registry alone can render a site unmarketable. In addition, banks are often reluctant to finance development projects at listed sites because of potential liability for cleanup costs should the owner default. Two commentators have suggested that DEC has the option of leaving a site off the registry altogether until it can determine whether it poses a threat. At a minimum, they recommend a one- or two-year limit for 2a sites to be either reclassified or removed from the registry. 43

In response to these pressures, DEC has stepped up efforts to reclassify or delist 2a sites. According to DEC, it delisted 83 sites and reassigned 27 sites in fiscal year 1990-91 — nearly double the number of Class 2a reclassifications in 1989-90 and five times the number in the previous year. 44 In addition, DEC has slowed the rate of adding new sites to the registry. Only sites where investigations have documented the disposal of a “consequential amount of hazardous waste” will apparently now be put on the state list. 45

Table 1*

<table>
<thead>
<tr>
<th>New York State Superfund At A Glance</th>
<th>(April 1991)</th>
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<tbody>
<tr>
<td>Total State Registry Sites</td>
<td>1,052</td>
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<tr>
<td>NPL Sites</td>
<td>82</td>
</tr>
<tr>
<td>Estimated Site Cleanups Needed</td>
<td>700</td>
</tr>
<tr>
<td>Site Cleanups Completed</td>
<td>105</td>
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<tr>
<td>Remediation Underway</td>
<td>316</td>
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<tr>
<td>Average Cost/</td>
<td></td>
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<tr>
<td>Length of Non-NPL Cleanup</td>
<td>$8.8 million/5 years</td>
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III. The Hazardous Waste Site Problem

It is difficult to gauge the full extent of hazardous waste site contamination in New York. Like most states, New York is still in the process of discovering old hazardous waste dumping grounds. But in a little more than a decade of searching, approximately 1,460 sites have been identified and listed on New York State’s official “inactive hazardous waste site” registry. 46 Some of these sites have been cleaned up and removed from the registry or delisted because they were determined not to pose a significant environmental or public health threat.

In April 1991, there were a total of 1,052 sites on New York’s official list. Of these sites, 82 locations were listed on the federal NPL. 47 No sites were, or have ever been, listed in Classification 1. In the remaining classifications, the largest concentration of sites — nearly 200 — could be found in the heavy manufacturing counties of Erie and Niagara. The county with the single greatest number of sites was Suffolk County on Long Island, with 99 dumps. Surprisingly, while more than a third of the state’s population lives in New York City, there were only 29 sites within the City’s five boroughs and no sites at all in Manhattan. 48
No one knows how long will it take to investigate and clean up all of these sites. In 1986, DEC projected that it would take until the year 2000 to remediate all of the state’s hazardous waste dumps. At the time, DEC estimated that 1,400 sites would be listed and 500 sites would require cleanup attention. More recently, state officials have calculated that 1,700 sites will eventually be listed on the state registry and that more than 700 sites will require cleanup work. As of April 1, 1991, 105 sites had been fully remediated and new cleanup work had begun at 316. Pre-remedial enforcement efforts were underway at another 75 sites. However, because so many sites are listed as “2a,” there are no assurances on the state’s long-term projections for cleanup work. As DEC itself has conceded, this indefinite grouping “makes it difficult to estimate the number of sites that will ultimately require remediation.”

One of the most controversial issues in the remedial program is what level of cleanup will be selected for a site. In some instances, wastes are not removed or destroyed, but rather “contained” at the site. This approach usually includes the “capping” of a site with an impermeable layer to prevent the percolation of rainwater through the contaminated property. In DEC’s first remedial plan published in 1986, the Department concluded that the “containment strategy is likely to be the most common form of remedial action.”

In recent years, however, DEC has apparently backed away from this position. DEC now states that it advocates the use of permanent remedies over containment technologies, as long as the environmental benefits justify the increased costs. In addition, DEC has established a hierarchy of remedial technologies from most to least preferable:

1. destruction, onsite or offsite;
2. separation/treatment, onsite or offsite;
3. solidification/chemical fixation, onsite or offsite;
4. control and isolation technologies, onsite or offsite;
5. land disposal, offsite only.

Along the same lines, DEC’s newly proposed regulations state that “[t]he goal of the program for a specific site is to restore that site to pre-disposal conditions.” The proposed regulations also declare that they apply to the cleanup or restoration to a site’s “original state,” but add that if such a condition cannot be ascertained then only to “a reasonably environmentally sound condition.” In addition, the proposed regulations would allow site remedial programs to be exempt from state environmental standards if there is “good cause” not to follow them — for example, where conformity “is technically impracticable from an engineering perspective.”

As evidence of its commitment to permanent cleanup technologies, DEC notes that 62 of the 92 (67%) Records of Decision (RODs) issued to date under the state’s program have called for some type of permanent remedies. Of the remaining RODs, 8 (9%) have combined permanent and non-permanent elements, and 22 (24%) call for strictly non-permanent remedies.

On average, it takes five years to remediate a non-NPL site in New York, at a price tag of $8.8 million. According to DEC, the average cost per site for a Remedial Investigation and Feasibility Study (RI/FS) is $1.2 million; design plans cost $960,000; and construction costs run just over $6.7 million. DEC acknowledges that remediation projects in New York are taking longer and costing more than DEC forecast a few years ago. DEC points out, however, that construction costs for federal Superfund sites in New York are considerably higher than for state projects, running in some cases as high as $85 million.

Who is paying for the state’s remedial work? Because DEC tracks remediation efforts by individual actions or “units,” it is difficult to give an accurate breakdown by funding sources at individual dumps. However, of the 403 sites on the registry where remediation efforts (RI/FS, Design, or Construction) are underway, or have been undertaken in some form, responsible parties have funded, or are funding, cleanup work at 274 (68%) locations, state funds (municipal and non-municipal) can be linked to 84 sites (20%) and federal Superfund is responsible for 41 spots (10%). Local monies have supported only 4 (0.9%) site remediation projects.

Mark A. Izeman, a third-year student at New York University School of Law, was a summer associate with Berle, Kast & Case. He is co-author, with Eric A. Goldstein, of The New York Environment Book (Island Press, 1990).


U.S. Environmental Protection Agency, Enhancing State Superfund Capabilities: A Nine-State Study (October 1990) at ii.

