

Hurricane Sandy Aftermath - Environmental Compliance and Insurance Issues

West LegalEdcenter/ThomsonReuters

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TODAY

- Superstorm Sandy – The View from New Jersey DEP
- Release Reporting Issues and Cleanup
- Federal Compliance Issues, Including Waivers
- Hot Issues in New Jersey, New York and Connecticut, and Waivers
- Insurance – Policy Language and Causation are keys
- Liability and Enforcement Concerns, and What's Next
- **Helpful Links**
- Your Questions today – DON'T BE SILENT, SPEAK UP – WE WANT YOUR QUESTIONS AND INPUT
 - ✓ **Take advantage of the “Submit Question” button in your viewer window**

SUPERSTORM SANDY -- THE CHRONOLOGY AND GOVERNMENT RESPONSES

*Ray Cantor, Esq., Chief Advisor to the
Commissioner, New Jersey Department
of Environmental Protection*



Releases and Issues!

- ❖ Some Environmental Concerns Addressed, other Impacts being Discovered, Government and Private Parties adjusting daily
- ❖ Some Known Incidents and Releases:
 - Arthur Kill Channel – oil spill from two large diesel storage tanks, oil contained
 - Combined sewer overflows in NJ, affecting some NJ rivers, bays and portions of rivers contiguous to NY
 - EPA: avoid contact with waters in Newark Bay and NY Harbor
 - Fishing, boating advisories or closing in NY, some rescinded
 - Boil Water Orders in several states
 - Passaic Valley (5th largest WWT plant in nation) flooded and lost power. Not yet doing secondary treatment
 - Water Conservation Advisories in at least 86 towns to minimize pollutant discharge
- ❖ Unknown Consequences and Impacts – Everything Being Reconsidered
 - Passaic River/other cleanups?

Releases and Issues (cont'd)

- ◇ NJ Sierra Club and NJ Riverkeeper/Baykeeper: (1) Objected to NJ waiver for rebuilding, based on environmental concerns. Called for EPA action. (2) Requested investigation into PVSC preparedness.

- ◇ Superfund Sites Reviewed by EPA (as of 11/12/12)
 - 105 removal sites assessed and no immediate threat
 - 143 Remedial Sites, 96 assessments completed (including Gowanus and Newtown)
 - Sampling results for Gowanus and Raritan Bay Slag site on EPA website

- ◇ “Toxic Site Worry” The Wall Street Journal of 11/12/12
 - 45 of 198 Superfund Sites are within 1/2 mile of coast
 - Brooklyn’s Gowanus Canal “only low levels”, Newtown Creek Brooklyn (citizens hired consultant for sampling)
 - NJDEP: Sites in North NJ “not inundated by tidal surges”

Waivers by Federal Government

- NEPA and Emergency Assistance Waiver Under Stafford Act
 - No waiver for other environmental laws, or Endangered Species Act, National Historic Preservation Act

- US EPA Waivers, Extensions
 - Clean Fuel Waivers for PA, NJ, NYC area, MA until 11/13
 - Fuel Delivery and blending allowed to NJ terminals until 11/20
 - EPA's No Action Assurances for Vapor Recovery Requirements
 - EPA Brownfields Grant proposal deadline extended to 12/3

- US Department of Transportation PHMSA HazMat Waivers
 - Emergency special permits to ship hazardous materials, including gasoline and diesel fuel
 - Applies from New Hampshire to West Virginia
 - Other requirements waived if vehicle escorted by law enforcement
 - See Other permissions in PHMSA waiver

Waivers have limitations and conditions. Seek enforcement discretion.

New Jersey Waivers

NJ DEP Admin Order No. 2012-13 – Public Works

- Waives Flood Hazard Control Act Rules, NJAC 7:13 et seq. and Coastal Zone Permit Program Rules, NJAC 7:7A et seq.
- Applies to ***Public Infrastructure*** damaged by Sandy – state, county, municipal agencies may repair/replace
 - Examples: roads, railroads, culverts, bridges, utility lines, outfall structures, stormwater management basins, bulkheads, shoreline stabilization
- 180 days for inventory and certifications by NJ professional engineers
- Review and written authorization of eligible damages and activities by DEP having effect of waiving
- Further documentation within 60 days of completion
- FEMA



NJ Waivers - cont'd

The DEP Waiver Rule – NJAC 7:1B et seq.; Effective August 1, 2012 – All DEP Rules

