UDRBC HEARING

I come before you today as president of the Upper Delaware River Basin Citizens Association, which represents the landowner's throughout the Delaware River basin-their rights, lifestyle and heritage. Our organization is comprised of the landowners whom are responsible for the clean air, water and overall quality of the environment that we all enjoy today. We are the stewards of this land, many of whom have lived, worked and raised their families in the Delaware basin for generations. The UDRBC is in support of sustainable natural gas exploration throughout the basin just like our neighbors in the Susquehanna River basin. The 2015 report by the SRBC executive director states "based on the analysis of the SRBC's nutrient and sedimentation data, the health of the Susquehanna overall is improving."

The fact that the same three commissioners on the SRBC, whom voted yes to Natural Gas exploration, and yet on the DRBC, vote ***no*** to natural gas exploration because they ***care so much about the water quality in the Delaware River*** are about to be exposed for who they are. A façade! A lie! Yes, my friends, a lie!

The Barnes Landfill is an abandoned landfill, built on the side of the mountain back in 1947, overlooking the Delaware River in Barryville, NY. It was operated until approximately 1989 and was in the closure process until the money ran out in 2003. NYS then found that the pollutants contained in the landfill were so hazardous that they declared it a superfund site in 2004. Apparently, no further work for closure and containment were undertaken and the leachate, thousands of gallons per day, was allowed to flow from the base of the landfill into a nearby creek, then into the Delaware; not a quarter mile away. Unfortunately it is still flowing into the Delaware as we speak. You can go to YOUTUBE, "Barnes landfill leachate, to see for yourself!

I became aware of this environmental nightmare in 2012 and wrote a letter to Governor Cuomo (Exhibit A) and copied every governor and Attorney General from each State affected downstream, as well as Carol Collier, the former Executive D

irector, of the DRBC alerting them to this environmental tragedy.

I would like to read you an excerpt from the letter to Governor Cuomo, which reads as follows:

"I have written you numerous letters in the past year and a half, pointing out just how hypocritical you are when it comes to protecting New Yorkers and our fellow Americans downstream in the Delaware River Basin. I have learned there is not one landfill super fund site but two landfill super fund sites, in the Delaware River Basin, that are spewing their hazardous compounds into the drinking water of millions of people downstream. In March of 2011, Willie Janeway, the Director of NYS Region 3's Department of Environmental Conservation, came to my DEC Part 360 permitted solid waste facility and we traveled down to the old Barnes Landfill in Barryville, NY, and we walked through the site. I showed him exactly where at the base of the landfill the large holding tank would overflow dumping thousands, ultimately millions, of gallons of contaminated hazardous waste effluent from the collection system down through the woods crossing numerous private properties into the brook and shortly thereafter into the Delaware River.

Mr. Janeway assured me that the NYS DEC would be taking some sort of action to mitigate this problem preventing these chemicals and pollutants from entering the drinking water of millions of Americans downstream. However, to-date, nothing has been done and this landfill continues to spew its pollutants into the Delaware River on a daily basis for the past decade."

It is almost beyond comprehension, however, I only received one reply to my letter and that was from a NYDEC Staff Personal Martin Brand. I have his letter marked as (Exhibit B) for your review. I would like you to read a small excerpt from NYDEC staffer Mr. Martin Brand:

"The Barnes Landfill site is a former private municipal landfill operated from 1947 to 1989 regulated under the solid waste rules at 6 NYCRR Part 360. The site is not an inactive hazardous waste disposal site (or "Superfund" site) and there is no indication that hazardous materials were ever disposed in the landfill. The Department is aware that there are continuing issues over the control of control leachate from the leachate collection system and leachate storage tank. You pointed out these concerns during a site visit with then Regional Director William Janeway during a site visit with him in March 2011. My staff from the Division of Material Management subsequently inspected the site on September 22, 2011. These inspections revealed some concerns regarding the stability of the soil cover and vegetative layers over the existing synthetic geomembrane (the geomembrane

is exposed in several areas, though it is apparently intact and functioning) and leachate was observed in the vicinity of the leachate storage tank and the downgradient property line. The vegetation is uncontrolled due to a lack of routine maintenance.

While of significant concern, none of the areas exhibit the magnitude of potential environmental impact as characterized in your letter. Our inspections have not revealed any leachate or groundwater discharges to the Delaware River, tributaries, or other surface water bodies, and we have not observed damage to neighboring properties. It should be noted that the leachate flows at the site, while still of concern, have improved markedly since the cap was completed in May of 1992.

We are evaluating appropriate actions to solve the problems noted by you and my staff. With our assistance, the New York State Office of Attorney General (OAG) is investigating past and current owners and potentially responsible parties that could be approached, from a legal perspective, to take responsibility for the site. As you know, the escrow fund established years ago to provide funds for maintenance has been depleted. Unfortunately, there are currently no funding mechanisms available to the State for these types of situations."

