

# Municipal Enforcement of Environmental Laws

By Robert Feller, Esq., Bond, Schoeneck & King and Susan F. Weber, Esq.

*This is the first of a two-part article discussing options for municipalities to take advantage of changes in the environmental regulatory climate, largely using their existing powers and state and federal statutory provisions. This part focuses on common law tools for environmental regulation. Next issue's article will concentrate on state and federal tools and offer a conclusion.*

Enforcement of environmental laws is generally viewed as a matter for federal and state authorities. In fact, though, local governments pioneered most of today's environmental laws. Water pollution, air pollution and solid waste were issues of local public health and safety until the 1960's, when state and federal statutory systems were enacted following Hooker Chemical/Love Canal and other well known environmental disasters. The federal Environmental Protection Agency and state Department of Environmental Conservation were empowered to regulate activities with the potential to pollute and to enforce the statutes designed to protect our health and natural resources from environmental insults. However, the basic policy question of which level of government should undertake these environmental functions is now being revisited. Until this question is resolved, and it may be some time before a resolution is reached, municipalities have an opportunity to step into the breach and reap benefits for their communities.

## WHY MUNICIPAL ENFORCEMENT?

The current trend toward downsizing federal and state governments may result in more of the responsibility for environmental protection falling, by default, upon municipalities. Even where they are not feeling forced to step into the breach left by retreating state and federal environmental regulators, municipalities may wish to become proactive in environmental matters in order to assure the proper handling of an environmental issue of special local interest.

Despite pervasive federal and state environmental regulatory schemes, there are many ways in which municipalities can return to their historical role as environmental protectors. Local government officials,

not federal or state officials, are closer to the citizens who may be exposed to environmental hazards, citizens who are most likely to suffer adverse consequences of exposure. Highly motivated local enforcement could speed the remediation of hazards in the community, thus protecting residents' health and improving the environment.

Another benefit of local enforcement is the flexibility municipalities have in choosing enforcement tools. Unlike federal and state officials, they are not bound by rigid guidelines in seeking to resolve cases, nor must they worry about ensuring jurisdiction-wide enforcement consistency. Municipalities can tailor their actions to the situation, customize the available enforcement tools, and suit the remedies to local concerns and needs.

Thinking of bidding your professional  
A/E/Survey services?

### The consultant with the lowest fee:

- Can exploit a limited scope of work with change orders after the fact.
- Has a secret way to provide all needed services at half the price of other design professionals.
- Has no room for unanticipated deviations.

Think again. Try Qualifications Based Selection.

[www.nysqbs.org](http://www.nysqbs.org)

Municipal enforcement will cost money. It's not only the state and federal bureaucracies that must learn to run leaner and meaner; most municipalities are also faced with budget constraints. But there are ways to finance what local governments choose to do in the environmental arena. In some situations, fines and penalties are available to support program costs. Settlement terms can be negotiated to include payment for monitoring or local oversight costs. Actions under some statutes provide reimbursement for most remedial costs. In instances where programs are delegated to municipalities by the State, generally the prosecuting municipality receives all or part of any fines and penalties collected. And laws can be enacted to provide for recovery of penalties by the enforcing governmental entity. Remember, it is not necessary that a full environmental regulatory program be

embarked upon in order to see benefits. Surgical strikes can yield dramatic results and be reasonably priced, too. There are three general situations where municipalities may wish to consider a local enforcement program:

**1. Federal or state authorities are ignoring the problem.** State or federal inactivity frequently results from lack of resources to cover a multitude of demands. Priorities are based on how serious the authorities perceive the impact to be, relative to the other situations they have on their plate. However, the local impact may be out of proportion to its national or statewide impact. In such cases, the municipality may wish to act. Examples where municipalities have chosen to do so include banning open trash burning, tough local anti-litter laws, and banning styrofoam food packaging.<sup>1</sup>

**2. Federal or state authorities are addressing the problem, but in an unsatisfactory way.** Federal and state authorities sometimes view problems in ways that are fundamentally different from the local view. These higher levels of government must be concerned that laws are enforced evenly across their jurisdictions and that no unacceptable precedent is created in the course of an enforcement action. Municipalities do not have these limitations.

