



**Department of
Environmental
Conservation**

Overview and Updates on Natural Resource Damages Liability and Other DEC Initiatives

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Outline

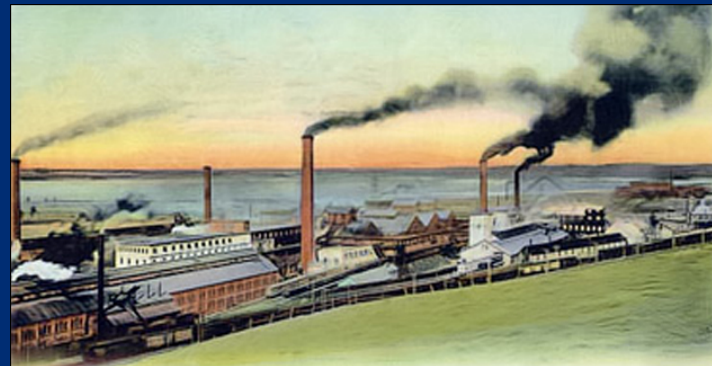
Overview and Updates on NRD Liability and Other DEC Initiatives

- Removal, Remediation, Natural Resource Damages
- Examples
- What's **New**

Release of Contaminants

Traditional Contaminants

- Petroleum, PCBs (Manufacturing), PCE and TCE (Dry Cleaners), Coal Tar and VOCs (Manufactured Gas Plants)



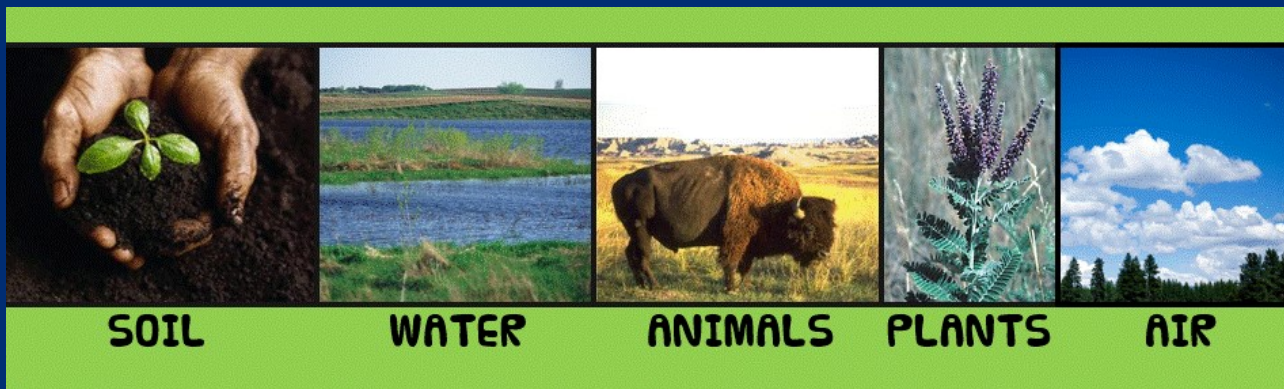
Emerging Contaminants

- PFAS (Manufacturers, Fire, Airports, Defense, more...)
- 1,4-Dioxane (Pharma, Plastics, Packaging, Pesticides)

Release of Contaminants

Injury to Natural Resources

- Groundwater • Surface Water • Drinking Water
- Soil • Sediments • Air • Fish • Wildlife



Credit: SD Assn of Conservation Districts



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What Does DEC Do After a Release?

1. Response Actions:

- Removal and/or Remediation
 - Performed by PRP, or DEC (then pay us later)
 - Use green remediation principles
 - **Social Cost of Carbon (SCC)**, pursuant to **Climate Leadership and Community Protection Act**

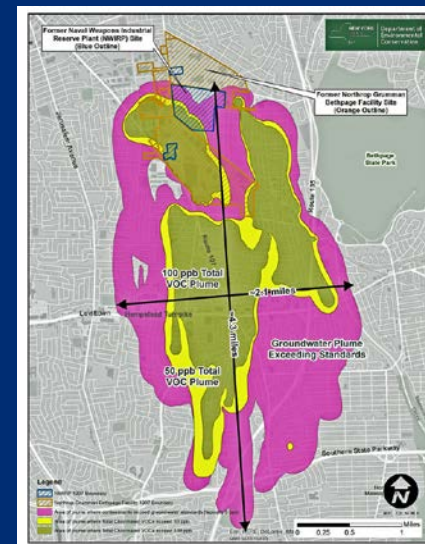
2. Seek Natural Resource Damages (NRD)



Response Action Example: Groundwater

NYSDEC Priority: Drinking water protection

- Long Island - sole source aquifer
 - Multiple large GW plumes (mostly VOCs)
 - Grumman/Navy Plume in Bethpage
 - Amended Remedy announced Dec. 2019
 - 24 extraction wells, 5 treatment plants, 4 recharge basins, 24 miles of conveyance piping
 - \$585 million for construction & operation



Natural Resource Damages

Injury is a measurable negative change, in the chemical or physical quality of a natural resource and the services they provide.