So, NYS, with a $96 billion dollar budget in 2004, didn't, and still isn't doing the right thing and the DRBC, with $30 million in the bank won't spend a dollar protecting the drinking water of millions downstream. How many people south of Barryville, NY have suffered health effects from exposure to the superfund leachate over the past 15 years? We will never know, however, litigation may be the only answer to stop this travesty and hold those individuals, states and the DRBC accountable for poisoning millions of people downstream whom the DRBC was chartered for and given the responsibility of ensuring clean water to drink, fish and recreate in!! (Exhibit C)

I find this statement from Governor Cuomo's Department of Environmental Conservation Staff, most reprehensible, callous and irresponsible. I know firsthand how concerned the NYDEC was with the containment and treatment of this leachate as my Environmental Company performed services for Mr. Ligouri, whom owned the landfill from the mid-nineties until he passed away prior to 2003. It was during the closure of the landfill we had a heavy rain event and it was impossible to contain and remove leachate flowing to the two 5000 gallon holding tanks. The leachate overflowed these tanks just onetime and the NYDEC hit Mr.

Ligouri with a felony charge and a heavy fine for violating the federal clean water act. Mr. Ligouri passed away soon after this. Exhibit D

Governor Cuomo's is a Commissioner on the DRBC and has stated he will vote for the Fracking Ban along with current Governors of PA and NJ with the pretense that they are concerned about the water quality of the Delaware River and the possibility of a potential accident if natural gas exploration is allowed in the basin. The hypocrisy and arrogance of these Governors is a shameful and is a rallying cry for landowners and the politicians who represent us throughout the basin. The DRBC is an agenda driven, rogue Federal agency, bullied by biased self-severing environmentalists that operate at the whim of organizations such as the William Pen Foundation to do their bidding. Why has the Delaware River Keeper or the Catskill Mountain Keeper, whom they claim are champions of the Environment, why are they not campaigning like our organization, "The UDRBC" to clean up the Barnes Landfill and prevent leachate from a NYS superfund site from entering the Delaware and potentially harming so many people downstream? (Exhibit E)

I am presenting these facts to the PA State Government Committee to illustrate the hypocrisy of the DRBC so you can better understand the intent of the DRBC which is not about the water quality in the Delaware Basin, it's about their true agenda which is about regulation, control, and incursion into the sovereignty of PA law. On behalf of all the PA landowners in the Delaware River Basin we implore you to protect the sovereignty of the PA Law, our rights as landowners and hold the DRBC responsible for allowing the pollution of the drinking water of millions of Pennsylvanians downstream for a decade and a half.

Ned Lang

President of UDRBC

June 10, 2013

The Honorable Andrew M. Cuomo
Governor of New York State
NYS State Capitol Building
Albany, NY 12224

Dear Governor Cuomo,

WHAT HAPPENED?????

I started this letter out by asking "what happened" because when you came into office, a year and a half ago, you presented yourself to New York State citizens as a person of hope who would, do the right thing for the hard working New Yorker, assist New York State businesses in their attempt to work through the recession and, most importantly, ensure that environmental issues are balanced and harmonized with the needs of New York's working class and business community.

While you have promoted in the commercials I see and hear in the news media, a very rosy picture, one which is skewed and contrary to the reality of what is really taking place on a daily basis in New York State. It is extremely evident that the real purpose of your programs is not to help and assist New York State's business community but to harass and berate that business community with evermore new rules, regulations, and regulators and bureaucrats in which to enforce them, in an effort to patch the holes in your budget.

I have written you numerous letters in the past year and a half, pointing out just how hypocritical you are when it comes to protecting New Yorkers and our fellow Americans downstream in the Delaware River Basin. I have learned there is not one landfill super fund site but two landfill super fund sites, in the Delaware River Basin, that are spewing their hazardous compounds into the drinking water of millions of people downstream. In March of 2011, Willie Janeway, the Director of NYS Region 3's Department of Environmental Conservation, came to my DEC Part 360 permitted solid waste facility and we traveled down to the old Barnes Landfill in Barryville, NY, and we walked through the site. I showed him exactly where at the base of the landfill the large holding tank would overflow dumping thousands, if not millions, of gallons of contaminated hazardous waste effluent from the collection system down through the woods crossing numerous private properties into the brook and shortly thereafter into the Delaware River.

Mr. Janeway assured me that the NYS DEC would be taking some sort of action to mitigate this problem and preventing these chemicals and pollutants from entering the drinking water of millions of Americans downstream. However, to-date, nothing has been done and this landfill continues to spew its pollutants into the Delaware River on a daily basis for the past decade.

I have recently learned that another super fund site, the Cortese Landfill, has not been completely cleaned up and this landfill has been releasing chemicals and heavy metals into the ground surface water since the early 1980's.