I. Introduction

Cleaning up hazardous waste sites under New York’s Superfund program is not a simple task. On average, it takes five years and nearly $9 million to fully remediate a state hazardous waste site. Typically, once a suspected hazardous waste site is identified, state officials will conduct a preliminary site assessment (which has merged the older Phase I and Phase II investigations) to determine its potential danger. Occasionally there will be only an emergency removal or an interim response action (IRM) at a site, and no further cleanup will be taken. But most sites determined to pose a “significant threat to the public health or environment” — classification “2” under the state statutory scheme — will undergo long-term remedial work.

The first step in the remediation process is the preparation of a Remedial Investigation and Feasibility Study (RI/FS). The RI is an investigation of the nature and extent of contamination at a site; the FS studies alternative remedial technologies for cleanup and makes a final recommendation. Citizen input into the proposed cleanup plan generally comes at this stage. Next, a final remedial decision is made by the state Department of Environmental Conservation (DEC) and is formally incorporated into a Record of Decision (ROD). Detailed work plans and actual construction follow the ROD. Finally, after construction is completed, post-closure monitoring is set up at the site for an extended period of time.

Last summer, DEC published proposed revisions to its Superfund regulations. A large volume of comments was received, and DEC is now rewriting the proposed rules and considering whether to allow a new comment period or proceed directly to promulgation.

Part one of this article discussed the regulatory framework of New York’s superfund program and gave a status report on overall remedial progress. In this second part, enforcement strategies against responsible parties at the remedial stage are examined. In short, there are essentially four options that may be available to the State.

(continued on page 12)
January 30, 1992

January 31, 1992
Annual meeting, Environmental Law Section, New York State Bar Association, Marriott Marquis Hotel, Manhattan. Information: NYSBA, (518) 463-3200.

February 6–7, 1992

February 11, 1992

March 10, 1992
"Legal Aspects of Oil Spills," seminar sponsored by the Office of the Regional Counsel for EPA Region 2, 26 Federal Plaza, New York City. Information: (212) 264-1017.

March 19, 1992

March 31–April 1, 1992

WORTH READING


SUPERFUND STRATEGIES

(continued from page 1)

First, it can negotiate consent orders with responsible parties to privately fund and implement a cleanup program. Second, the State can compel action by responsible parties through an administrative hearing. Third, it can initiate a State-funded cleanup at a site without the involvement of responsible parties and sue for subsequent cost-recovery. And fourth, it can pursue responsible parties through civil litigation in the State or federal courts. Here is a close look at each of these enforcement alternatives.

II. Consent Orders

For most of the program's history, DEC has aggressively sought to compel responsible parties to conduct and finance the bulk of cleanup work through the use of consent orders. As DEC's enforcement head sees it, such cleanups are "relatively non-resource intensive," can "produce the fastest environmental results," and "establish a cooperative relationship between the parties." 4 In addition, state law limits DEC's authority to carry out cleanups itself with state funds. Absent a health or environmental emergency, DEC can apparently initiate "fund-led" cleanups only when a responsible party refuses to carry out an order, where responsible parties cannot be located, or after "all reasonable efforts to secure voluntary agreement" have been pursued. 5 Thus, DEC has historically adopted a so-called "enforcement first" policy in its hazardous waste site remediation program.

The negotiation process with responsible parties generally begins with negotiation of the RI/FS. 6 This stage is among the most time-consuming and contentious. Responsible parties will often bring in their own consultants and experts to negotiate technical points with DEC staff. One of the major issues discussed is what level of cleanliness must be achieved at the site. Once the RI/FS consent order is signed, responsible parties will usually hire a consultant to carry out the study. After the RI/FS is completed, it must be submitted to DEC for approval. If necessary, the consultants must make any necessary changes and resubmit the document. If the RI/FS is still inadequate, the DEC can either initiate administrative proceedings against the responsible parties or (unless the consent decree provides otherwise) the responsible parties
can appeal to an administrative law judge (ALJ) to settle the dispute.

Once the RI/FS is completed and approved, DEC begins the remedy selection process that ultimately produces the ROD. The ROD can be written only by DEC, although responsible parties — along with the public — have input into its drafting. After it chooses a remedy, DEC negotiates a new consent order with the responsible parties for the design and construction of the remedial work.

One exception to this process is for municipal sites that are eligible under the 1986 Environmental Quality Bond Act (EQBA) to receive an initial 75 percent contribution from New York State for cleanup work. DEC has required municipalities wishing to receive EQBA funding to agree to a complete investigation and remediation of the site. Thus, only one consent order is usually needed for these sites. Under state law, municipalities must also agree to reimburse the State if any federal or responsible party payments become available for remedial costs at the site.

Both the number and the value of consent orders have increased significantly over the life of the State's program. In fiscal years 1981 to 1984, 23 consent orders were signed at a total value of $40 million. In fiscal year 1990–91 alone, 80 consent orders were secured for a total of just over $277 million.

As indicated above, most consent orders do not encompass initial testing through final construction work — or so-called “A to Z” consent orders. Rather, remedial work is usually broken into distinct stages, with a large number of consent orders in recent years covering only investigatory work or IRM actions. Of the 80 consent orders signed during fiscal year 1990–91, for example, only 12 contained agreements for both the investigation and the final design and construction phases. Nine of these consent orders were signed under the EQBA program for municipalities, including separate orders at four inactive New York City landfill sites.

Because cleanup work at most sites is broken down into several consent orders, each phase can entail protracted negotiations between the State and responsible parties. To combat this sluggishness, the Citizens Environmental Coalition suggests in a 1990 report that the State set “drop dead” dates at which time negotiations with responsible parties would be cut off and the case considered for direct legal action. According to the Coalition, DEC may be letting friendly site owners control the “timing and extent” of remedial action. They also assert that DEC appears to be targeting “easy” sites, or sites with cooperative owners, rather than the “worst” dumps in the State.

DEC has had limited success in securing consent orders at multiparty sites. A recent study by the New York State Legislature points out that of the 37 consent orders signed at multiparty sites in fiscal year 1988–89, only two orders were signed by all known responsible parties for the particular site. Further, 26 of the 37 orders were agreements between DEC and one responsible party. Of these sites, DEC was able to secure an agreement for full remediation at only one location — the remaining orders covered investigatory work, IRMs or non-remedial settlements.