Municipalities dissatisfied with state or federal regulatory effort can often use their own authority to impose additional requirements. In some situations, municipalities can displace state authorities completely through delegated programs or other means. Even where the federal or state authorities have reached a settlement

Continued on page 22

*Over 50 Years of  
Full Service Engineering  
Excellence*

**CHA**

**CLOUGH HARBOUR & ASSOCIATES LLP**  
III Winners Circle  
Albany, NY 12205  
518.453.4500  
[www.cloughharbour.com](http://www.cloughharbour.com)

Commercial, Educational  
& Institutional Facilities

Colleges & Universities

Federal, State &  
Municipal Governments

Developers

Departments of Transportation

Utilities

Manufacturers & Industry

**Quality by design.**

**Continued from page 21**

with an offending party about a particular incident, a displeased municipality has options. A settlement does not bind a municipality unless it has been made a party to the agreement. If not, the municipality can continue to exercise any independent enforcement powers it may have.

**3. There is no federal or state jurisdiction.** Federal and state laws do not reach certain types of environmental concerns or, even where there is some federal or state jurisdiction, there may be exemptions which allow local action in circumstances of special local significance. For instance, even though New York State regulates wetlands, it generally does so only for wetlands that exceed 12.4 acres. Federal wetland regulation has no lower limit, but the Corps of Engineers seldom exercises jurisdiction over small wetlands. Under their own authority,

municipalities can choose to regulate small wetlands. If noise or odor are a local problem, or perhaps excessive idling of trucks is causing unacceptable emissions in a particular area, a local law or ordinance enforced by the municipality could control the problem. Another example is boat speed and noise limits. These must be set by state law on navigable waters, but local governments can work with their state legislators to enact and then enforce them.

**WHAT ARE THE TOOLS?**

There are three sources of authority for municipalities to enter the arena of environmental regulation and enforcement — the common law, federal statutes and state statutes. Using common law and traditional municipal powers is discussed here; state environmental and public health and federal statutes will be discussed in part 2 in next month's issue.

**Common Law Tools**

Although courts have generally held that federal statutes preempt the federal common law of nuisance<sup>2</sup> these statutes have not affected the use of the state common law.<sup>3</sup> In fact, most federal environmental statutes contain provisions which explicitly preserve existing state common law actions.<sup>4</sup> State statutes likewise provide similar savings clauses.<sup>5</sup> Among the common law actions which remain available to municipalities are public nuisance and trespass. A public nuisance is generally defined as "an unreasonable interference with a right common to the general public."<sup>6</sup> A public nuisance is "an offense against the State and is subject to abatement or prosecution on application of the proper governmental agency . . ."<sup>7</sup> A municipality has standing to bring actions for public nuisance pursuant to its authority as "guardian of the environment."<sup>8</sup> Principals of public



**Govern Software**

# The one stop solution for your local government software needs.

**Over 20 years of innovative, flexible & customizable software solutions**

- e-Government Solutions**
- Individualized Support**
- Personalized Training**
- Dedicated Service Professionals**

*"After ten years of working with Govern's staff, it was easy to choose the right partner to take us into the next millennium. Thanks to Govern, the Town of Southampton has truly joined the electronic age!"*

*Richard Blowes, Project Manager, Town of Southampton, NY*

**To learn more about Govern Software's local government solution: visit [www.govern.net](http://www.govern.net) or call us at (800) 561-8168**

nuisance are inherently flexible, and change over time to reflect the public's current view of what constitutes a nuisance.<sup>9</sup> Thus public nuisance actions can be used to "fill the inevitable gaps of an ever expanding regulatory system."<sup>10</sup>