The Cortese landfill also lays adjacent to the Delaware River and happens to be located just north of my property and contiguous to my property of 235 acres with 1 mile of river front. My family and friends have been swimming in the Delaware River, approximately 400 yards south of the discharge point, since my discharge from the US Coast Guard in 1983, therefore exposing not just the millions of people downstream to these pollutants and chemicals but my family and friends also.

In fact, if I had not been recently elected to the town board of the Town of Tusten, I would have had no knowledge that this Superfund site had not been cleaned up because the contractor notified the Town of Tusten that they would be doing additional work at this site. I find this absolutely irresponsible and disturbing that NYS allowed the continual pollution of the Delaware River and did nothing to properly contain and prevent the discharge of these hazardous wastes through the proper closure of these facilities. When the responsible parties for these landfills, have either moved, passed away or gone out of business, NYS turned its back on what is the right and responsible thing to do which is to clean up these sites and not to allow the contamination of drinking water of millions of people downstream. However, when NYS has to spend its own money it turns a blind eye to what is the fair and right thing to do by any standard.

A case in point can be found when you look at the new DEC Part 360 Permittee facility on-site environmental monitoring program (OSEM). The DEC monitors come to my facility on a regular basis and they search my facility trying to detect any type of violation. When they can find none, the monitor told me and I quote, "we cannot see any violations at your facility, however, we have several housecleaning issues that you will have to attend to." So while NYS DEC is enforcing "housecleaning issues" of DEC Part 360 Permittee facilities that are actually doing the right thing every day of the week and not polluting the ground water or drinking water of millions of people, NYS allows the ongoing pollution of the Delaware River.

When I first wrote to notify you of the issues I had with the Barnes Landfill, I asked that you understand that my comments were out of concern for the damage to the environment, drinking water and the health and welfare of not just NYS residents but the millions of residents of Pennsylvania, New Jersey, Delaware and Maryland. In typical NYS fashion, I was then audited by the NYS Department of Labor, NYS Department of Transportation, NYS Sales Tax and now by NYS DEC monitors for housekeeping issues.

I do not really believe that you think by bullying my company and employees will stop me from speaking out about NYS's callous and irresponsible actions when it comes to the real protection of our environment. In fact, I'm sure you know there are laws against bullying and you should practice what you preach.

As you can see by the list of people being cc'd at the bottom of this correspondence, I am continuing to expand my message so that all people, both in NYS and outside NYS know exactly, what you stand for and at some point, NYS and yourself will be held accountable for the lives and families you have destroyed by pouring toxins into the drinking water of our fellow Americans.

Sincerely,

Edward "Ned" Lang
EL:rcm

cc:

State of New York
Senator John J. Bonacic, 201 Dolson Avenue, Suite F, Middletown, NY 10940
Senate Majority Leader Dean Skelos, 55 Front Street, Rockville Centre, NY 11570
Assembly Speaker Sheldon Silver, 250 Broadway, Suite 2307, New York, NY 10007
Assemblyman Alan Maisel, 2424 Ralph Avenue, Brooklyn, NY 11234
Commissioner Joe Martens, NYS DEC, 625 Broadway, Albany, NY 12233-1010
Acting Regional Director of Region 3 DEC, Thomas Rudolph, 21 S Putt Corners Rd, New Paltz, NY 12561
US Congressman Chris Gibson, 92 Sullivan Ave, Ferndale, NY 12754
Sullivan County Chamber of Commerce, PO Box 405, Mongaup Valley, NY 12762
Sullivan County Partnership for Economic Growth, 198 Bridgeville Rd., Monticello, NY 12701

State of Pennsylvania
Governor Tom Corbett
Lt Governor Jim Cawley
Main Capitol Bldg – Room 225
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State of Pennsylvania
Attorney General Kathleen Kane
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Harrisburg, PA 17120

cc: -continued

Michael A. Nutter

Mayor of Philadelphia, PA
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Linda D. Thompson
Mayor of Harrisburg, PA
King Government Center
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Harrisburg, PA 17101

State of New Jersey
Governor Chris Christie
Lt Governor Kim Guadagno
Office of the Governor
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State of New Jersey
Acting Attorney General
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Trenton, NJ 08625

Carol R. Collier, Executive Director
Delaware River Basin Commission (DRBC),
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W Trenton, NJ 08620

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Mayor of Trenton, NJ
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State of Delaware
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Lt Governor Matt Denn
Attorney General Joseph R. Biden III
Carvel State Office Bldg.
820 N French St.
Wilmington, DE 19801

cc: -continued

Louis L. Redding
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Wilmington, DE 19801

Carleton E. Carey, Sr.
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Dover, DE 19803-0475

State of Maryland
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Lt Governor Anthony G. Brown
State House
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Annapolis, MD 21401

State of Maryland
Attorney General Douglas F. Gausler
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Baltimore, MD 21202

Joshua J. Cohen
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Annapolis, MD 21401

