

# Municipal Enforcement of Environmental Laws - Part II

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

*This is the second 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 state and federal tools and offers a conclusion.*

Although enforcement of environmental laws is generally viewed as a matter for federal and state authorities, environmental regulation may fall upon municipalities by default through deregulation and governmental downsizing. Also, municipalities may want to get involved in environmental matters when federal or state authorities are not addressing a local problem or are addressing it in an unsatisfactory way. Municipalities can choose the time and place to act, and customize their programs using the tools discussed in this article.

## Using State Environmental and Public Health Laws

### 1. Public Health Law

Local boards of health are authorized to enforce the Public Health Law (PHL) and state and local sanitary codes, and to obtain temporary restraining orders for violations.<sup>1</sup> They have the authority to make regulations not inconsistent with the sanitary code, as they deem necessary and proper for the preservation of life and health, and to maintain actions for violations of their orders and regulations.<sup>2</sup> The standards or guidelines established for regulations need only be so detailed as is reasonably practicable in light of the complexities of the area regulated.<sup>3</sup> The PHL further grants local boards of health enforcement authority to prescribe and impose penalties for violations of the regulations and state sanitary code.<sup>4</sup>

Under the PHL, the local board of health or local health officer has the authority to order the suppression and removal of all nuisances and conditions detrimental to life and health found to exist within the health district.<sup>5</sup> If the owner or occupant fails to comply with any such order, the board or its agents may act to suppress or remove the nuisance.<sup>6</sup> When the local board acts to abate the nuisance, it can bring an action to recover its expenses.<sup>7</sup> If the board is awarded a judgment for the recovery of its expenses, the judgment is a lien upon the real property, and the board may sell the premises to satisfy the lien.<sup>8</sup>

### 2. Environmental Conservation Law – Water Pollution Control

Pursuant to ECL §71-1919, municipalities which have sewer systems may prohibit the discharge of sewage or other harmful substance into any body of water within their boundaries. Such municipalities may maintain an action in the Supreme Court to prevent such discharge,<sup>9</sup> and may obtain an injunction requiring the defendant to take such action as shall prevent the discharge or disposal of sewage or other substance into such waters.<sup>10</sup>

The ECL also gives local health commissioners the authority to collect penalties provided under State law for permits issued under local programs or state programs delegated to local authorities.<sup>11</sup> Thus local authorities may seek delegation of state programs and enforce them at the local level, supported by fines and penalties recovered.

### 3. The Navigation Law and the Oil Spill Fund

Under the Navigation Law (NL), any person who is responsible for the discharge of petroleum products is strictly liable for the cost of cleanup.<sup>12</sup> The law gives an innocent party who cleans up the discharge a cause of action

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against the discharger for cleanup and removal costs and for direct and indirect damages.<sup>13</sup> The NL also allows for a claim directly against the state Oil Spill Fund for the costs of restoring, repairing, or replacing any real or personal property damaged or destroyed by a discharge of petroleum; for any income lost from the time such property is damaged to the time such property is restored, repaired or replaced; and for any reduction in property value resulting from the discharge.<sup>14</sup> Municipalities can take direct action to address oil spills and use either of these mechanisms to recover their costs.

#### **4. State Delegated Programs**

The ECL provides general authority for the DEC, at the discretion of the Commissioner, to delegate implementation of programs under the ECL to local municipal health or environmental departments.<sup>15</sup> Several environmental regulatory programs provide specific mechanisms to transfer authority at a municipality's option. In such cases, the state agency responsible for the program would transfer that authority via a delegation agreement to the locality and would retain only an oversight role. DEC programs that qualify for this treatment include freshwater wetlands<sup>16</sup>, the air pollution<sup>17</sup> and water pollution.<sup>18</sup> There is also an opportunity for localities to assume authority for the environmental review of development projects that would otherwise be under the jurisdiction of the Adirondack Park Agency.<sup>19</sup> In all cases, the precise boundaries between local and state authority will be governed by the delegation agreement they enter into.