As the Legislature's report observes, these numbers are not surprising "because a responsible party will certainly avoid making a commitment for full remediation if other viable responsible parties exist." DEC recognizes many of these problems. With respect to multiparty sites, the Department acknowledges that they "inherently are more difficult to negotiate" than single party sites. Still, DEC reports that at a majority of multiparty sites, there is usually one responsible party who is primarily responsible for the site, or there will be only one viable responsible party, or the State will have a strong case against only a single responsible party. DEC also says that there are few sites where a large number of responsible parties have made minor contributions of waste and where no primary polluter exists.

In an effort to speed up site cleanups, DEC has clarified in the regulations it proposed last summer that the Department can commence a State-funded remedial program when the owner or responsible party for a site has refused to "voluntarily agree to remediate." Under the proposed rules, responsible parties will have a specific time limit to agree to the "objective" of the State's consent order negotiations before DEC can expend state monies, but in no case longer than nine months.

The proposed regulations provide that if a responsible party agrees to sign a consent order before DEC serves notice of a formal administrative proceeding, the agreement may contain only an obligation to investigate the site. In contrast, if a responsible party agrees to enter into a consent order after such notice is served, then the party is obligated to carry out "necessary remediation." 

III. Administrative Hearings

If consent order negotiations are unsuccessful, or a responsible party has failed to carry out an existing consent order, DEC has the option of commencing an administrative hearing. Unlike the U.S. Environmental Protection Agency (EPA) under federal Superfund, DEC does not have the power to issue "unilateral" orders against responsible parties (or to assess treble damages against those who fail to comply). Instead, state law requires that a hearing must be held before a responsible party can be directed to undertake a cleanup program. State law also allows responsible parties to raise any statutory or common law defenses at these hearings, and "such defenses shall have the same force and effect at such hearings as they would have in a court of law." 

Previous regulations detailing the hearing process were nullified in the New York Court of Appeals' 1989 decision
in *New York State Superfund Coalition v. DEC.* 19 But
DEC's proposed regulations set out a new hearing proce-
dure. In a nutshell, the process is as follows: DEC serves
the respondent with a notice of proceeding, which allows
the respondent to make a demand for the discovery of
DEC's records. DEC then serves a complaint, which sets
out the DEC staff's case in detail, supported by proof in
affidavit form. The respondent may then respond to the
complaint by disputing the allegations with proof by
affidavit, and may raise defenses or grounds to dismiss.
These pleadings are then submitted to the DEC Commissi-
ioner, who determines which issues are in dispute and sets
a schedule for an oral proceeding before an ALJ. At the
hearing, both sides may present evidence on the disputed
issues and are free to cross-examine witnesses. When the
hearing concludes, the ALJ must submit a report and
recommendations to the Commissioner. The Commissi-
ioner then makes the final determination. 20

Under the proposed regulations, an order issued by the
Commissioner may require the respondent to develop and
implement a remedial plan subject to DEC's approval. The
order may also specify that the respondent is liable to the
State for all "reasonable" costs incurred before the effec-
tive date of the order and that the order is "not a waiver
of any other remedy available or to become available
against any person, whether or not a party, to obtain any
relief necessary to the protection of the public health
and/or the environment." 21

To streamline the hearing process, the proposed DEC
regulations place several limitations on the conduct of
respondents. First, the proposed rules state — as they did
in the old DEC regulations — that "there is no third-party,
counterclaim or crossclaim practice." 22 Thus, parties can
not bring other responsible parties into the hearing. Sec-
ond, as noted above, the oral portion of the hearing process
is restricted to only those facts the Commissioner deter-
mines to be in controversy. 23 Third, the proposed rules
assert that any allegation made by DEC staff in the com-
plaint that is not specifically controverted by proof in
affidavit form will be admitted into the record. 24

Despite the potential power of administrative orders,
DEC has rarely sought their use. From 1984 to 1990, DEC
held just nine administrative hearings. 25 Out of the these
proceedings, the Commissioner of DEC signed only one
administrative order. That case involved the implementa-
tion of cleanup work at a site in Syracuse, New York. 26
Although it took four years from discovery to the issuance
of that order, DEC's enforcement head believes that the
decision "reflects that administrative hearings are an en-
forcement tool that DEC will use aggressively against
uncooperative PRPs [potential responsible parties]." 27

IV. State-Funded Cleanups

Like many states, New York has been reluctant to spend
public monies for remediation projects. Backed by a statu-
tory scheme that discourages the use of state funds, DEC
has developed a program that relies heavily on privately
financed remedial action. As noted in part one of this
article, responsible parties are funding remedial work at
approximately 70 percent of the sites in the State. State
and federal monies are supporting cleanup activities at
roughly 20 and 10 percent of the remaining sites,
respectively. 28

According to DEC, a little more than $82 million in
capital expenditures (not including administrative costs)
has been spent under the State superfund program since
its inception. In fiscal years 1989–90 and 1990–91, annual
capital expenses hovered around $30 million. 29 The State
anticipates higher annual costs in future years as more
projects enter "the cost-intensive construction phase of the
remedial process." 30 Much of this money will come from
the EQBA, from which approximately $126.9 million has
been obligated for investigative and remedial activities at
nearly 500 sites. Thus, roughly 90 percent of the $1.1
billion (reduced from $1.2 billion in 1990) from the EQBA
is still available. 31 While most monies spent by the State
are subject to cost recovery actions against responsible
parties, DEC has apparently recouped only a fraction of
its outlays to date.

Despite the State's historic emphasis on responsible
party remediation, there are some indications that DEC
may be more willing to conduct fund-led cleanups in the
future. The proposal to limit consent order negotiations
to a maximum of nine months, for example, might make
it easier for DEC to commence state-funded cleanup work
earlier than it did in the past. 32 In addition, DEC stresses
in the Regulatory Impact Statement (RIS) for its proposed
rules that under state law it is not required to hold an
administrative hearing prior to developing and imple-
menting a fund-led cleanup. 33 DEC also states in the RIS
that state law "vests the Department with the discretion
to conduct remediation itself whenever it would be cost-
effective to do so, not only in response to an instance of
'imminent danger' or 'irreversible or irreparable dam-
age'." 34 DEC argues that there are many instances — such
as the threat of groundwater contamination — where it is
more cost-effective for the State to carry out cleanup work
than to initiate an administrative hearing "that will delay
the remediation and result in contamination of the
resource."