Stephanie Rawlings-Blake
Mayor of Baltimore, MD
100 North Holliday St.
Baltimore, MD 21202

New York State Department of Environmental Conservation
Division of Materials Management - Region 3
21 South Putt Corners Road, New Paltz, NY 12561-1620
Phone: (845) 256-3123 • **FAX:** (845) 255-3414
Website: www.dec.ny.gov **E-mail:** mdbrand@gw.dec.state.ny.us

Joe Martens
Commissioner

August 9, 2013

Edward Lang
EnviroVentures
P.O. Box 495
Narrowsburg, NY 12764

RE: Barnes and Cortese Landfills

Dear Mr. Lang:

Acting Regional Director, Thomas Rudolph, has asked me to respond to your letter of June 10, 2013 regarding your concerns over the potential impacts associated with two closed landfills in Sullivan County, New York. You have raised questions about the status of the Barnes Landfill in Barryville, NY and the Cortese Landfill in Narrowsburg, NY.

The Barnes Landfill site is a former private municipal landfill which operated from 1947 to 1989 and regulated under the solid waste rules at 6 NYCRR Part 360. The site is not an inactive hazardous waste disposal site (or "Superfund" site) and there is no indication that hazardous materials were ever disposed in the landfill. The Department is aware that there are continuing issues over the control of leachate from the leachate collection system and leachate storage tank. You pointed out these concerns during a site visit with then-Regional Director William Janeway during a site visit with him in March 2011. My staff from the Division of Materials Management subsequently inspected the site on September 22, 2011. These inspections revealed some concerns regarding the stability of the soil cover and vegetative layers over the existing synthetic geomembrane (the geomembrane is exposed in several areas, though it is apparently intact and functioning) and leachate was observed in the vicinity of the leachate storage tank and the downgradient property line. The vegetation is uncontrolled due to a lack of routine maintenance.

While of significant concern, none of the areas exhibit the magnitude of potential environmental impact as characterized in your letter. Our inspections have not revealed any leachate or groundwater discharges to the Delaware River, tributaries, or other surface water bodies, and we have not observed damage to neighboring properties. It should be noted that the leachate flows at the site, while still of concern, have improved markedly since the cap was completed in May of 1992.

We are evaluating appropriate actions to solve the problems noted by you and my staff. With our assistance, the New York State Office of the Attorney General (OAG) is investigating past and current owners and potentially responsible parties that could be approached, from a legal perspective, to take responsibility for the site. As you know, the escrow fund established years ago to provide funds for maintenance has been depleted. Unfortunately, there are currently no funding mechanisms available to the State for these types of situations. The NYSDEC is working on a future legislative initiative to fund the investigation and remediation of these "orphan" landfills. In the meantime, be assured the Department will continue to explore all avenues to bring the landfill into full compliance with the regulations.

The 5-acre Cortese Landfill site was operated from 1970 to 1981 by the John Cortese Construction Company. Industrial wastes, including waste solvents, paint thinners, paint sludges, and waste oils, were disposed of at the landfill in 1973. Records indicated that an estimated 5,000 to 8,000 drums were buried on the site at that time. In the early 1980s, the NYSDEC sampled the site and found it was contaminated.

Due to the severity of contamination, the site was accepted for inclusion on the National Priority List (NPL) of federal Superfund sites in 1986. Studies were begun by responsible parties under U.S. Environmental Protection Agency (EPA) oversight shortly thereafter in an effort to completely characterize the nature and extent of contamination.

~~A decision on how best to clean the site was reached in September of 1994, identifying drum~~ removal, capping of the landfill, and groundwater extraction and treatment as the selected remedy. In 1995, the Town of Tusten excavated, and disposed of off-site, contaminated soil from two small septage lagoons south of the landfill and constructed a storm water management system around the landfill in order to reduce leachate production. During the course of this effort, 300 drums filled with hazardous liquids, solids, and sludges were removed from an area adjacent to the septage lagoons. In 1996, the responsible parties conducted a drum removal under EPA oversight which resulted in the excavation and removal of more than 5,000 drums, three tractor-trailer loads of hazardous sludge, and 50 dump trucks of contaminated soil. The construction of the cap component of the remedy was completed in October 1998.

A groundwater study was completed in 2001, and soil cores were collected from beneath the landfill mass in 2004. While this data was ultimately used to design the treatment system, new information led the USEPA, to reconsider the groundwater remedy, and in 2010, they issued a new decision with respect to cleaning up the groundwater. The new remedy targets the source of the continuing contamination (i.e., remaining chemicals which exist within the landfill beneath the water table). This will be achieved by injecting air beneath the water table and removing contaminants that are freed by the bubbling action via a system known as soil vapor extraction. This system is currently being constructed, and is expected to be operational by the late summer of 2013. Other components of the new remedy include the injection of substances into the groundwater to promote biological destruction of contaminants, as well as a thorough monitoring of off-site groundwater to assure that natural processes are capable of removing any remaining contamination.

