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**Emerging Contaminants
and New Title 12 of ECL,
Article 27**

Claims that could arise out of DEC's investigation, mitigation and remediation of contaminants and emerging contaminants at hazardous waste and solid waste sites

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**Title 12 Addresses 2 Gaps in the
Protection of Groundwater**

- » The potential for "Contaminants" from both lawfully closed and illegal solid waste sites to adversely impact groundwater quality.
- » The potential for compounds not yet categorized as hazardous substances, i.e., "Emerging Contaminants," to adversely impact drinking water supplies.

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Contaminant / Emerging Contaminant

- » "Contaminant" means "emerging contaminants"... and for solid waste sites, the parameters identified in [Part 360 – 2.11]." ECL §27-1201(1).
- » "Emerging Contaminant" means any physical, chemical, microbiological or radiological substance listed by the commissioner of health that meet certain criteria. PHL §1112(2)

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»» Emerging Contaminant Criteria

- » Not subject to any other substance-specific drinking water regulation,
- » Known or anticipated to occur in public water systems, and
- » Because of their quantity, concentration, or physical, chemical or infectious characteristics, may cause:
 - physical injury or illness, OR
 - pose a potential hazard to human healthwhen present in drinking water. PHL §1112(3)(a)

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»» What Are PFAS?

- » Per-and polyfluoroalky substances ("PFAS")
- » Group of man made chemicals that include:
 - > Perfluorooctane-sulfonic acid ("PFOS")
 - > Perfluorooctanoic acid ("PFOA")
 - > Gen X
 - > PFOS and PFOA no longer manufactured in U.S.

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»» Why Are PFAS a Significant Concern?

- Continued production internationally
- Still imported into the U.S. via consumer goods
- » Ubiquitous
- » Historic discharges impacting drinking water
- » Persistent
- » Bio-Accumulation
- » Potential Health Effects

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Statutory Emerging Contaminants

PHL §1112(3)(c) required the commissioner to list:

- » 1,4-Dioxane
- » PFOS
- » PFOA
- » Focus on developing a MCL

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MCLs for Emerging Contaminants

- » Existing "Standard" – 70ppt (EPA Guidance)
- » The proposed Maximum Contamination Limits ("MCL") are:
 - › 1,4 – Dioxane – 1ppb
 - › PFOS – 10ppt
 - › PFOA – 10ppt
- Recommended by NYS Drinking Water Council 12/18/18
- Commissioner accepted recommendation on 7/8/19
- » Notice of Proposed Rulemaking published 7/24/19 in NYS Register

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MCLs for Emerging Contaminants
(continued)

- » 60 Day comment period (it closed on 9/22/19)
 - › Approx. 4,700 comments received and currently under review
- » Regulation goes into effect upon publication of Notice of Adoption
- » Currently no DEC Soil Clean-Up Objective (SCO) for PFAS
- » 1,4 – Dioxane – SCO Range 0.1ppm to 250ppm

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Current DEC Statewide Evaluation of Remedial Program Sites

- » Based on informal DEC policy
 - › Updated Guidance March 2019 (copy available)
- Sampling of all media for ECs
- Biota sampling may be necessary
- DEC has developed PFAS Analyte List
 - » DEC Project Manager has discretion
 - » Remedial Investigation Report may not be final
 - » Modified EPA Method 537 preferred method

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Current DEC Statewide Evaluation of Remedial Program Sites
(continued)

- » Reporting limits for PFAS are:
 - › Groundwater – 2 ppt
 - › Soil – 1 ppb
- Reporting limits for 1,4 – Dioxane:
 - › Groundwater – “should be no higher than” - 0.35 ppb
 - › Soil – “should be no higher than” - 0.1 ppm

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NYSDEC Requires Sampling at State Remedial Program Sites

- » Cost
- » Same for every Emerging Contaminant after Listing?
- » What do you do with data?
- » Referred to as “Forever Chemicals” (FoodandWater.org) (ABC News 9/26/2019)

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» Distinction Between "Hazardous Wastes" vs. "Hazardous Substances"

- » "Hazardous Wastes" include solid wastes that meet specified criteria:
 - "Listed Hazardous Wastes";
 - » "Characteristic Hazardous Wastes";
 - » Substances listed in Part 597.3 which later become a waste material.
- When do the "Hazardous Substances" listed at Part 597.3 become a waste material?
 - When they are discarded, abandoned, or become inherently waste-like, such as substances released to the environment.