V. Civil Litigation

Another enforcement tool at the State's disposal is the
use of civil litigation through the Attorney General's (AG)
office. There are several reasons why DEC may decide to
proceed in court. DEC may be faced with a responsible
party who refuses to negotiate a consent order, and DEC
may believe that it would be more efficient to pursue the
party through civil proceedings in court than through an
administrative hearing. The Department may also refer a
case to the AG's office if a party refuses to comply with
an administrative consent order. In addition, a court setting may be appropriate if common law nuisance and federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) claims provide stronger legal authority than do state statutes.36

For reasons that are not completely clear, DEC has referred only a limited number of inactive hazardous waste site cases to the AG’s office. From 1984 to 1990, DEC passed along only 58 superfund cases.37 In fiscal years 1989–90 and 1990–91, there were just 19 such referrals.38 In 1988, the State Comptroller’s office observed that “there has been little overall program coordination between [DEC] and the Attorney General’s Office,” and that the AG “needs to be involved early on in the negotiation process or remediation could be delayed and the [DEC] could spend funds on remediation that responsible parties should pay for.”39 More recently, the Citizens Environmental Coalition found that even when cases are sent to the AG’s office, very few actions in the past several years have been undertaken against financially viable “recalcitrant” parties.40 The Coalition concluded that “[t]here seems to be no programmatic, financial or administrative reason for the lack of case referrals by DEC.”41 DEC now says that staff shortages in the AG’s office would make more referrals futile, and that many PRPs are paying voluntarily without a need for suit.

Over the last few years, many of the referral cases handled by the AG’s office have involved bankruptcy-related suits to protect the fiscal soundness of the State’s program. The AG’s office has also brought several actions under federal CERCLA for natural resource damages on behalf of the Commissioner of DEC, who has been designated New York’s trustee of natural resources. It has also initiated actions against responsible parties for cost recovery and has litigated over sites that do not fall under the state superfund program because they contain “hazardous substances” instead of “hazardous wastes.”42

One important hazardous waste site case recently brought by the AG’s office on behalf of DEC involved a challenge to a cleanup program approved by EPA at a federal Superfund site in Moreau, New York. The controversy concerned the contamination of an aquifer in Moreau. State officials argued in federal district court that a proposed consent decree between EPA and the General Electric Company – one of the responsible parties – did not comply with state groundwater standards and thus should be rejected.43 While not directly ruling on the groundwater issue, the court refused to approve the consent decree because it found that the “EPA may have misled the State into concurring” with a proposed cleanup strategy that did not adequately address the contamination of the aquifer.44 The decision, supported by Section 121(f) of CERCLA, suggests that New York may be able to challenge effectively some EPA cleanup remedies at federal sites where they violate state environmental standards.

VI. Conclusion

New York has made significant strides in its superfund operation over the last decade. A total of 105 sites have been fully remedi"ed and cleanup work is underway at more than 300 others.45 More broadly, DEC reports that of the more than 1,464 sites that have been listed on the State’s official registry, approximately 97 percent of all sites have “entered investigation, enforcement, remediation or have been cleaned up and/or delisted.”46

Still, the State’s program has not ironed out all its problems. Almost 50 percent of the sites on the State’s registry are listed in the “temporary” 2a classification, raising questions over DEC’s long-term assessment of the number of sites that will ultimately require attention. Further, while DEC now boasts that responsible parties are paying for roughly 70 percent of the remedial work in the State,47 it is difficult to ensure that cleanups are being done properly. As two DEC enforcement lawyers have written, “it is critical that DEC oversee RP [responsible party] site activities at the extremely large number of sites for which orders have been finalized in recent years, especially since RPs’ incentives often are to minimize the work done and propose minimal remedial action.”48

Finally, despite proposed regulations to limit consent order negotiation time, there still appears to be little use of the AG’s office and DEC administrative hearings when dealing with recalcitrant parties. To be sure, the State’s injunctive authority is considerably weaker than that under federal Superfund because DEC does not have the power to issue unilateral orders against responsible parties. But given the poor prospects for statutory change on this issue in the near future, the State will need to maximize its use of existing authority to prod defiant parties into action or to initiate fund-led cleanups itself. Only with a more aggressive approach will New York be able to make quicker progress in attaining its current goal of remediating 700 sites statewide.

Mark A. Izeman, a third-year student at New York University School of Law, spent the summer of 1991 a summer associate with Berle, Kass & Case. He is co-author, with Eric A. Goldstein, of The New York Environmental Book (Island Press 1990).

1 New York State Department of Environmental Conservation, Hazardous Waste Site Remedial Plan (July 1, 1991) at 20, 22.


5 Environmental Conservation Law (ECL) § 1313(5)(a), (b); Public Finance Law § 97-b(4).

6 The discussion of the consent order process is taken from Markell, “New York State’s Superfund and RCRA Enforcement Programs” at 271.
§ 9607. Liability [CERCLA § 107]

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

§ 101

(35)(A) The term "contractual relationship", for the purpose of section 9607(b)(3) of this title, includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:

(i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.

(ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.

(iii) The defendant acquired the facility by inheritance or bequest.

In addition to establishing the foregoing, the defendant must establish that he has satisfied the requirements of section 9607(b)(3)(a) and (b) of this title.
(B) To establish that the defendant had no reason to know, as provided in clause (i) of subparagraph (A) of this paragraph, the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

(C) Nothing in this paragraph or in section 9607(b)(3) of this title shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this chapter. Notwithstanding this paragraph, if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under section 9607(a)(1) of this title and no defense under section 9607(b)(3) of this title shall be available to such defendant.