As can be seen, the remedy for the Cortese Landfill has not been an easy one to implement; however, great effort has been made throughout the process to ensure that the public and environment are protected to the maximum extent possible. To that end, the USEPA, with NYSDEC and New York State Department of Health support, has required the characterization of all exposure pathways and is confident that there are no unacceptable risks to nearby residents. The basis of that determination is that: groundwater immediately downgradient of the landfill is not used as a drinking water source; a public supply well located in the vicinity of the landfill has been tested repeatedly, and no site contaminants have been found; and, the potential for soil vapors to carry volatile contamination into households has been assessed and found not to be a concern. While minor exceedances of surface water standards have been detected immediately adjacent to a visible seep in some sampling events, testing of surface water downstream of that area has met standards. Regardless of the current state of risk, the USEPA and NYSDEC are seeking further remedy as required by law and regulation, with a goal of returning the site to its pre-release condition to the maximum extent practicable.

Thank you for the references to various articles about the area and the Delaware River. We share your concerns and your obvious long-time commitment to the health and well being of the area. If you have further questions about these two sites, feel free to contact me or my staff.

Sincerely,

MBrand

Martin D. Brand, P.G.
Regional Materials Management Supervisor

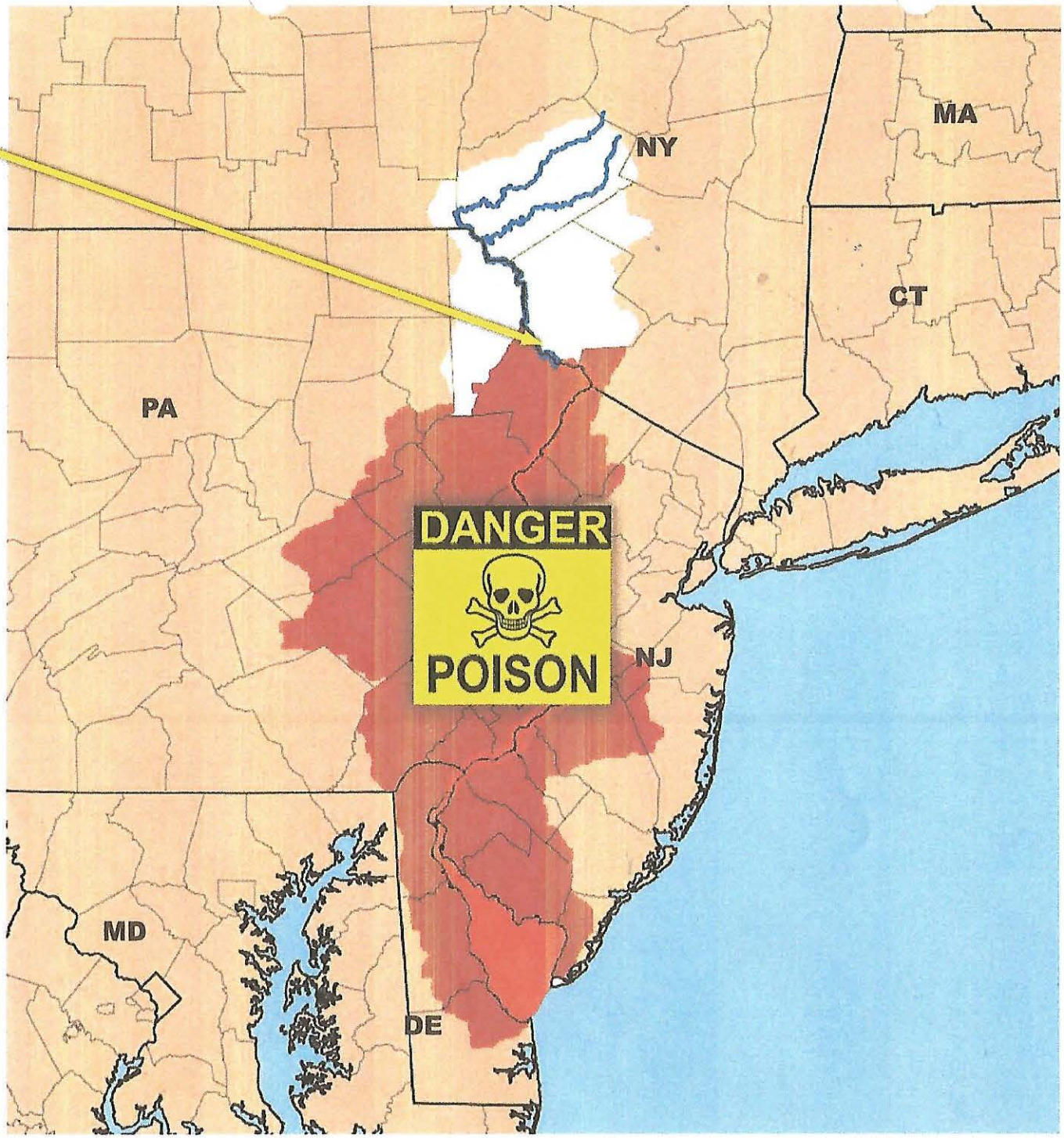
ecc: T. Rudolph, Acting Regional Director, NYSDEC Region 3
W. Rudge, NYSDEC Region 3
J. Brown, NYSDEC DER Albany
S. Parisio, NYSDEC Region 3