#### **5. Permit Review and SEQRA**

Whenever the State Environmental Quality Review Act (SEQRA) requires the preparation of an environmental Impact statement, a local governing body with approval jurisdiction over the project has an opportunity to impose

specific conditions. Such conditions, based on environmental impact review, may go beyond the locality's approval authority if necessary to address impacts revealed in the review process. However, these conditions should not intrude on the jurisdiction of any other permitting entity. This opportunity to favorably condition a project is available to the local agency whether or not it is responsible for the preparation of the environmental impact statement (i.e., is the lead agency).

### **Federal Statutory Tools**

#### **1. Citizen Suit Provisions.**

Virtually all major federal environmental statutes have citizen suit provisions.<sup>20</sup> Municipalities can use these provisions to bring actions against any person violating those federal laws.<sup>21</sup> For example, using the citizen suit provisions, municipalities can enforce against unpermitted or nonconforming discharges of pollutants into waterways or the air; close down unpermitted facilities; stop operations at hazardous waste management facilities which fail to take corrective action (i.e., clean up past contamination on the site); enforce against facilities that are out of compliance with any permit condition, facilities causing or contributing to violations of standards, or facility operators or others who fail to file required reports.<sup>22</sup>

In order to bring an action, the municipality must notify appropriate federal or state authorities of the alleged violation and intention to sue and

provide them an opportunity to take action.<sup>23</sup> Citizen suits are an especially useful tool because the municipality may recover litigation costs, including attorneys fees if it prevails.<sup>24</sup>

#### **2. Recovery of Response Costs under CERCLA (Federal Superfund).**

CERCLA applies to the release of hazardous substances. Although its citizen suit provision is not broad enough to allow private prosecutions of persons who are responsible for such releases, it does provide a private right of action for persons to recover response costs that they themselves have incurred.<sup>25</sup> Recovery can only be had if the response costs are incurred in a manner Consistent with the National Contingency Plan.<sup>26</sup>

Hence, municipalities that have cleaned up a release of hazardous substances can bring a cost recovery action against any of the parties that CERCLA designates as "responsible parties." Unless the parties can show that the harm is divisible, they are held jointly and severally liable for all response costs without regard to fault,

according to common law principles.<sup>27</sup> Significantly, where the responsible party cannot pay, a cause of action for cost recovery lies against the Superfund itself.<sup>28</sup>

Where the party incurring the costs is itself a responsible party under CERCLA, the cost recovery claim is essentially converted to one for contribution, and recovery is limited to the amount of costs incurred above and beyond the responding party's equitable share.<sup>29</sup> This generally represents a limitation when the cost recovery is sought by the site owner (under CERCLA the current site owner is, as a matter of law, a responsible party). However, municipal plaintiffs enjoy a special advantage because, by definition, a municipality that has not caused or contributed to the release of a hazardous substance is not considered a site owner for CERCLA purposes if it acquired the property through bankruptcy, tax delinquency,

abandonment or other circumstances in which title is acquired involuntarily.<sup>30</sup> In such cases, the municipality can continue to pursue a full cost recovery action.

### **3. Natural Resource Damage Claims under CERCLA.**

In addition to response costs, CERCLA holds responsible parties liable for injury destruction or loss of natural resources resulting from the release of a hazardous substance.<sup>31</sup> CERCLA defines natural resources as "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . . any State or local government . . ."<sup>32</sup>, and provides that liability for their destruction "shall be to the United States Government and to any State for natural resources within the State

or belonging to, managed by, controlled by, or appertaining to such State . . ."<sup>33</sup>

Until recently, federal district courts had interpreted this provision expansively, reasoning that the term "State" included municipalities in the class of parties which could recover natural resource damages and holding that municipalities had standing to recover natural resource damages.<sup>34</sup> Recently, courts have held otherwise including a court which had previously granted standing to a municipality.<sup>35</sup>

Even though natural resource damages can only be pursued by federal and state authorities, a municipality may seek designation from such authorities to act on their behalf as trustee for natural resources.<sup>36</sup> With such a designation, a municipality can be granted standing for an action to recover natural resource damages under CERCLA.

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#### 4. Pretreatment Program under the Clean Water Act.