(D) Nothing in this paragraph shall affect the liability under this chapter of a defendant who, by any act or omission, caused or contributed to the release or threatened release of a hazardous substance which is the subject of the action relating to the facility.
NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
DIVISION OF HAZARDOUS WASTE REMEDIATION
INACTIVE HAZARDOUS WASTE DISPOSAL REPORT

CLASSIFICATION CODE: 2 REGION: 3 SITE CODE: 360015
EPA ID: NYDO56808398

NAME OF SITE: Tappan Terminal - Mobil Oil
STREET ADDRESS: S. Side Avenue
TOWN/CITY: Hastings on Hudson
COUNTY: Westchester
ZIP: 10706

SITE TYPE: Open Dump- Structure- Lagoon- Landfill- Treatment Pond-
ESTIMATED SIZE:

SITE OWNER/OPERATOR INFORMATION:
CURRENT OWNER NAME: Mobil Oil
CURRENT OWNER ADDRESS: 3225 Gallows Road, Fairfax, VA
OWNER(S) DURING USE:
OPERATOR DURING USE:
OPERATOR ADDRESS:
PERIOD ASSOCIATED WITH HAZARDOUS WASTE: From To 1986

SITE DESCRIPTION:
During the process of abandoning this oil terminal, Mobil Oil found up to
12,000 ppb of chlorobenzene and 100 ppb of diethyl ether in on-site groundwater. Dyes were found in soil in concentrations between 1% and 11% by weight. Several other semi-volatile priority pollutants were also found in soil and groundwater at lower concentrations. A sample was taken from the adjoining Hudson River with no priority pollutants detected.

An EPA Preliminary Assessment was completed in 1989. The DEE is negotiating a consent order for an RI/FS.

HAZARDOUS WASTE DISPOSED: Confirmed-X

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<th>TYPE</th>
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<tr>
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<tr>
<td>Diethyl Ether (F003)</td>
<td>Unknown</td>
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<tr>
<td>Dyes</td>
<td>Unknown</td>
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ANALYTICAL DATA AVAILABLE:
Air- Surface Water- Groundwater- X Soil- X Sediment-

CONTRAVENTION OF STANDARDS:
Groundwater- X Drinking Water- Surface Water- Air-

LEGAL ACTION:

TYPE...: Consent Order - DEE State- X Federal-
STATUS: Negotiation in Progress- X Order Signed-

REMEDIAL ACTION:

Proposed- Under design- In Progress- Completed-

NATURE OF ACTION:

GEOTECHNICAL INFORMATION:
SOIL TYPE:
GROUNDWATER DEPTH:

ASSESSMENT OF ENVIRONMENTAL PROBLEMS:

High levels of organic chemicals have been found in the groundwater and surface water.

ASSESSMENT OF HEALTH PROBLEMS:

The area around this site is heavily industrialized. Although a potential pathway of exposure to contaminants at this site appears to be through direct contact with contaminated soils, a fence along the perimeter of the site limits access. Businesses and homes located in the vicinity of the site are supplied with public water.
NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
DIVISION OF HAZARDOUS WASTE REMEDIATION  
INACTIVE HAZARDOUS WASTE DISPOSAL REPORT

CLASSIFICATION CODE: 2   REGION: 3   SITE CODE: 360222
EPA ID:

NAME OF SITE: Harbor at Hastings  
STREET ADDRESS: River Street  
TOWN/CITY: Hastings on Hudson  
COUNTY: Westchester  
ZIP: 10706

SITE TYPE: Open Dump- Structure-X Lagoon- Landfill- Treatment Pond-  
ESTIMATED SIZE: 36 Acres

SITE OWNER/OPERATOR INFORMATION:  
CURRENT OWNER NAME: Harbor-at-Hasting Associates  
CURRENT OWNER ADDRESS: 25 West 43rd Street, New York, NY  
OWNER(S) DURING USE: Anaconda Wire and Cable Co.  
OPERATOR DURING USE: Anaconda Wire and Cable Co.  
OPERATOR ADDRESS:  
PERIOD ASSOCIATED WITH HAZARDOUS WASTE: From To

SITE DESCRIPTION:  
The site consists of fill material extending into the Hudson River. The previous owner, Anaconda Wire and Cable Company, ceased operations at the site in 1974. The present owners propose to develop the property as a housing project.

A site investigation was performed on the site in 1986/87. The results of this investigation showed elevated concentrations of heavy metals and PCBs in the soil and contravention of groundwater standards for lead, manganese, and phenols. An RI/FS is needed.

HAZARDOUS WASTE DISPOSED: Confirmed-X   Suspected-

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<tr>
<td>Heavy Metals</td>
<td>Unknown</td>
</tr>
<tr>
<td>Base Neutrals</td>
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</table>
ANALYTICAL DATA AVAILABLE:
Air- Surface Water- Groundwater-X Soil-X Sediment-

CONTRAVENTION OF STANDARDS:
Groundwater-X Drinking Water- Surface Water- Air- 

LEGAL ACTION:

TYPE...: State-Federal
STATUS: Negotiation in Progress- X Order Signed-

REMEDIAL ACTION:

Proposed-X Under design- In Progress- Completed-

NATURE OF ACTION: Remediation

GEOTECHNICAL INFORMATION:
SOIL TYPE:
GROUNDWATER DEPTH:

ASSESSMENT OF ENVIRONMENTAL PROBLEMS:

PCBs and heavy metals from this site have contaminated soil and groundwater. Remediation will be required.

ASSESSMENT OF HEALTH PROBLEMS:

Surface soil is contaminated with PCBs up to 100 ppm, PAHs up to 200 ppm and lead up to 1500 ppm. The areas of contamination are accessible only to a few business tenants on the south portion of the site. This surface contamination does present the potential for exposures to occur through direct contact, incidental ingestion, and/or inhalation. A number of employees use the north end of the site where surface contaminants have not been detected. In order to prevent potential human health exposures to contaminants, environmental clean-up of the site will have to be performed prior to construction of the proposed on-site multi-unit condominium complex. Groundwater is contaminated with petroleum hydrocarbons, however, there are no known users of groundwater in the area, and groundwater likely discharges directly to the adjacent Hudson River. The impacts of the site on the river and consequential human exposures need to be determined.
New York State Department of Environmental Conservation

MEMORANDUM

Regional Haz. Waste Remediation Engineers, Bur. Directors, Section Chiefs
Michael J. O'Toole, Jr., Director, Hazardous Waste Remediation Division

TECHNICAL AND ADMINISTRATIVE GUIDANCE MEMORANDUM: PRIORITY RANKING SYSTEM FOR CLASS 2 INACTIVE HAZARDOUS WASTE SITES

DATE: DEC - 9 1992

Legislative Mandate: Title 13, ECL 27-1305.4.e. requires the Department of Environmental Conservation, in consultation with the New York State Department of Health, to evaluate existing site evaluation systems and develop a system to select and prioritize sites for remedial action. This system shall incorporate environmental, natural resource and public health concerns. With this mandate in mind, a Priority Ranking System has been created.

