

PRESENTATION OUTLINE
Environmental Issue Spotting 101
Presented at the Fall Meeting of
The Environmental Law Section
Of the New York State Bar Association
1.5 MCLE Credit Hrs. (75 Minutes)
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I. Introduction

The purpose of this presentation is to provide a procedure to identify categories of N.Y.S. Environmental Conservation Law (“ECL”) violations based on an inspection video generated by the New York State Department of Environmental Conservation (the “DEC”). The presentation will also explore the common errors that can be drawn from the review of raw environmental evidence and practical suggestions for the further investigation of environmentally impacted pollution sites.

Why is issue spotting important?

- Due diligence in real estate transactions,
- Avoid criminal or civil liability for new owners, lenders, government bodies
- Establishing affirmative defenses to clean-up liability or violations
- Assume “**guilty or not, you have to pay**” applies in most liability situations
- Municipal Land Banks (new state law)
- State Environmental Quality Review Act (“SEQRA”), ECL Article 8,
Environmental Assessment Form (“EAF”)

Other issues related to this presentation:

- Evidence collection;
- Forensic Sampling;
- 4th and 5th Amendment Search, Seizure and Self Incrimination;
- criminal enforcement.

For purposes of viewing this video, assume the following facts:

- no NYSDEC (state) permits;
- no prior NYSDEC inspections;
- Facility has a local POTW (sewer) permit;
- Facility is engaged in providing metal plating services which use chemicals and materials containing heavy metal compounds and corrosives.

ASSUME All MATERIALS DEPICTED ON THE DVD, SOLID, LIQUID AND GASEOUS ARE HAZARDOUS TO YOUR HEALTH!!!!

II. Potential Violations, by NYS Environmental Media

Solid Waste - Definitions, Recycling, Releases, Unauthorized disposal?

Unauthorized SW Disposal - 6 NYCRR Part 360-1.5(a)(1)(2),
Unauthorized SWMF - 6 NYCRR Part 360-1.7(a)(1)

Regulated Waste (Industrial Commercial Process)(Transporter Violations)
6 NYCRR Part 364

Hazardous Waste, ECL Article 27, Title 9, 6 NYCRR Part 371

Characteristic Categories (6 NYCRR Part 371.3)

Ignitable
Corrosive
TCLP (toxic leachate test, includes heavy metals)
Reactive

PCB (NY only)

Listed Hazardous Wastes by Industrial Process (Part 371.4)
(HW categories are not mutually exclusive)

Hazardous Waste Management Fed. Delegation
(RCRA derived regulations)

6 NYCRR Parts 372 and 373
Standards for Generators, Transporters, TSDFs,
Permit Requirements for TSDFs and Transporters,
Labeling Requirements, Reports, Manifests, Records Retention,
Financial Assurance, Safety, Storage
(the RCRA “Home Run”, approx. 25 multiple facility violations)
<http://www.dec.ny.gov/chemical/8770.html>

Hazardous Substance Violations, ECL Articles 37, 40

(Product vs. Waste dilemma)

6 NYCRR Parts 595-597, 598

Haz. Sub. releases

Chemical Bulk Storage, Spill Reporting Stds, inspections
tank registrations, closure requirements,
stds for pipes and valves (infrastructure)

Is this a CBS Facility by Definition?

- Above ground tanks on site (185 gallons)
- Non-stationary tanks storing 1,000kg/2,200 lbs
(excludes 55 gallon drums)

- Unclosed tanks
- USTs (any capacity) ?
(excludes PBS, “petroleum and process tanks”)

Water Quality Violations – ECL Article 17

Are there water pollutants, point sources, permits, impacted waterways of the state, and releases depicted in the video? **Groundwater is a NY waterway.**

GA Groundwater Permit Standards
6 NYCRR Part 703, 703.5, 703.6 (standards)
[ex. Effluent limit for cyanide is 400 ppb]

ECL §17-0501 (non-point source)

Point Source: “discernable, confined and discrete conveyance”

- ECL 17-0501(16)

ECL §17-0701(1)(a) and (b), unpermitted construction/use

ECL §17-0803

ECL §17-0807(4) [recall city POTW permit]

Air Violations

Are there HAPs? Emission source(s)? Permits? Registrations?

Unpermitted Emission Source, 6 NYCRR Part 201,

Title V Eligible, 6 NYCRR Part 201-6

Minor Facility Registration, 6 NYCRR Part 201-4

Public Nuisance, 6 NYCRR Part 211.2

Generic Opacity Prohibition, 6 NYCRR Part 211.3

PHL Section 225, NYSDOH Nuisances Which m\May Affect Life and Health

Surface Coating Process Regulations, 6 NYCRR Part 228

- 6 NYCRR Part 228.9 - allows for inspections to determine if Part 228 applies if process is not specifically listed in facility table.