BARRYVILLE, NY

LEACHATE, UNABATED AND UNTREATED HAS BEEN FLOWING UNRESTRICTED FROM A DESIGNATED SUPERFUND SITE IN BARRYVILLE, NY, SINCE 2001.

THE RED AREA REPRESENTS MILLIONS OF GALLONS ANNUALLY, THAT THIS TOXIC SUBSTANCE HAS CONTAMINATED EVERYTHING DOWNSTREAM, AFFECTING SEVERAL STATES, HUNDREDS OF MUNICIPALITIES, AND MILLIONS OF PEOPLE.

Barnes Leachate Overflow
on YouTube to see video!



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Landfill upkeep money running out

By DAVID HULSE

MINISINK FORD, NY — After explaining earlier that the agency was too understaffed to keep a more regular watch on leachate spillage at the former Barnes Landfill, a state Department of Environmental Conservation (DEC) spokesman last week warned that escrow money to fund maintenance of the landfill closure will expire in two years.

Where more money will come from is unknown, because the state currently does not know who the owner of record is, DEC Natural Resources Supervisor Bill Rudge told the Upper Delaware Council (UDC) last week.

Before the state shut the landfill down in late 1980s, a sale by then owner, the late Emmett "Steve" Barnes, to then principal client, Robert Liguori, was rumored. But no deed was ever filed by the Westchester waste carter.

If no new deed is found, Rudge said the DEC would begin legal action against Barnes estate to continue funding the closure costs.

Overflowing leachate collection tanks have been the chief problem and Rudge said the steep access road leading to the two 5,000 gallon tanks has several times caused the pumping/collection truck to get stuck at the site. Those tanks need to be emptied every two weeks.

In addition to that cost, test wells have to be maintained and regularly sampled. Rudge said recent testing of samples showed no change in historic levels and no presence of any accumulated explosive gases.

UDC members had concerns, mostly related to more frequent monitoring of the site.

Rudge said the DEC has no money for additional monitoring staff, and while an automatic spill alarm could be installed, that would require new telephone and installation costs.

The former landfill is immediately upgrade from the large Kittatinny Campground site in Minisink Ford and the proximity of the two led to complaints about the landfill in 1986, after the landfill began accepting trash from Rockland and Westchester carters.

Liguori, who had taken over management of the landfill, was eventually arrested by DEC officers on felony water pollution charges and the landfill closed down shortly thereafter.

This page last modified on July 11, 2003 at 01:33:08 A.M.

GIBBONS

New York Seeks to Recover Landfill Closure Costs Through Inventive Use of Superfund

In-Sites
(John H. Klock, Edward F. McTiernan)
July 31, 2002
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New York's Environmental Quality Bond Act[1] was enacted in 1986, in part, to "assist financially strapped towns meet their obligations under the New York State Environmental Conservation Law ("ECL") in responding to the threats posed by inactive hazardous waste sites owned and/or operated by towns."[2] This financial assistance comes in the form of reimbursement from New York for seventy-five (75%) percent of the town's cost to properly close its landfill. Recently the New York Department of Environmental Conservation and the New York Attorney General have been attempting to recoup EQBA funds disbursed to municipalities through cost recovery actions under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").[3] New York has also resorted to blurring the distinction between inactive hazardous waste sites and traditional municipal landfills that were never used for disposal of hazardous wastes. New York's attempt to shift the routine costs of closing local landfills in accordance with State standards from the municipal owners and operators to private parties presents both legal issues and policy considerations, which are explored below.

The Closure Dilemma For Municipal Landfills

New York has been able to blur the distinction between inactive hazardous wastes sites and municipal landfills because of a dichotomy between the Resource Conservation and Recovery Act ("RCRA")[4] and CERCLA. Under RCRA and its implementing regulations, household wastes, as well as solid wastes from many commercial activities containing low levels of hazardous substances, are not regulated as hazardous wastes.[5] Nevertheless, it is well-established that municipal solid waste contains CERCLA hazardous substances and that disposal of municipal solid waste can give rise to CERCLA liability.[6]

RCRA allows parties to legitimately dispose of wastes containing hazardous substances at municipal landfills. Thus, any municipal landfill could - and usually does - contain hazardous substances which could become the source of soil or groundwater contamination. However, New York law does not leave municipal landfills unregulated. Rather, municipal landfills are "solid waste facilities" subject to extensive permitting and operating requirements pursuant to the ECL.[7] When a municipal landfill reaches the end of its operating life it must be closed in accordance with the ECL and a final cover system or cap must be installed.[8] The regulations governing landfills are intended to address the well known and fully anticipated risk that municipal landfills contain wastes which include hazardous substances. Importantly, the minimum landfill closure requirements of the ECL must be followed whenever a municipal landfill is closed regardless of whether or not hazardous substances are present.