Damages are a monetary value of loss, paid as compensation.



Natural Resource Damages

- Purpose:
 - Compensate the public for injuries from releases.
 - Make the public whole
 - Not punish strictly liable parties
- Liability, including response costs, is joint and several
- New York, as Trustee, must use NRD recoveries to restore, rehabilitate, replace, or acquire the equivalent of the injured resources and their services.



Natural Resource Damages

Legal Authority - Federal

- CERCLA, 42 U.S.C. § 9621 et seq.
- Oil Pollution Act (OPA), 33 U.S.C. § 2701 et seq.
- Clean Water Act (CWA), 33 U.S.C. § 1321(f)(4), (5)
- National Marine Sanctuaries Act, 16 U.S.C. § 1443(a)(1)
- System Unit Resource Protection Act, 54 U.S.C. § 100724-100725
(formerly Park System Resource Protection Act)



Natural Resource Damages

Legal Authority - State

- NY Navigation Law Article 12 (the “Oil Spill Law”)
 - primary mechanism to deal with liability and cleanup for oil spills on land and water in New York State
- Common law
 - Public Nuisance; Unjust Enrichment; Restitution; Indemnity



NRD Process (Overview)

1. Identify a Release
2. Identification of Potential Claims
3. Injury Assessment, Quantification
4. Damage Assessment and Resource Valuation



5. Negotiation and Settlement
6. Implement Restoration Plan

NRD Process

3. Injury Assessment, Quantification

- Number of acres or sediment affected
- Number of animals/fish affected
- Gallons of water contaminated
- Calculate Past & Future Injury

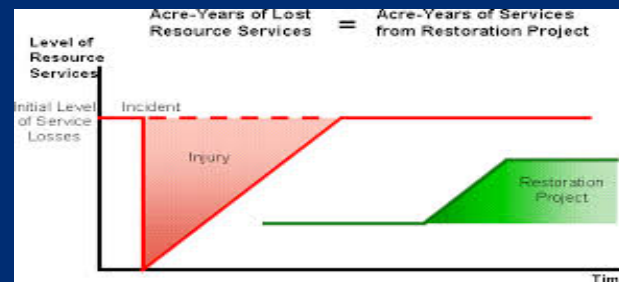
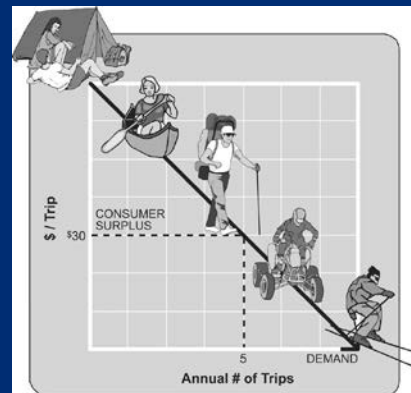
credit: Cape Gazette



NRD Process

4. Damage Assessment and Resource Valuation

- Quantify Lost Services
(DSAY = Discount, Service, Acres, Years)
- Extent + Severity
- HEA (Habitat Equivalency Analysis)
- Evaluate Replacement Projects
- Scale projects to equal lost services (including time)
- Decide best way to obtain replacement habitat



NRD Process

5. Negotiation & Settlement - Options (reflected in a Consent Decree)

- 1. Project Based Settlement
Execute restoration project

- 2. Cash Settlement
Negotiation \$ & cash-out

- 3. Cash-Out & Project Settlement
Execute some project(s), cash out the rest



Credit: CEEweb for Biodiversity



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NRD Process

6. Implementation of Restoration Plan

- Nexus to the Injury
- Ideally, benefit same resources in type, quantity, ecosystem
- Other factors (e.g., cost effectiveness) come into play
- Projects need to be Shovel Ready
- Project Types: Land Acquisition, Habitat improvements, Conservation easements, Recreational access, Environment education, Cultural restoration