- The Department may prospectively waive the strict compliance with any of its rules only when it determines that at least one of the following exists and all other requirements of the Waiver Rule are met:
 - Conflicting rules;
 - Strict compliance with the rule would be unduly burdensome;
 - A net environmental benefit; or
 - A public emergency.
- 13 absolute prohibitions of waivers in 7:1B-2.1
- Waivers have limitations and conditions
- Website at <http://www.state.nj.us/dep/waiverrule/>

Cleanups – Immediate Environmental Concerns

- Sites under investigation/remediation
- New conditions
- License Site Remediation Professionals

New York Waivers, Extensions

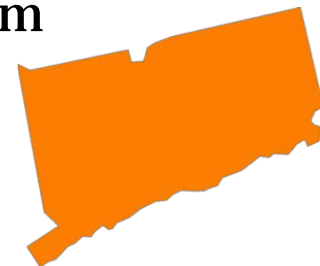
- New York has posted a list at: <http://www.dec.ny.gov/public/76659.htm>
- Those include:
 - DEC is granting an extension for application submissions for minor permit modifications and permit renewals.
 - DEC is preparing a General Order to specify requirements for generators of hazardous waste to come with, to allow for hazardous waste generated by the storm damage to be properly disposed of without incurring the fees and taxes for a specific period of time.
 - The state will extend the due date for regulatory fees which include fees for tons of regulated air pollutants emitted by facilities subject to the Title V operating permit program.
 - DEC is extending deadlines for compliance with obligations in agency-issued orders on consent for respondents. In addition, DEC will reschedule routine cases on the hearings docket.
 - The State and City have issued waivers suspending restrictions on sulfur content levels that may be contained in heating fuels.

Waivers have limitations and conditions.
Enforcement discretion possible.



Connecticut - Waivers of DEEP

- Emergency Engine Temporary Authorization Issued Oct 26, 2012. Through Nov. 14th, affects hours, sulfur content of fuel, quantity.
Some conditions apply, including recordkeeping
- Placement of sandbags and storm debris removal, exp. Jan 2012, No. TA Sandy 10-2012-1
- Replacement of Sand, exp. Jan 2013 No. TA Sandy 10-2012-2
- Debris Removal and Repair Statewide Temporary Authorizations, exp. Jan 2013, No. TA Sandy 10-2012-3
- Riprap Placement and repairs in eroded areas, exp. May 2013, Nos. EA Sandy 10-2012-3 and TA-Sandy-10-2012-4
- Emergency Authorization for Municipalities Managing Storm Generated Debris , EA No. 20122036
- Permission for Open Burning by Municipalities for Brush



Waivers have limitations and conditions. Enforcement Discretion

Insurance Claims - How much loss is actually insured?

- **Business Insurance – First Party**
 - Root Causation may be uncertain
 - “All Risk” v. Named Peril
 - Loss of Insured Property and Business Interruption
 - Measure of loss/recovery
 - Notice and other policy conditions, exclusions, endorsements
 - Other lines:
 - Flood; Commercial General Liability; Cyber Liability; Professional Liability; Pollution Liability; Directors and Officers Liability; Inland Marine; Endorsements to Other Coverages
- **Homeowners Insurance**
 - Proximate Causation, e.g., wind, flood, hurricane
- **Quality of Professional Advice – Brokers, Others?**

Government Removal Authorities and Funding for Cleanup

EPA

- Removal authorities for CERCLA Hazardous Substances and under CWA for Oil: 42 USC §§ 1321, 9604

FEMA

- Public Assistance Grants for Debris Removal: 42 USC §§ 5121 et seq.

New Jersey

- New Jersey Spill Compensation and Control Act: N.J.S.A. 58:10-23.11 and related regulations.

Connecticut

- USTs: C.G.S. Title 22a, § 22a-449a et seq., as amended

Cleanups - cont'd

New York Cleanup Authorities and Funding

- Navigation Law article 12 (see Navigation Law sec 173 et seq.) or Navigation Law Article 12 and related regulations, including:
 - 17 NYCRR 32.3 and 32.4
 - ECL § 17-1007; 6 NYCRR § 613
 - Chemical Bulk Storage Act 6 NYCRR Parts 595, 596, 597
 - ECL § 17-1743
 - Chemical Bulk Storage Act 6 NYCRR Parts 595, 596, 597; ECL 40-0113(d)
 - Transportation Law 14(f); 17 NYCRR 507.4(b)
 - 6 NYCRR § 380.7
 - 6 NYCRR 381.16; ECL § 27-0305; Waste Transporter Permits

Such laws vary from state to state, imposing reporting requirements, time limits, procedures for compliance and penalties for non-compliance. Funding programs may be financially constrained.