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» Regulatory Status of Emerging Contaminants

- » In January 2016, New York became the first state to regulate PFOA as a hazardous substance.
- » PFOS was added to the hazardous substance list by emergency rule in April 2016. The final Rule listing PFOA and PFOS as hazardous substances became effective in March 2017.

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» NYSDEC Authority to Require Sampling at State Remedial Program Sites

- » Sampling at New York Remedial Sites
 - » DEC February 2019 Memo – "Sampling for 1,4-Dioxane and [PFAS] Under DEC's **Part 375 Remedial Programs**" significantly expanded investigative requirements for emerging contaminants at all new remedial program sites.
- » What remedial programs are impacted?
 - » Emerging contaminants that are identified as contaminants of concern as a result of sampling at new or existing sites must be assessed as part of remedy selection.
- Potential For Regulation of Emerging Contaminants at Closed Remedial Sites

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NYSDEC Authority to Require Sampling at State Remedial Program Sites
(continued)

- » Grounds for Modifying or Revoking a Certificate of Completion (COC) under all Part 375 Remedial Programs.
- » "Good cause" is not defined.
- » But, if the Department finds evidence of contamination at a closed site in concentrations that are likely to constitute a threat to human health or the environment.
- » Or, if sample results demonstrate concentrations above cleanup standards (once developed), it is likely that investigation and/or remediation will be required based upon the "reopener" language in the original order or agreement.

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NYSDEC Authority to Require Sampling at State Superfund Sites

State Superfund Orders

- » Paragraph XVI.A. of NYSDEC's "Standard Clauses For All New York State Superfund Administrative Orders":
- » Respondents are required to "comply with and be bound by the provisions of 6 NYCRR Subparts 375-1 and 375-2."

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NYSDEC Authority to Require Sampling at State Brownfield Sites

Brownfield Cleanup Agreements

- » Paragraph XIV.B. of the "Standard Clauses For All New York State Brownfield Cleanup Agreements":
- » Applicants must "comply with and be bound by the provisions of 6 NYCRR Subparts 375-1" (including § 375-1.9 (e), the provision authorizing reopening a COC for "good cause").
- » ECL 27-1419 also grants the Commissioner authority to modify or revoke a COC at a BCP site for "good cause".
- » ECL 27-1421 "reservation of rights".

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» NYSDEC Authority to Require Sampling at State Brownfield Sites
(continued)

- » The provision provides a liability limitation to applicants, but reserves DEC's right to require further investigation and/or remediation that the department deems necessary due to concerns relating to:
 - › environmental contamination demonstrating the site is no longer protective of public health or the environment; or
 - › a change in an environmental standard, factor, or criterion which renders the site no longer protective of public health or the environment.

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» NYSDEC Authority to Require Sampling at State Voluntary Cleanup Sites

Voluntary Cleanup Agreement Reopeners

- » Applicants that completed an approved remedial program received a limited release and covenant not to sue, subject to certain reopeners.

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» Two New Kinds of Sites

- » Drinking Water Contamination Sites
- » Solid Waste Sites

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»» Drinking Water Contamination Sites

- » "Contaminant" means "emerging contaminants" . . . and for solid waste sites, the parameters identified in [Part 360 – 2.11]" ECL §27-1201(1).
- » "Contamination" means the presence of a contaminant...in ... groundwater ... sufficient to cause or substantially contribute to an exceedance of SCGs, including ... notification levels, maximum residual disinfectant levels or action levels established by DOH.

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»» Notification Level

- » "Notification Level" means the concentration in drinking water that the commissioner has determined ... warrants public notification and may require actions ..." PHL §1112(2)(a).
- » Although, per PHL §1112(2)(a), remedial action may not be required, there is a bias toward regulatory action once the notification level has been exceeded because the definition of "contamination" has been met.
- » Therefore, the "notification level" functions as a safe harbor concentration when it has not been exceeded, but functions more like a cleanup standard once exceeded.