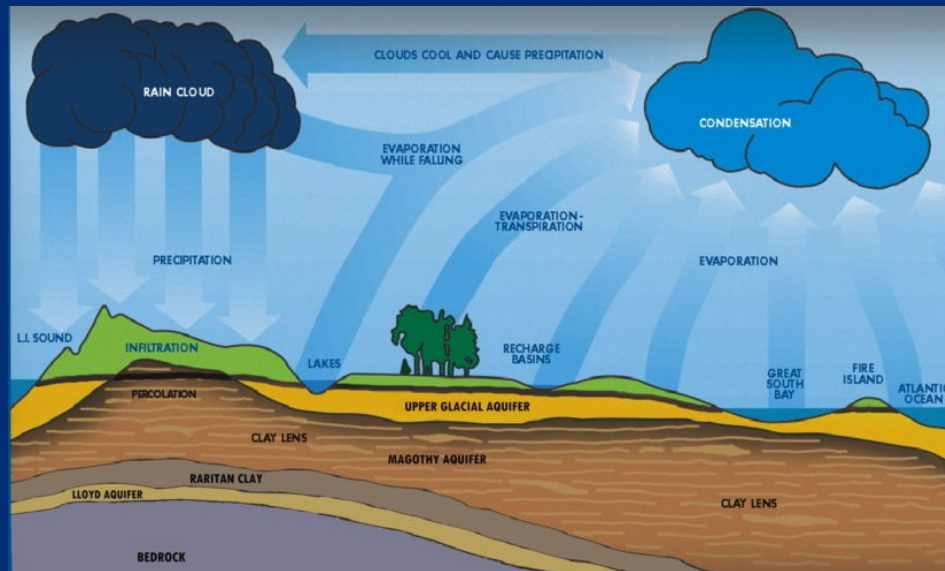


NRD at NYSDEC

Drinking water protection: Groundwater NRD

- Grumman/Navy Plume

- Grumman and Navy declined to work with DEC on NRD assessment
- DEC retained expert to assess damages



Credit: Suffolk County Water Authority

NRD at NYSDEC

Soils – Construction & Demolition Debris

- Litigation: Brentwood, Long Island
 - *Seggos v. Datre* (E.D.N.Y.)
 - C&D waste illegally dumped
 - Town park closed 2014-2017
 - DEC suing waste haulers, brokers, arrangers
 - Seeking NRD for lost use of park



NRD at NYSDEC

Seggos v. Datre, 17-CV-2684 (E.D.N.Y.)

- MTD – SOL – When did the “loss” occur?
 - Defendants: When NYS learned of C&D release
 - Plaintiff (New York/NYSDEC): When the Park closed
 - Court (8/5/19): CERCLA claim accrued when (1) NYS first knew, or with reasonable diligence would have known, of the public’s loss of use of the Park, and (2) such loss was connected to the release of the C&D.
- => Discovery ongoing re NYS knowledge of the loss



NRD at NYSDEC

Seggos v. Datre, 17-CV-2684 (E.D.N.Y.)

- Proposed Consent Decree with one Arranger
 - Settle for \$101,131 out of \$3m total NRD for Park closure
 - Based on estimated annual visits, \$ value of each visit
 - Court: (1) Inconsistency in NYS methodology precludes settlement (rationale for choice of population unclear)
 - => Implication: Underlying methodology reasonable
 - (2) For estimation and allocation, truckload measure is reasonable and practical; but must allocate to all defendants.



NRD at NYSDEC

Surface water and habitat protection

▪ Settlement: Onondaga Lake

- Industrial pollution since 1917 (mercury, PCBs, etc.)
- Honeywell settled with NYSDEC/USFWS
- Settled for \$5 Million
- 19 Restoration Projects: Habitat creation & restoration; wetlands restoration; trails; boat launches & fishing access; 100+ acres of conservation easements



NRD at NYSDEC

Small Spills

- DEC is considering promulgation of a simplified NRD assessment formula for small petroleum spills
 - “Small” = less than 5,000 gallons
- Factors to include type of contaminant, resource affected, season, and affect on human recreation
- Issued as a guidance document



What's New? **Climate Change!**

Climate Leadership and Community Protection Act - Underway
Climate Action Council will:

- Convene Advisory Panels & Just Transition Working Group
- Consult with the Climate Justice Working Group and Environmental Justice Advisory Group
- Prepare and approve Scoping Plan to attain GHG limits

20 of 22 members recently appointed



What's New? **Climate Change!**

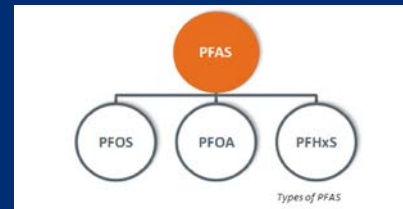
Climate Leadership and Community Protection Act - *Underway*

- 1 year: DEC to establish (1) GHG emission limits, (2) Social Cost of Carbon (\$/ton CO₂e)
- 2 years: DEC to report on Statewide GHG emissions
DEC to assist Council in drafting Scoping Plan
- 3 years: Final Scoping Plan from Council
- 4 years: DEC to promulgate GHG emissions regulations



What's New?

Emerging Contaminants: PFAS & 1,4-Dioxane!