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How The EQBA Operates

When the EQBA was enacted in 1986 its scope was limited to inactive hazardous waste sites. The EQBA was amended in 1990[9] to extend coverage to include any landfills owned or operated by a municipality rather than solid waste disposal landfills only.[10] As a result, when a landfill reaches the end of its useful life and the town complies with the ECL by developing a plan for the closure of its landfill, the town may apply to the State to obtain funds for implementing the closure.[11] The town engages the contractors and pays for the closure. The town is then reimbursed for 75% of its cost to design and construct the mandatory cap. To be eligible for EQBA reimbursement, the town must enter an Order on Consent which, *inter alia*, requires the town to complete the remediation without regard to the availability of State financial assistance.[12]

Recovery Of EQBA Funds

In *Bedford Affiliates v. Sills*[13] the Second Circuit joined a number of other circuits in holding that potentially responsible parties ("PRPs") - such as landfill owners - may not pursue CERCLA Section 107(a)[14] cost recovery claims against other PRPs. Rather, landfill owners and operators are limited to actions for contribution under CERCLA Section 113(f).[15] The distinction between Section 107(a) and Section 113(f) is critical. While courts have read Section 107(a) as permitting the imposition of joint and several liability, in a Section 113(f) contribution action the court allocates response costs among liable parties using such equitable factors as the court determines are appropriate. As a practical matter the contribution plaintiff faces a much more difficult task than a Section 107 plaintiff, who can recover all of its cleanup costs from a few PRPs - or even one. There is nothing in the EQBA, its enabling regulations, or the statute's legislative history, to support the view that the 25% of landfill closure costs borne by the town under the EQBA limits or otherwise dictates town's CERCLA liability. Quite the contrary: CERCLA imposes liability on the landfill owner "[n]otwithstanding any other provision or rule of law."[16] As a result, the towns - having received reimbursement for 75% of their landfill closure costs - are not highly motivated to invest time or resources in difficult and uncertain CERCLA contribution actions against local industry.

In a number of recent cases, New York State has either joined with the municipality in these cost recovery actions as a Section 107 plaintiff or brought an action solely in its own name. (Unlike the municipality, the State can use Section 107 because it neither owned nor operated the landfill and thus is not a PRP.) Under either scenario New York is seeking to recover funds reimbursed to towns pursuant to the EQBA. The State enjoys several advantages compared with a municipality. First, as mentioned above, as a Section 107 plaintiff the State wields the substantial hammer of joint and several liability. CERCLA also establishes a strong presumption that response costs incurred by a State are reasonable and consistent with the National Contingency Plan.[17] In essence, this approach allows the State to assume the rights of the municipality, which actually expended the closure costs and can bring only a contribution action, and expand those rights by transforming the municipality's contribution claim into a much more powerful cost recovery claim under Section 107 -- in effect a regulatory overruling of *Bedford Affiliates*.

What the Courts Have Said So Far

CERCLA permits municipalities to recover only the "necessary costs of response incurred" by them.[18] The phrase "necessary costs of response" is not defined in CERCLA, a fact noted with some regularity by the courts.[19] Nevertheless, the term "response" is broadly defined.[20] The far reaching scope of this definition led the

Supreme Court to observe that the phrase "costs of response" covers "essentially the entire spectrum of cleanup expenses."[21]

.ıe lack of an express statutory definition has not preventing courts from deciding that certain cleanup expenditures do not constitute "necessary costs of response." For example, costs of investigating and monitoring contamination which are primarily intended to support litigation are generally not recoverable.[22] Likewise, costs incurred prior to the enactment of CERCLA are not recoverable as response costs.[23] Thus, not all sums incurred responding to hazardous substances are recoverable as CERCLA response costs.