Purpose: All Class '2' inactive hazardous waste sites for which the remedial action process has not yet begun will be priority ranked using the priority ranking system described herein, to help direct remedial actions to the highest priority sites first. The resultant priority list will help the Division:

- select sites for enforcement
- select which sites will receive oversight when technical resources are scarce
- select which State-funded sites will be funded should backlogs develop.

Priority Ranking System

- **Priority I** - Sites for which remediation should supersede all other Class 2 sites. Priority I can be assigned if any one of the following criteria is met:
  a. A public or private water supply which is currently in use has been contaminated or threatened;
  b. Human exposure to contaminants has been identified which represents a significant health risk as determined by DOH;
  c. Bioaccumulation of site contaminants in flora or fauna has resulted in a health advisory;
  d. Site contaminants are present at levels that are acutely toxic to fish or wildlife or that have caused documented fish or wildlife mortality.

- **Priority II** - Important Sites. Priority II will be assigned if any of the following criteria are met:
  a. A Class A or AA surface water body, primary or principal aquifer has been contaminated or threatened without affecting an existing water supply;
  b. Bioaccumulation of site contaminants in flora or fauna has resulted in actionable levels (but not a health advisory);
  c. Contaminants are at levels chronically toxic to fish/wildlife;
j. Endangered, threatened or rare species, significant habitats, designated coastal zone areas, protected streams or regulated wetlands have been impacted by releases from the site.

- Priority III - General Site Category. Priority III will be assigned unless one or more of the site prioritization criteria, specified above, apply to a site. When resources become available, after remedial needs for Priority I and II sites have been accommodated, remediation of sites under this category can be considered.

- Factors Which May Enhance A Site's Rank

After a class 2 inactive hazardous waste disposal site has been prioritized according to its impact on natural resources and human health, it is measured against three additional factors. The first of these is the IJC (International Joint Commission) Factor. If a site is part of an IJC Remedial Action Plan (RAP), its priority will be raised by 1. The second is the Economic Development Zone (EDZ) Factor. If the site is within a New York State-designated EDZ, its priority may be raised by 1. Upgrading on the basis of Economic Development is not automatic, however, and may occur when development activity is being planned for the near term, rather than at the time the site is initially ranked. The third is the Community Support Factor. If the site has been targeted for local government supported development by a developer willing to enter into a consent order with DEC to finance site investigation and remediation, a Priority increase of 1 may be appropriate but is not automatic. Consideration must first be given to the importance placed on the proposed project by the community as expressed through the local government. The term "Community Support" can take on a range of interpretations: from indifferent tolerance to enthusiastic endorsement. Increased priority should be given to those projects that are actively being sought by the community, and the developer has viable plans for development in the near term.

- Implementation

The Bureau of Hazardous Site Control will be responsible for ranking all Class 2 sites pending remediation and for publishing the results in the Quarterly Status Report of Inactive Hazardous Waste Disposal Sites. For all Class 2 site nominees, the attached Inactive Hazardous Waste Disposal Site Priority Ranking worksheet will be used by classification package preparers to determine a site's priority. A completed copy of this form will be attached to the classification package before it is routed for review and approval. Use of this form will ensure a permanent file record as well as uniformity in the application of site priority ranking criteria. An instruction sheet for the Site Priority Ranking Worksheet along with definitions of terms used in the priority classification categories are attached. Each reviewer of a classification package should review and comment, as appropriate, on the proposed priority ranking.
cc. A. DeBarbieri
    J. Lacey
    C. Sullivan
    R. Davies
    R. Dana
    J. Eckl
    E. McCandless
    A. Carlson
    C. Goddard
    P. Counterman
    A. Fossa
    J. Kelleher
    J. Colquhoun
    D. Persson
    M. Birmingham
    D. Johnson
    M. Kadlecik
Regional Directors
Regional Engineers
Regional Solid/Hazardous Waste Engineers
Regional Citizen Participation Specialists
### Priority I - Sites for which remediation should supersede all other Class 2 sites. Priority I can be assigned if any one of the following questions can be answered affirmatively.

a) Has a public or private water supply which is currently in use been contaminated or threatened?  

b) Has human exposure to contaminants (or the potential for exposure) been identified which represents a significant health risk as determined by DOH?  

c) Has bioaccumulation of site contaminants in flora or fauna resulted in a health advisory?  

d) Are site contaminants present at levels that are acutely toxic to fish or wildlife or that have caused documented fish or wildlife mortality?

#### Priority II - Important Sites. Priority II will be assigned if any of the following questions can be answered affirmatively.

a) Has a Class A or AA surface water body, primary or principal aquifer been contaminated or threatened without affecting an existing water supply?  

b) Has bioaccumulation of site contaminants in flora or fauna resulted in actionable levels (but not a health advisory)?  

c) Are contaminants at levels chronically toxic to fish/wildlife?  

d) Have endangered, threatened or rare species, significant habitats, designated coastal zone or regulated wetlands been impacted by releases from the site?

#### Priority III - will be assigned unless one or more of the site prioritization criteria, specified above, apply to a site. After remedial needs for Priority I and II sites have been accommodated, remediation of sites under this category can be considered. If Priority III, check box 3.

Enter the number of the priority box checked 1, 2, or 3 here. This is the site's priority rank.

### FACTORS

**IJ C Factor** - If the site has been identified by the International Joint Commission (IJC) as a component in a remedial action plan, subtract (1) from the value in box 4 and enter the result in box 5.

**EDZ Factor** - If the site is within a New York State designated Economic Development Zone (EDZ) should this fact cause the site priority to be raised?

**Community Support Factor** - If the site has been targeted for local government-supported development by a developer willing to sign a consent order with DEC to finance investigation and remediation should this fact cause the site priority to be raised?

If either "yes" box is checked, subtract 1 from the value in box 4 and enter the result into box 6. If "no" is checked, the value in box 6 equals box 4 (or box 5 if applicable). If both IJC and EDZ/Community Support factors apply, only 1 (not 2) will be subtracted from the value in box 4. The resultant value in box 6 will never be less than 1.

**REM NOTE:** Should this site be considered a candidate for an Interim Remedial Measure (IRM) as defined in 6NYCR Part 375-1.3n?