Expect Private and Public Damage Claims and Cost Recovery Claims

No one wants a lawsuit, but you've been injured and have damages...

- **Strict Liability Claims for Abnormally Dangerous Substances or Hazardous Substances**
- **Tort Claims for negligence if established that the actions are not those of a reasonable person, if proximate cause to injury, and damages. May be negligence *per se* if a violation of environmental law was cause or contributing factor.**
- **Private Property Damage, lost profits claims Under Oil Pollution Act of 1990**
- **Cost-Recovery Claims under Federal Superfund Law (CERCLA) or State laws**
- **Natural Resource Damage Claims by public trustees under CERCLA, OPA, CWA, National Marine Sanctuaries Act, Park System Resources Protection Act, State Laws**
- **IS A SUPERSTORM UNPREDICTABLE, WHEN IT IS PREDICTED? Act of God defenses unlikely to succeed under some laws, as Sandy was widely predicted**

What's Next? Developing Issues and Impacts

- ✓ FEMA Public Assistance Applications
- ✓ Lots of sampling!
- ✓ Indoor air quality issues: Mold, Oil, Sewage
- ✓ Insurance Claims
- ✓ Building Codes and State Plan Revisions
- ✓ Insurance Costs for Shoreline properties
- ✓ Debris and Disposal Issues: Asbestos, Lead, PCBs in Building Materials, Hazardous Waste, and more
- ✓ Enforcement Discretion through Communication with Regulators
- ✓ Violations Discovered and Lack of Reporting may lead to Enforcement, Penalties
- ✓ More Brownfields Grants?

Questions Today

**For questions today, use the
“Submit Question” button in
your viewer window**



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Helpful Links and Telephone Numbers

U.S. EPA Links

- Sandy Website: <http://www.epa.gov/sandy/>
- <http://www.epa.gov/oem/content/reporting/index.htm> (information on how to report releases of hazardous substances or petroleum products)
- http://www.epa.gov/oem/content/epcra/serc_contacts.htm (list of state emergency response contacts)
- <http://www.epa.gov/hurricanes/>
- Report Chemical or Oil Spills to the National Response Center: 1-800-424-8802
- Other Environmental Concerns: George Zachos, EPA Regional Public Liaison: 1-888-283-7626
- http://www.epa.gov/region4/r4_hurricanereleases.html (information on emergency operating procedures)

Helpful Links - cont'd

Other U.S. Government Links

- Federal Emergency Management Agency:
<http://www.disasterassistance.gov> or 1-800-621-3362
- <http://www.fema.gov/assistance/index/shtm>
- The special permit authorizing the use of non-specification cargo tank vehicles to transport gasoline and diesel fuel:
http://phmsa.dot.gov/staticfiles/PHMSA/SPA_App/OfferDocuments/SP15752_2012110433.pdf
- The special permit authorizing the use of non-specification metal refueling tanks:
http://phmsa.dot.gov/staticfiles/PHMSA/SPA_App/OfferDocuments/SP15751_2012110209.pdf
- <http://www.dol.gov/opa/storm-recovery.htm>
- <http://www.sba.gov/sandy>

Helpful Links - cont'd

New Jersey Links

- Sandy Website: <http://www.nj.gov/dep/special/hurricane-sandy/>
- Oil and Haz Substance Spill reporting 1-877-927-6337 (877-WARN-DEP)

New York Links

- NYDEC Sandy Website: <http://www.dec.ny.gov/public/76659.html>
- DEC's Spill Hotline (1-800-457-7362)
- NY State Hurricane Sandy Helpline (1-888-769-7243)
- Small Business Assistance (1-800-659-2955)
<http://www.nycedc.com/backtobusiness>

Connecticut

- Sandy website: <http://www.ct.gov/deep/cwp/view.asp?a=4145&Q=513782>
- DEEP Spill reporting: 860-424-3338 or Toll Free: 1-866-DEP-SPIL (1-866-337-7745)
- UST Cleanup Fund:
http://www.ct.gov/dep/cwp/view.asp?a=2717&q=325322&depNav_GID=1652