Of particular interest on the issue of what costs may constitute CERCLA response costs is the 1994 decision by the District Court for the Western District of Washington in *City of Seattle v. Amalgamated Services, Inc.*[24] The facts in *City of Seattle* are simple and strikingly similar to the general pattern in New York's EQBA cases. Plaintiff, the *City of Seattle*, had operated a landfill from 1966 until 1983. Eventually, Seattle entered into a consent decree with the state Department of Ecology to properly close its landfill. After completing this closure, the City sought to use CERCLA to recover its costs from companies that had used the landfill. The defendants argued that the City would have had to meet the state and local minimum landfill closure standards, whether or not there was a release or threat of release of hazardous substances. Because the costs of complying with these minimum closure standards were not caused by the presence of hazardous substances, the City's routine closure cots could not constitute "necessary costs of response." The District Court cited several CERCLA opinions that have allowed defendants to assert defenses based upon causation issues and held that, as a matter of law, routine landfill closure costs arising from state and local requirements are not CERCLA response costs. The *Seattle* court stated:

> Any actions the City was already obligated to take to meet the [minimum standards] were not caused by the escape of hazardous substances. Only costs incurred to meet additional requirements caused by the escape of hazardous substances, or listing as a Superfund site, qualify as necessary response costs.[25]

The earliest New York decision to consider whether routine landfill closure costs were "necessary costs of response" was *Barnes Landfill, Inc. v. Town of Highland*[26]. The facts in *Barnes* differ slightly from those in *Seattle* - and the typical EQBA claim - because *Barnes* involved a landfill owned by a private party rather than a public entity. Nevertheless, the question presented was whether the owner and operator of a landfill could resort to CERCLA to recover its routine closure costs. The Southern District also considered the causation issue and ruled that "[o]rdinary closing or clean-up costs [for a landfill] not pertaining to hazardous substances, incurred under state law or otherwise, would not be a basis for holding defendants responsible under CERCLA." [27]

Less then two years later, the Southern District was presented with an opportunity to revisit this issue in *Town of New Windsor v. Tesa Tuck, Inc.*[28] New Windsor spent money closing a landfill that it had operated from 1962 until 1976. The town entered into an administrative order with New York which, in turn, agreed to reimburse New Windsor for seventy-five (75%) percent of the clean-up costs from the EQBA. The defendants, once again landfill customers, did not direct their arguments to the causation issues issued relied upon by *City of Seattle*. Rather, the defendants argued that because New York had merely reimbursed New Windsor, the State had not "incurred" any response costs. The District Court acknowledged that only a liable party can "incur" response costs. Therefore, if New York were a mere volunteer when it ·mbursed New Windsor, the State had not incurred response costs. However, .hout mentioning either *Seattle* or *Barnes*, the court reasoned that because the

State has a constitutional mandate to protect the public health and the environment, by using the EQBA funding mechanism to channel response costs through New Windsor, the State had indeed "incurred" response costs.[29]

Finally, on January 31, 2002, the Northern District issued its opinion in *New York v. Moulds Holding Corporation*[30]. Faced with facts that were nearly identical to those of *New Windsor*, the Northern District reasoned that "there is no question that the State could have remediated the landfill on its own and then brought a claim..."[31] Therefore, the court did not hesitate to impose liability on the private customers of the landfill for the State's seventy-five (75%) reimbursement of the town.

Open Legal Questions

The Second Circuit has not yet been called upon to review New York's use of CERCLA to recoup funds paid to towns pursuant to the EQBA. Notwithstanding the District Court decisions in *New Windsor* and *Moulds*, there is at least some reason to suspect that the Second Circuit might be troubled by New York's approach. In *United States v. Alcan Aluminum Corp.*,[32] the Second Circuit left open the "back door" to arguments for "a special exception to the usual absence of a causation requirement [under CERCLA.]" It remains to be seen whether the Second Circuit would recognize such an exception in circumstances when all response costs are "caused" by New York's own regulatory requirements governing landfills and not the presence of hazardous substances.

Policy Considerations

New York's efforts to press the outer limits of what constitutes CERCLA response costs also raises a number of important policy considerations. When CERCLA was authorized in 1986, Congress was concerned about whether "one state or a small group of states were able to dominate the overall national agenda for cleaning up Superfund sites by spending state monies on relatively low priority sites."[33] By resorting to CERCLA to close municipal landfills which do not present any imminent threat, and are virtually indistinguishable from any other landfill which must be closed, New York might be doing just that.

Moreover, New York's present strategy could backfire on the towns. Towns receiving EQBA funds expected finality when they agreed to fund 25% of the landfill closure costs. If New York proceeds against private PRPs, these parties will assert CERCLA contribution claims against the towns. In these third party actions the PRPs will attempt to increase the towns' equitable share of the total closure costs. Several decisions support allocations to landfill owners and operators of greater than 50%,[34] and at least one district court has assigned 95% of the total landfill closure costs to the owner operator.[35] Because the towns often profited from tipping fees received during the life of the landfill and sometimes had questionable operating practices, they may not be anxious to defend the 25% EQBA allocation.

One further consideration is whether the EQBA was meant to clean up all municipal landfills in this fashion. It would appear that the Legislature thought not because the EQBA does not to include any cost recovery provision. Where the presumptive remedy is simply the customary cap, strong policy arguments can be made that the landfill should not be managed as if it were an inactive hazardous waste site. Only when additional remediation beyond the minimum ECL standards is necessary to prevent or eliminate problems related to the presence of hazardous substances should the State be allowed to recover costs from landfill users.