If "yes" please explain why:

Preparer_ ______________________ Date_ ______________________
NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
Division of Hazardous Waste Remediation
Priority Ranking System
For An Inactive Hazardous Waste Disposal Site of Classification Code 2

INSTRUCTIONS

PRIORITY RANKING WORKSHEET

Use of Worksheet

The Priority Ranking Worksheet is to be completed for all Class 2 inactive hazardous waste sites pending remediation. For new Class "2" site candidates, this worksheet will be included in all classification approval packages as a supporting document.

Who Will Complete the Worksheet

The BHSC is responsible for ensuring that a worksheet is completed for all eligible sites. PRS worksheet preparers, however, may include both Central Office and Regional members of the professional staff of DHWR or consultants who are contracted by the Department to investigate inactive hazardous waste disposal sites.

How to Proceed

Compare the physical setting and conditions of the site to be ranked with each category shown on the Priority Ranking Worksheet. Place a check in the box next to all categories that apply. Insure that the description of the site found in blocks 8 and 11 of the Registry Site Classification Decision Form contain site information which explains your choice of priority.

The site is then reviewed to see if it meets these additional factors. First, it must be determined whether a site has been identified by the International Joint Commission (IJC) as a component of a Remedial Action Plan (RAP). If a site is part of an IJC RAP, it will be upgraded to the next higher priority.

Next, a review of site conditions must be undertaken to determine if the site is within a designated New York State Economic Development Zone (EDZ) or the site has been targeted for local government supported development by a developer willing to enter into a generic consent order with DEC to finance site investigation and remediation. If economic development is a relevant factor, the Department may consider whether the site should qualify for a priority upgrade, e.g. re-rank to the next higher priority. Upgrading on the basis of economic development is not automatic, however, and may occur when development activity is being planned for the near term, rather than at the time the site is initially ranked.
The recommended site priority would then be determined from the site's initial rank and consideration of these three additional factors using best professional judgement and ensuring protection of public health and the environment.

Suppose, for example, a Class 2 site is initially ranked Priority II because it has contaminated a primary aquifer which is not presently being used as a water supply. Suppose further that the site is located in a State designated Economic Development Zone. If, in this case, the community has no immediate plans or interest in the site for economic development, it may be appropriate to leave the ranking at Priority II rather than automatically "upgrade" the site. In another case, suppose there is strong community support to "upgrade" a Priority II site to Priority I because local government wants to encourage development in part of its municipality that is not designated an EDZ. If a developer steps forward to sponsor the investigation, the site may be considered for a new priority rank. However, consistent with the case above, without tangible local support for the project, the re-ranking may not yet be justified. Finally, if a Priority II site is part of a remedial action plan identified by the IJC because contaminated groundwater is impacting nearby surface water it would be re-ranked to Priority I.

The following definitions may help you arrive at your ranking decisions.

Definitions

Public or Private Water Supplies are those which provide water for human consumption.

Public Water Supplies are either community or noncommunity systems which provide piped water to the public for human consumption.

Community Systems are public water systems that have at least five service connections or regularly serve at least 25 year-round residents.

Noncommunity Systems are public water systems that are not community water systems.

Private Water Supplies are systems owned and used by an individual. (source - Chapter I State Sanitary Code, Part 5, Subpart 5-1)

Primary (Sole Source) Aquifers are highly productive aquifers presently being utilized by major municipal water supply systems as sources of water (USEPA sometimes designates these as sole sources of drinking water for a community).
Principal Aquifers are those known to be highly productive or whose geology suggests abundant potential water supply, but which are not intensively used as sources of water supply by major municipal systems at the present time. They are, in effect, the potential Primary Water Supply Aquifers of the future. (source-DOW Technical and Operational Guidance Series 2.1.3)

Note: The only difference between Primary and Principal Aquifers is that one is used intensively now, the other is not.

Significant Health Risk - An event or situation which causes a health advisory to be issued by the Department of Health. Usually the health advisory recommends an action to reduce the health threat to humans, such as relocation of people to an area that affords greater safety.

Acute Toxicity is an adverse effect that usually occurs shortly after or is a sudden onset resulting from a single dose of or exposure to a toxin or poison (a substance which through its chemical action kills, injures or impairs an organism).

Chronic Toxicity is an adverse effect that is irreversible or progressive or occurs because the rate of injury is greater than the rate of repair resulting from repeated doses of or exposure to a toxin or poison over a relatively prolonged period of time. (source-Part 70.1, MSDS Pocket Dictionary, Webster's Dictionary)

Bioaccumulation is the total contaminant burden of an organism (plant or animal) from environmental exposure by many diverse pathways by absorption, by diet, by original contamination from parental sources (reproductive products) (source NYCCR-Part 70.1)

Class "AA" Surface Water Body is a source of water supply for drinking, culinary or food processing purposes and any other usages. The waters, if subjected to approved disinfection treatment, with additional treatment if necessary to remove naturally present impurities, will meet NYSDOH drinking water standards and will be considered safe and satisfactory for drinking water purposes. (source-NYCCR Part 701.9)

Class "A" Surface Water Body is a source of water supply for drinking, culinary or food processing purposes and any other usages. The waters, if subjected to approved treatment equal to coagulation, sedimentation, filtration and disinfection, with additional treatment if necessary to reduce naturally present impurities, will meet NYSDOH drinking water standards and will be considered safe and satisfactory for drinking water purposes. (source - Part 701.119)

State Economic Development Zone is an area within the state that has been designated as an economic development zone pursuant to Article 18-B of the General Municipal Law. Such zones are established to stimulate private investment and private business development, promote job creation and retention, and revitalization for the state's most severely distressed areas by providing state benefits to businesses that expand or locate in one of the state's nineteen economic development zones. It is the public policy of the state to achieve these goals through the mutual cooperation of all levels of state and local government and the business community.
International Joint Commission is a body of people appointed by the U.S. President and Canadian Prime Minister which provides a framework for cooperation on questions relating to water and air pollution and the regulation of water levels and flows.

Health Advisories A statement issued by the New York State Department of Health which specifies limitation on human exposure to certain conditions, substances or organisms within defined areas or ecosystems. Advisory levels are lower than actionable levels. Some examples follow:

- **Water Advisory** - A health advisory issued by the Department of Health warning people to limit or avoid contact with water (e.g. drinking, bathing, wading).

- **Food Advisory** - A health advisory issued by the Department of Health warning people to limit or avoid eating certain foods grown in proximity to a contaminated site.