A public agency may seek an injunction to require that the nuisance cease, and may either abate the nuisance itself or seek a court order for abatement.<sup>11</sup> If the agency abates the nuisance itself, it can recover the costs of abatement.<sup>12</sup>

In addition to recovering the costs of abatement, a municipality may be able to recover punitive damages from the entity that caused or created the public nuisance.<sup>13</sup> To win such an extraordinary remedy, it is necessary to prove that the defendant acted with actual malice involving intentional wrongdoing.<sup>14</sup> By seeking punitive damages as well as compensatory damages and injunctive relief, the municipality has the benefit of both stopping the current nuisance and creating a future deterrent to similar action. Thus, a nuisance action brought by a municipality can be an effective tool for environmental protection.<sup>15</sup>

### State Statutory Tools

A wide variety of tools for municipal enforcement originate in the basic police powers of municipalities; others are found in the laws governing public health and environmental protection.

**1. Municipal Laws (General Municipal Law, General City Law, Town Law, Village Law, Municipal Home Rule Law).** Municipalities have police and zoning powers under which they can regulate and enforce environmental quality within their jurisdictions. Under their police powers, for example, municipalities can regulate noise, dust, aesthetics, smoke, waste disposal, flood plains or wetlands. Unless preempted by federal or state law, they may regulate in any

manner which can be justified on the basis of protecting the health, welfare and well being of their citizenry. One of the few areas where local jurisdiction is preempted is in the area of state permitting of mines.<sup>16</sup> However, even in this area, land use laws or zoning ordinances that restrict where mining may take place, or which prohibit mining altogether, are valid, as are laws of general applicability that will apply to mining as well as other uses. And the Mined Land Use Law sets forth a mechanism for local government to have input into the State mining permit process and authorizes local enforcement of some permit requirements.<sup>17</sup>

Generally, municipalities can impose environmental requirements by local law or ordinance.<sup>18</sup> Municipalities may enact local laws regarding "[t]he protection and enhancement of its physical and visual environment" under Municipal Home Rule Law §10.1.<sup>19</sup> This section has been used successfully to adopt local laws regulating noise,<sup>20</sup> regulating the sanitary disposal of waste,<sup>21</sup> prohibiting littering,<sup>22</sup> regulating the transfer of oil from vessels on navigable waters to waterfront terminal facilities,<sup>23</sup> governing the collection and disposal of refuse,<sup>24</sup> banning the idling of diesel locomotives in certain areas because of smoke and odor concerns<sup>25</sup> and prohibiting the use of certain plastics by retail food establishments in order to reduce non-biodegradable materials in the solid waste stream.<sup>26</sup>

Town Law §130 authorizes the adoption of ordinances for enumerated purposes or for "such other purposes as may be contemplated by the provisions of this chapter or other laws." Among the other purposes which have been upheld are the preservation of aesthetics,<sup>27</sup> the regulation of smoke, gases and wastes<sup>28</sup> and the control of noise pollution.<sup>29</sup> Similar authority exists under General City Law §§19 and 20.

By adopting local laws or ordinances, municipalities can establish generally applicable standards and/or require specific project review, usually under a permitting or similar program.<sup>30</sup> Through its regulatory program, the municipality can impose customized permit conditions and use their permit enforcement authority to address, project-specific problems of concern.

### CONCLUSION

Municipalities can take advantage of the widening gap in environmental regulation and at the same time offer benefits to their citizens that enforcement by state or federal authorities does not always provide. Using state common law, existing municipal powers in new ways, and the state statutory provisions described above, they can tailor their efforts to the community's needs and to their financial wherewithal. Often, a small initial investment in expertise can yield big benefits in public relations and cost reimbursement. Next issue: using state and federal environmental and public health statutes, and other creative approaches. ❖

### ENDNOTES

<sup>1</sup> *Society of Plastics Indus. v. County of Suffolk*, 573 NE2d 1034, 77 NY2d 761 (1991).

<sup>2</sup> *Milwaukee v. Illinois*, 451 U.S. 304 (1981).