Waste water is often managed through a municipally-owned treatment plant. The Clean Water Act authorizes municipalities to regulate industrial discharges that pass through their systems.<sup>37</sup> Parallel provisions in the ECL authorize local control of industrial discharges to the waters of the State.<sup>38</sup> It permits a municipality to develop and administer a pretreatment permit and enforcement program, typically through the adoption of a sewer use ordinance. The sewer use ordinance can be utilized to limit pollutant loadings, as well as to control use and flow.

### OTHER CREATIVE APPROACHES

As the saying goes, there are many ways to skin a cat (or a polluter for that matter). In addition to creatively employing the common law, state and federal statutory tools discussed in last month's article and above, municipalities have other ways of influencing environmental behavior in their jurisdictions.

**I. Become a player in federal and state enforcement actions even if there is no specific local jurisdiction.** Public participation is required under some statutes, but state and federal authorities often resist. Localities can insist on a seat at the settlement table and use this position not only to bargain for particular remedial results but to obtain the right to monitor the polluter's future operation and to recover their costs for doing so.

**II. Take advantage of any non-regulatory jurisdiction.** Municipalities often own and/or operate local facilities, landfills and municipal waste water treatment plants. As owners or operators, they can impose conditions on the use of these facilities even beyond those which they could impose as

regulator. The same goes for incentives they may award (i.e., loans, recognition of good environmental behavior, etc.).

**III. Recover for lost property values caused by pollution.** Case law has established the right of homeowners to get their real property assessments reduced when the value of their property is impaired by pollution. What many municipalities do not realize is that, in such cases, the municipalities have a right of action against the polluter to recover the lost tax revenue.<sup>39</sup>

#### Let's Be Practical

Municipal action in the environmental arena will cost money. But local governments need not do everything, and there are ways to finance the choices, a few of which are mentioned above. In some cases, expenditures may be reimbursed from state and federal authorities. In others, fines and penalties can support the program, or settlements can be crafted to include funding for compliance monitoring. It is not necessary to have a full-fledged environmental regulatory program to see benefits. Surgical strikes can yield dramatic results and be reasonably priced, too.

### CONCLUSION

Local governments now have a better opportunity than ever before to become proactive in the area of environmental law, both as environmental regulator and as environmental enforcer. Because most state environmental statutes do not implicitly or explicitly preempt local environmental programs, and many traditional local governmental powers may be employed in creative ways to fill in gaps, there are many opportunities for action at the local level. Expertise and ability in this area is readily available.

Not all approaches discussed in this series will be appropriate for every municipality. And municipalities need

not avail themselves of every opportunity to regulate and enforce. The beauty of municipal involvement is that it may be used selectively to target areas or issues of special local concern. For the rest, it can rely on federal and state authorities.

By stepping into the widening gap in environmental enforcement, municipalities can target their actions to areas of most importance to their citizens. Once a municipality arms itself with mechanisms and expertise to bring enforcement actions, it is in a position to take direct action and to leverage its authority to force administrative settlements and, in some situations, obtain fines and penalties which can be used for local benefit projects and to support the enforcement program. ❖

### ENDNOTES

<sup>1</sup> N.Y. Pub. Health Law §1308.

<sup>2</sup> N.Y. Pub. Health Law §308. See also id. 5347, granting county boards of health the authority to "formulate, promulgate, adopt and publish rules, regulations, orders and directions for the security of life and health in the health district which shall not be inconsistent with the provisions of . . . the sanitary code. Such rules, regulations, orders and directions shall be known as the sanitary code of such district."

<sup>3</sup> Boyer v. Department of Health of Albany County 52 A.D.2d 652, 381 N.Y.S.2d 805 (1976).

<sup>4</sup> N.Y. Pub. Health Law §309(f).

<sup>5</sup> N.Y. Pub. Health §1303.

<sup>6</sup> Id. §1305. It should be noted, however, that boards of health in abating an alleged nuisance, unless acting under the judgment or order of a court, act at their own peril, and may be held liable if their acts are challenged in court, unless the thing abated was in fact a nuisance. People v. Board of Health, 140 N.Y.1 (1893); Smith v. Irish, 37 A.D. 220, 55 N.Y.S. 837(1899).

<sup>8</sup> Id. §1307.

<sup>9</sup> N.Y. ECL §71-1919.