- **Fish Advisory** - A health advisory issued by the Department of Health warning people to limit or avoid eating certain kinds of fish taken from contaminated water.

- **Air Advisory** - A health advisory issued by the Department of Health warning people in proximity to a site that excess activity may cause reactions in persons and/or age groups with certain health conditions.

- **Soil Advisory** - A health advisory issued by the Department of Health warning people to limit or avoid contact with contaminated soils in the proximity of a site.

- **Water Notification** - A public water supply notification issued by the Department of Health warning suppliers of the exceedance of Part 5 of the Sanitary Code.

**Actionable Levels** - Actionable levels are regulatory levels set by an agency responsible for the protection of human health which serves as a threshold for an acceptable marketable commercial product. When exceeded, results in an item being removed from the market.

*Agency responsible for protection of human health*

**Interstate** - U.S. Food and Drug Administration
**Intrastate** - Department of Agriculture and Markets
Dear Interested Citizen:

The Departments of Environmental Conservation (DEC) and Health (DOH) have issued a revised system to prioritize Class 2 inactive hazardous waste sites for remedial action. Sites designated "Class 2" are a significant threat to the public health or the environment, and require action.

The Priority Ranking System establishes a process to help determine which of the more than 600 Class 2 sites in New York should be remediated first. These choices must be made because it is impossible to work on all of them at the same time. All Class 2 sites, whether Priority I, II or III, are scheduled to be remediated. Priority ranking only affects the order in which sites will be remediated.

In July 1990, a draft of the Priority Ranking System (PRS) was adopted on a trial basis. Priority rankings have been assigned to Class 2 sites and have been included in DEC's Quarterly Status Report since January 1991. Final review and approval of the PRS and public notification of its formal adoption were held off until recently when the results of the trial period were fully evaluated and the new inactive hazardous waste site regulations (Part 375) were approved.

Many people contributed valuable ideas and suggestions during the development of the draft PRS and its nearly two-year trial run. This input has resulted in a final Priority Ranking System that has become an effective, routine method to screen all Class 2 sites.

A summary of the Priority Ranking System is enclosed. The policy is formally set forth in the Division of Hazardous Waste Remediation's Technical and Administrative Guidance Memorandum (TAGM) Priority Ranking System for Class 2 Inactive Hazardous Waste Sites (HWR-92-4047). The TAGM is available upon request by writing to:

Mr. Robert Marino  
NYSDEC Division of Hazardous Waste Remediation  
50 Wolf Road  
Albany, NY 12233-7010

If you have questions about the Priority Ranking System, please contact Robert Marino at (518)457-0747 or Bruce Bentley at (518)485-8418 or 1(800)342-9296.

Sincerely,

Michael J. O'Toole, Jr.  
Director  
Division of Hazardous Waste Remediation

Enclosure
Summary

Currently there are more than 600 Class 2 inactive hazardous waste sites in New York State. A Class 2 site represents a threat to human health or the environment and requires action. However, choices must be made because it is impossible to work on all of them at the same time.

The Priority Ranking System (PRS) was developed as a tool to help determine which hazardous waste sites should be addressed first. A draft version of the PRS had first been developed and adopted in July 1990. The draft System went through a two-year trial run. Its final review, approval and public notice were held off until recently when the results of the trial period were fully evaluated and the new hazardous waste site regulations (Part 375) were approved.

The final version of the Priority Ranking System, presented here, incorporates two changes to correct problems revealed by the nearly two-year trial run:

- the way in which economic development considerations influence a site’s ranking was changed. Economic development considerations had been included as criteria in the Priority II category. Economic development considerations now are included as modifying criteria that may allow a site to move up one Priority ranking;

- sites which cause contamination of primary or sole source aquifers but do not yet impact or threaten water supplies (well head, intake, etc.) were moved from Priority I to Priority II.

For each Class 2 site, the Priority Ranking System considers environmental, natural resource and public health concerns. The system sets the order for site remediation by placing each Class 2 site into one of three Priority categories: I, II or III. Please note that all Class 2 sites, whether Priority I, II or III are scheduled to be remediated.

The Priority Categories

Priority I

Priority I is assigned to sites that should be remediated ahead of all other Class 2 sites. Priority I is assigned to sites where:

- water supplies are threatened or have been contaminated;
- human exposure to contaminants is a significant health risk;
- DOH has issued health advisories;
- contaminant levels are acutely toxic in fish and wildlife.
Priority II

Priority II is assigned to sites where:

- surface or groundwater classified for drinking water is threatened or has been contaminated;
- contamination has resulted in actionable levels, but not DOH health advisories. Actionable levels are contaminant thresholds for marketable consumables that, when exceeded, result in removal of the consumable from the market;
- contaminant levels are chronically toxic to fish and wildlife;
- contaminants have affected endangered, threatened or rare species, significant habitats, designated coastal zone areas, protected streams or regulated wetlands.

Priority III

Priority III is assigned to all other Class 2 sites. Remediation of these sites is scheduled to be undertaken after remediation of Class I and II sites.

The Ranking Process

A site is initially evaluated to determine the priority rank based on the environmental, natural resource and public health factors listed above. The site is then reviewed to determine if it meets three additional factors:

First: it must be determined if the site has been identified by the International Joint Commission (IJC) as a component of a Remedial Action Plan (RAP). If the site is part of an IJC RAP, it would be moved to the next higher priority category. (The IJC is a group appointed by the U.S. President and Canadian Prime Minister which provides a framework for cooperation on questions relating to water and air pollution and the regulation of water levels and flows.)

Second: a review of site conditions must be undertaken to determine if the site is within a designated New York State Economic Development Zone (EDZ). If the site is in an EDZ, it may be moved to the next higher priority category. However, upgrading based on economic development is not automatic.

Third: if a potential developer of a site is willing to enter into a Consent Order with NYSDEC to finance site investigation and cleanup, the site may be upgraded to the next higher priority category. However, the upgrade is not automatic. Consideration must also be given to the importance placed on the developer’s project by the community as expressed through the local government.

The recommended site priority ranking would then be determined based on site’s initial rank as well as consideration of these three additional factors using best professional judgement and ensuring protection of the public health and the environment.

The Priority Ranking System is an effective tool we now routinely use to help us to more efficiently apply our resources to the hazardous waste site challenge. As a result, we are better able address the remediation of New York’s hundreds of hazardous waste sites.