<sup>3</sup> *International Paper Company v. Ouelette*, 479 U.S. 481 (1987).

<sup>4</sup> See, e.g., 42 U.S.C. §7459(1988); 42 U.S.C. §6929 (1988); 33 U.S.C. §1365 (e); 42 U.S.C. §7604 (e) (1988). See also, *Leo v. General Electric Co.*, 145 A.D.2d 291, 538 N.Y.S.2d 844 (2d Dept. 1989) (rejecting claims that the CWA, CERCLA and TSCA preempted New York's common law of nuisance).

<sup>5</sup> See, e.g., N.Y. *Env'tl. Conserv. Law* §17-1101, which states that "it is the purpose of titles 1 to 11 and title 19 of this article to provide additional and cumulative remedies to abate the pollution of the waters of the state and nothing herein contained shall abridge or alter rights of action or remedies now or hereafter existing,

Continued on page 24

Continued from page 23

nor shall any such provisions or any act done by virtue of such provisions, be construed as estopping the state, persons or municipalities, as riparian owners or otherwise, in the exercise of their rights to suppress nuisances or to abate any pollution now or hereafter existing." See also, N.Y. ECL §19.0703 (air pollution control); §24-0509 (freshwater wetlands); N.Y. ECL §27-13(4) (hazardous waste); 1964 Op.Atty.Gen. 124; State v. Schenectady Chemicals, Inc., 117 Misc.2d 960, 459 N.Y.S.2d 971 (1983), aff'd. 103 A.D.2d 33, 479 N.Y.S.2d 1010 (3d Dept. 1984).

<sup>6</sup> Restatement of Torts (Second) §821B (1978). In determining whether an interference is "unreasonable", the courts are to consider whether the conduct (1) involves a significant interference with the public health, safety, comfort, or convenience; (2) is illegal; or (3) is of a continuing nature or has produced a long lasting effect on the public right that the actor has reason to know will be significant. Id.

A private nuisance, on the other hand, threatens one person or relatively few, creates an unreasonable interference with the use or enjoyment of land and is actionable by the person whose rights have been disturbed. Copart Inds. v. Con. Ed., 41 N.Y.2d 564 (1977) (citations omitted).

<sup>1</sup> New York v. Fermenta ASC Corp., 160 Misc.2d 187, 194, 608 N.Y.S.2d 980,985 (Sup.Ct. Suffolk Co. 1994) (quoting Copart, 41 N.Y.2d at 567).

<sup>2</sup> See, e.g., Amland Properties Corp. v. Aluminum Co. of America, 711 F. Supp. 784, 808 (D.N.J. 1989) (quoting Restatement (Second), or Torts §821C (1979)) (the plaintiff must "have authority as a public official or public agency to represent the State or a political subdivision in the matter...).

<sup>3</sup> See, James A. Sevinsky, PUBLIC NUISANCE: A COMMON LAW REMEDY AMONG THE STATUTES, Section of Natural Resources Law of the American Bar Association, July 1990.

<sup>4</sup>Id.

<sup>5</sup> City of Yonkers v. Dyl & Dyl Development Corp., 67 Misc.2d 704, 325 N.Y.S.2d 206 (Sup. Ct. Westchester county 1971).

<sup>6</sup> Gregory v. City of New York, 40 N.Y. 272, 280 (1968).

<sup>7</sup> U.S. v. Hooker Chems. & Plastics Corp., 748 F.Supp. 67, 32 ERC 1203 (W.D.N.Y. 1990); City of New York v. Taliaferro, 551 N.Y.S.2d 253, 254 (2d Dept. 1990) ("the [trial] court had the right to award punitive damages pursuant to the common law theory of a public nuisance. This conclusion is not altered by the fact that the plaintiffs are governmental entities."); New York v. Schenectady Chemicals, Inc., 459 N.Y.S.2d 971, 978 (Sup.Ct. 1983), modified, 479 N.Y.S.2d