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»» Drinking Water Contamination Sites

- » "Drinking water contamination site" means any area ... "that is causing or substantially contributing to the contamination of one or more public drinking water supplies." ECL §27-1201(3).
- » "Contamination" occurs once the notification level is exceeded in groundwater.
- » Query, isn't the best use of all freshwater groundwater deemed to be as a drinking water supply?

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» Mitigating Drinking Water Sites

- » Whenever the commissioner of health has determined that a concentration of an emerging contaminant constitutes an "actual or potential threat to public health,"
- » DEC may "undertake all reasonable and necessary additional mitigation measures in any area of the State in which contamination is known to be present." ECL §27-1205(1).

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» Referral to State Superfund Program

- » If DEC determines that a drinking water contamination site poses a significant threat, DEC "shall refer the site to the inactive hazardous waste disposal site remedial program." ECL §27-1205(2).

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» Remediate or Title 12 Hearing

- Once the commissioner of health requires action, DEC has the authority to undertake directly the implementation of mitigation and remediation measures to address emerging contaminants in public water supplies.
- After notice and hearing, the commissioner of health may order an owner, and operator or person responsible for a drinking water contamination site undertake mitigation and remediation. ECL §27-1205(3).

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» Cost Recovery from Owner and/or Operator for Drinking Water Sites

- » DEC shall... recover all mitigation costs incurred ... “from the owner and/or operator of the drinking water contamination site.” ECL §27-1205(8).
- » ECL §27-1205(8) does not reference “responsible party.”
- » However, the expense of any “such mitigation” may be “recovered from any responsible person in any action or proceeding brought...” ECL §27-1205(12)(e).

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» The Problem with Cost Recovery

- » “Contamination” means the presence of a contaminant in any environmental media... sufficient to cause or substantially contribute to an exceedances of ... notification levels...” ECL §27-1201(2).
- » “Notification level” means the concentration level of an emerging contaminant that... warrants public notification and may require actions.” PHL §1112(2)(b).
- » Once the commissioner of health requires action, the owner, operator and responsible party of the drinking water contamination site are subject to cost recovery regardless of whether a health threat was actually presented by the contaminant.

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» Primary Checks on DEC Remediation

- » DEC shall employ feasible measures that can be successfully carried out with available, implementable and cost-effective technology.
ECL §27-1205(1).
- » DEC shall have the authority to undertake... “all necessary and reasonable” mitigation and remediation measures of drinking water contamination.
ECL §27-1205(3)(a).

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» Solid Waste Sites

- » "Solid waste site" means a site where:
 - o DEC or a court has a reasonable basis to suspect that illegal disposal... occurred"
 - o DEC... has a reasonable basis to suspect that an inactive solid waste management facility, which does not have a current monitoring program, is impacting or contaminating one or more drinking water supplies. ECL §27-1201(6).

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» Priority for Solid Waste Sites

- » The solid waste site priority in this state is to mitigate and remediate any solid waste site causing or substantially contributing to impairments of drinking water quality which may impact of public health. ECL §27-1203(1).
- » "Mitigation" means the investigation, sampling, management, or treatment of a solid waste site. ECL §27-1201(4).

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» State Money Available to DEC

- » The Department may implement necessary measures to [investigate,] mitigate and remediate the solid waste site within amounts appropriated for such purposes from the solid waste mitigation account. ECL §27-1203(6).

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» Solid Waste Site Account

- » “Solid waste mitigation account” means the account established pursuant to subdivision one of section 97-b State Finance Law. ECL §27-1201(7).
- » “With respect to monies in the solid waste mitigation account, ... no more than \$5 million will be available annually for such account.” SFL §97-b(2)(k).

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» Referral to State Superfund Program

- » If DEC determines that a solid waste site poses a significant threat, DEC “shall refer the site to the inactive hazardous waste disposal site remedial program.” ECL §27-1203(5).
- » There is not a cost recovery provision parallel to ECL §27-1205(8) and (12) with respect to any solid waste site that is not referred the State Superfund program.

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» Cost Recovery Under Other Laws

- » Potentially applicable cost recovery provisions for funds expended from the Solid Waste Mitigation Account:
 - CERCLA
 - NY State common law
 - * public nuisance
 - Natural Resource Damage

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Questions?

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