III. Reporting and Miscellaneous Violations

- Unauthorized Disposal/ Possession/Transportation of Hazardous Wastes,
ECL 27-0914(1-3)

- Failure to Report a Spill? ECL 17-1743, 6 NYCRR Part 597

DEC HOTLINE: 1-800-457-7362 (In NYS)

1-518-457-7367 (Outside NYS)

DEC Tip Line: 1(800) TIPP DEC (for suspected ECL violations)

- Toxic Release Index or TRI, SARA Title 3, MSDS for each chemical
- Failure to make waste determination? (both as a solid and hazardous waste)?
6 NYCRR Part 372.2(a)(2)
- Superfund/ Remediation? Article 27, Title 13, 6 NYCRR Part 375
- CERCLA Natural Resource Damages? 42 USC 9607(f)
- Fish/Wildlife, Lands/Forests/ Tidal or Freshwater Wetland/ Art. 15 waterways
- Federal Violations, Note CERCLA Emergency Clean Up Authority?
(\$1,000.00, or more per drum removal)
- Local Law Violations? (Hint: recall the local POTW, see V.below)
- ECL Summary Abatement (Imminent threat emergency authority)?
ECL 71-0301
- Evidence Seizures (failure to seize garden hose by Blue Lagoon)
- Dye Test to confirm source releases of Blue Lagoon

IV. NY and Federal Labor Law/ Indoor Air Quality Violations

NYSDOH – Indoor Air Quality Stds -
<http://www.health.state.ny.us/environmental/indoors/air/guidance.htm>

USEPA – Indoor Air Quality Stds
<http://www.epa.gov/iaq/pubs/index.html>

N.Y.S. Labor Law

§ 299. Ventilation he factory work room excessive heat be created therein, there shall be provided, maintained and operated such special means or appliances as may be required to reduce such excessive heat.

2. All machinery creating dust or impurities in quantities tending to injure the health of employees shall be equipped with proper hoods and pipes connected to an exhaust fan of sufficient capacity and power to remove such dusts or impurities; such fan shall be kept running constantly while such machinery is in use
3. If dust, gases, fumes, vapors, fibers or other impurities are generated or released in the course of the business carried on in any workroom of a factory, in quantities tending to injure the health of the

employees, suction devices shall be provided which shall remove such impurities from the workroom, at their point of origin where practicable, by means of proper hoods connected to conduits and exhaust fans. Such fans shall be kept running constantly while the impurities are being generated or released.

§ 875. Definitions. When used in this article:

2. "Toxic substance" means any substance which is listed in the latest printed edition of the national institute for occupational safety and health registry of toxic effects of chemical substances or has yielded positive evidence of acute or chronic health hazards in human, animal or other biological testing.

Material Safety Data Sheets (state MSDS equivalent)

§ 876(4). Subject to the limitations set forth in section eight hundred seventy-seven of this article, any manufacturer, importer, producer or formulator of any toxic substance shipped or transported or sold for any use within the state must provide, upon request, the following information:

- (a) the name or names of the toxic substance, including the generic or chemical name;
- (b) the trade name of the chemical and any other commonly used name;
- (c) the level at which exposure to the substance is determined to be hazardous, if known;
- (d) the acute and chronic effects of exposure at hazardous levels;
- (e) the symptoms of such effects;
- (f) the potential for flammability, explosion and reactivity of such substance;
- (g) appropriate emergency treatment;
- (h) proper conditions for safe use and exposure to such toxic substance;
- (i) procedures for cleanup of leaks and spills of such toxic substance.

US Department of Labor

Occupational Safety and Health Administration

<http://www.osha.gov/>

Definition of Imminent Danger

Section 13(a) of the Act defines imminent danger as ".....any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act."

Requirements. The following conditions must be met before a hazard becomes an imminent danger:

- There must be a threat of death or serious physical harm. "Serious physical harm" means that a part of the body is damaged so severely that it cannot be used or cannot be used very well.
- For a health hazard there must be a reasonable expectation that toxic substances or other health hazards are present and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency. The harm caused by the health hazard does not have to happen immediately.
- The threat must be immediate or imminent. This means that you must believe that death or serious physical harm could occur within a short time, for example before OSHA could investigate the problem.
- If an OSHA inspector believes that an imminent danger exists, the inspector must inform affected employees and the employer that he is recommending that OSHA take steps to stop the imminent danger.
- OSHA has the right to ask a federal court to order the employer to eliminate the imminent danger.

V. NYS Sewer Regulation (POTW)

NY Model Sewer Law

<http://www.dec.ny.gov/chemical/8729.html>

▪ Section 902 - General Prohibitions

No user shall contribute or cause to be contributed, in any manner or fashion, directly or indirectly, any pollutant or wastewater which will interfere with the operation or performance of the POTW. These general prohibitions apply to all such users of a POTW whether or not the user is subject to National Categorical Pretreatment Standards, or any other National, State, or Local Pretreatment Standards or Requirements.

▪ Section 1115 – Criminal Penalties (in part)

- Any person who willfully violates any provision of this Law or any final determination or administrative order of the Superintendent made in accordance with this Article shall be guilty of a Class A Misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than Five Hundred Dollars (\$500) nor more than One Thousand Dollars (\$1,000), or imprisonment not to exceed one (1) year or both. Each offense shall be a separate and distinct offense, and, in the case of a continuing offense, each day's continuance thereof shall be deemed a

separate and distinct offense.

- Any User who knowingly makes any false statements, representations, or certifications in any application, record, report, plan or other document filed or required to be maintained pursuant to this Law, or wastewater permit, or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required under this Law shall be guilty of a Class A Misdemeanor and, upon conviction, shall be punished by a fine of not more than One Thousand Dollars (\$1,000.00) per violation per day or imprisonment for not more than one (1) year or both.
- **New Sewer Regulations**
- <http://www.dec.ny.gov/regulations/39559.html>
- **Sewage Pollution Right to Know Act (ECL 17-0826-a)**
- <http://www.dec.ny.gov/chemical/90315.html>
- **Sewage Pollution Right to Know Act: Another Regulatory Requirement for POTW Operators, by Michael J. Lesser**
- http://nysbar.com/blogs/environmental/spill%20article_201307291212.pdf

VI. ASTM Phase 1

<https://www.astm.org/Standards/E1527.htm><https://www.astm.org/Standards/E1527.htm>

VII. What ECL Violations Did you Spot? Conclusions and Recommendations