## Minimum Wage Increases January 1, 2005

Following an override of Governor Pataki's veto by the New York State Senate on December 6, 2004, New York State's minimum wage will increase from \$5.15 per hour to \$6.00 per hour effective January 1, 2005. Although Federal law currently provides for a minimum wage of only \$5.15 per hour, all employers are obligated to pay their employees who work in New York State the higher minimum wage of \$6.00 per hour as of January 1, 2005. The new law, known as the Empire State Wage Act of 2004, also increases the New York State minimum wage to \$6.75 per hour effective January 1, 2006, and to \$7.15 per hour effective January 1, 2007.

The new law also raises New York State's minimum wage for food service workers who receive tips. The minimum wage for such workers will increase from \$3.30 per hour to \$3.85 per hour on January 1, 2005, to \$4.35 per hour on January 1, 2006, and to \$4.60 per hour on January 1, 2007. Employers must ensure that the hourly wage paid to a food service worker plus the actual tips received by the worker equals or exceeds \$6.00 per hour as of January 1, 2005, \$6.75 per hour as of January 1, 2006, and \$7.15 per hour as of January 1, 2007.

*The above information was provided by Bond, Schoeneck & King*

1010 (3d Dept. 1984) (state brought suit against chemical company for dumping chemical wastes that polluted surface and subsurface water, and sought punitive damages on its common law public nuisance claims. Court refused to dismiss those claims and noted that if the State were successful, "punitive damages would lie."); *Caso v. American Federation of State, County & Municipal Employees*, 43 A.D.2d 159, 350 N.Y.S.2d 173 (2d Dept. 1973) (Counts' could seek punitive damages in a public nuisance action it brought on behalf of its municipal governments for damages caused by the defendant labor unions work stoppage at the City of New York's sewage treatment plants).

<sup>8</sup> U.S. v. Hooker Chems., 748 F.Supp. at 1211 (citing *Sharapaton v. Town of Islip*, 452 N.Y.S.2d 347, 348-349 (1982)); see also, *Maitrejean v. Levon Properties Corp.*, 87 A.D.2d 605, 448 N.Y.S.2d 46, aff'd. 57 N.Y.2d 902 (2d Dept. 1982) (punitive damages for private nuisance); *Malerba v. Warren*, 96 A.D.2d 529, 464 N.Y.S.2d 835 (2d Dept. 1981) (regarding exemplary damages for trespass).

<sup>9</sup> In addition to nuisance actions, other potential common law causes of action include trespass, negligence, and strict liability for abnormally dangerous activities.

<sup>10</sup> ECL §23-2703(2)

<sup>11</sup>Id.

<sup>12</sup> Although cities and towns can act through local law or ordinance, villages can only act through local law (see Village Law §4-412 and Op. A.G. Inf. 83-48).

<sup>13</sup> Mun. Home Rule Law §10.1(a)(11).

<sup>14</sup> Op. A.G. Inf. 83-28.

<sup>15</sup> *People v. A & C Trucking Co.*, 88 Misc. 2d 988 (1977).

<sup>16</sup> *People v. Eisen*, 77 Misc.2d 1044, aff'd, 79 Misc.2d 829 (1974).

<sup>17</sup> *Mobil Oil Corp. v. Town of Huntington*, 85 Misc.2d 800(1975).

<sup>18</sup> Op. State Compt. 81-157, 81-323.

<sup>19</sup> See Opinions of the Attorney General, Opn. No. I 90-26 (citing NY Env'tl. Conserv. Law §19-0707).

<sup>20</sup> *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y. 761(1991).

<sup>21</sup> *People v. Scott*, 26 N.Y.2d 286 (1970).

<sup>22</sup> *Hudson Valley Light Weight Aggregate Corp. v. Schovel*, 64 Misc.2d 814 (1970).

<sup>23</sup> *People v. New York Trap Rock Corp.*, 57 N.Y.2d 371 (1982).

<sup>24</sup> See e.g. Town Law §130