- “Forever chemicals” - persist in environment and water
- Per- and Polyfluoroalkyl Substances: used for coatings and products that resist heat, oil, stains, grease, and water.
- 1,4-Dioxane: synthetic industrial chemical, highly mobile in water. Used in paint strippers, dyes, greases, antifreeze and aircraft deicing fluids, and in some consumer products

Response Actions & Legislation/Rulemaking

- Water Quality Rapid Response Team formed
- Emergency Rulemaking listing PFOA and PFOS as Hazardous Substances
- Clean Water Infrastructure Act – provided response funding
- Formed Drinking Water Quality Council: recommended MCLs of 10 ppt for PFOA & PFOS, 1ppb for for 1,4-dioxane
- Promulgation of MCLs pending



EC Sampling Initiative (2018 to Present)

Testing for PFAS & 1,4-Dioxane at active remedial sites

- ~1,475 Sites (SSF and BCP); Over 60% have been sampled

Follow up actions may include:

- Monitoring PFAS levels in groundwater and sampling other media
- Initiating water supply sampling or mitigating, as directed by DOH
- Incorporating PFAS into remedy selection process
- Adding PFAS to monitoring program and site management phase

See “Guidelines for Sampling and Analysis of PFAS Under NYSDEC’s Part 375 Remedial Programs” issued January 2020;

“Sampling for 1,4-Dioxane and Per- and PFAS,” issued June 2019



AFFF Collection Program (2017 to Present)

- Removal and disposal of AFFF (aqueous film forming foam)
- Applies to municipal fire and emergency response departments
- Required disposal by incineration
- Over 32,000 gallons collected to date and properly disposed



Inactive Landfill Initiative

- SFY 17-18 Budget added authority to investigate solid waste management facilities for impacts on drinking water
- Over 2,000 landfills & solid waste disposal sites evaluated
 - Includes field investigations at high priority sites
 - Evaluations completed in early 2019 – will determine where additional investigation is needed and establish priorities
 - Mitigation and remediation efforts underway



Biosolids and Compost Testing

- NYS conducted sampling of biosolids and compost from 8 Wastewater Treatment Plants in 2017
- Analyses: higher leaching from compost than biosolids
- **NYSDOH** currently completing a preliminary exposure assessment for compost products



Rotating Integrated Basin Studies (RIBS)

NYSDEC sampling PFAS at some surface water sites

- Piloted water-column sampling for PFAS at 7 RIBS routine sites in 3 regions of the State in late 2019
- May be expanded to all 40 RIBS routine sites during the spring and summer 2020 events



Upcoming Actions

- Perform preliminary environmental assessments at approx. 75 fire training centers
- Establish ambient surface water and groundwater guidance/standards
- Develop SCO for Protection of Groundwater
- Expect PFAS sites to be new NRD focus, especially if/when listed as CERCLA hazardous substances by the EPA

PFAS Litigation

NYS (and many others) suing manufacturers & distributors of PFAS & AFFF

- Centralized in AFFF Products Liability Litigation, U.S. District Ct., District of South Carolina, MDL No. 2873
- Allegations that AFFFs contaminated groundwater near airports, other industrial locations with PFOS, PFOA
- **Currently in discovery**

2020-21 NY State Executive Budget

- DEC Operations budget is \$464.7 million
- DEC Capital budget is \$7.3 billion
- Includes new \$3 billion **Restoring Mother Nature Bond Act** to restore habitats and reduce flood risk; improve water quality; protect open space; recreational infrastructure; expand renewable energy; etc.
- Act requires voter approval and implementing legislation



Executive Budget Article VII Proposals

- **Part PP – Styrofoam Ban**
- Ban sale, use, or distribution of disposable food service containers and packing peanuts made of expanded polystyrene. Exempt certain food items and providers.
- Civil penalties of up to \$250/\$500/\$1k/\$2k for successive violations; fines deposited to the EPF
- DEC authorized to promulgate regs on additional packaging



Executive Budget Article VII Proposals

- **Part SS – Product Stewardship Program**
- New Product Stewardship Program for recycling of **carpets** and **mattresses**; framework for future stewardship programs
- Financed by carpet and mattress producers
- Covered products sold only by stewardship producers
- Fines deposited to the EPF



Executive Budget Article VII Proposals

- **Part TT – Freshwater Wetlands Regulatory Program**
- Reform wetland maps; outdated maps not used for permits
- **Part UU – Bay Park Alienation**
- Establish easements for sewer main beneath parklands to complete Bay Park Conveyance Project in Nassau County
- **Part VV – \$ Security for Plugging and Reclaiming Wells**
- **Part WW – Permanent Fracking Ban**



What's New? **Plastic Bag Ban!**

Bag Waste Reduction Act - Prohibits plastic carryout bags

- Takes effect March 1, 2020
- Regs proposed in Nov. 2019; Public comment thru Feb. 3
 - Prohibition on distribution of film plastic bags
 - Allowable reusable bags
 - The recycling of film plastic by stores
 - Related requirements for manufacturers



Thank You

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