<sup>10</sup> See, Bond St. and Weathervest Slip Boathouse Owners v. City of North Tonawanda, 62 A.D.2d 1136, 404 N.Y.S.2d 463 (1978) (statutory action under this section is not the exclusive remedy for municipality to prevent discharge of sewage into any river, stream, lake or other body of water).

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<sup>12</sup> N.Y.Nav.Law §181(1).

<sup>13</sup> N.Y.Nav.Law §181(5).

<sup>14</sup> N.Y.Nav.Law §181.

<sup>15</sup> The Department may “delegate to municipal health or environmental departments of agencies or other appropriate governmental entities . . . such functions of review, approval or plans, issuance of permits, licenses, certificates or approvals required or authorized by this chapter as the commissioner may deem appropriate in order to . . . provide for better coordination among different levels of government or to enhance environmental protection . . .” N.Y. Envtl. Conserv. Law §3-0301.

<sup>16</sup> 6 NYCRR §§665.9.

<sup>17</sup> 6 NYCRR §201.1.

<sup>18</sup> ECL §17-0701(7).

<sup>19</sup> Executive Law §807; 9 NYCRR §582.1.

<sup>20</sup> See, Air Pollution Prevention and Control Act, 42 U.S.C. §7604; Resource Conservation and Recovery Act, 42 U.S.C. §8972; Emergency Planning and Community Right to Know Act, 42 U.S.C. §1104; Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9659; Federal Water Pollution

Control Act, 33 U.S.C. §1365; Noise Control Act, 42 U.S.C. §4911, Safe Drinking Water Act, 42 U.S.C. §300 j (8); Endangered Species Act, 16 U.S.C. §1540(g). Toxic Substance Control Act, 15 U.S.C. §2619; Surface Mining Control and Reclamation Act, 30 U.S.C. §127; Marine Protection, Research and Sanctuaries Act, 33 U.S.C. §1415; Deepwater Port Act, 33 U.S.C. §1515; Outer Continental Shelf Lands Act, 4 U.S.C. §1349; Hazardous Liquid Pipeline Safety Act, 49 U.S.C. §2014.

<sup>21</sup> Id. See, e.g. 42 U.S.C. §7602 (defining “persons” who may bring a citizen suit as including municipalities)

<sup>22</sup> See, 33 U.S.C. §1365; 42 U.S.C. §7604; 42 U.S.C. §6972; 42 U.S.C. §9659; 4 U.S.C. §1104.

<sup>23</sup> See, e.g., 33 U.S.C. §1365 (requiring the plaintiff in a citizen suit to provide notice to the EPA, the State and the alleged violator 60 days prior to the commencement of the action. If within those sixty days the federal or state government commences and diligently prosecutes an action, the municipality may intervene as a matter of right.)

<sup>25</sup> 42 USC §9607(a)(4)(B).

<sup>26</sup> Id.

<sup>27</sup> See e.g. U.S. v. Chem-Dyne Corp., 572 Fsupp 803 (SD Ohio 1983).

<sup>28</sup> 42 USC §9612(a)

<sup>29</sup> U.S. v. Colorado & Eastern R. Co., 50 F.3d 1530, 1536 (10<sup>th</sup> Cir. 1995).

<sup>30</sup> 42 USC §9601(20)(D).

<sup>31</sup> 42 USC §9607(a)(4)(C).

<sup>32</sup> 42 USC §9601(16).

<sup>33</sup> 42 USC §9607(f).

<sup>35</sup> Mayor of Rockaway v. Klockner & Klockner, 811 FSupp. 1039; City of Philadelphia v. Stepan Chem. Co., 713 FSupp. 1484. See also, City of New York v. Chemical Waste Disposal Corp., 836 FSupp. 968.

<sup>36</sup> Town of Bedford v. Raytheon Co., 755 F Supp. 469, 472 (D. Mass. 1991) (“[P]resumably, municipalities may now, under appropriate Circumstances seek designation of a municipal representative to pursue natural resource damages claims on behalf of or as a “natural resource trustee”).

<sup>37</sup> 33 USC §1317(b)

<sup>38</sup> ECL §17-0825

<sup>39</sup> State of New York and Town of Moreau v. General Electric, 199 A.D.2d 595 (3d Dept. 1993).