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ESG Investing: Searching for Clarity

CPLR 214 Amendment Seeks to Provide Water Suppliers an Opportunity to Recover Damages for Contamination of Water Sources

Offshore Wind: Status of New York State's Initiatives

Message From the Section Chair

By Linda R. Shaw

My year as Chair is off to an exciting start with the planning of the EELS fall meeting. We will be holding the meeting in person at the Statler Hotel in Ithaca, New York from Saturday, October 23 through Monday, October 25. The topic for this year's fall meeting is "Creative Environmental Planning." The conference will be held jointly with the Local Law and Municipal Law Section of the New York State Bar Association.

In addition, the Brownfield Task Force has been working hard on a new piece of brownfield legislation. The new legislation is based on bills introduced and passed by Senator Carl Marcellino in 2019, and a more recent bill introduced by Senator Tim Kennedy from Buffalo. The task force also worked on a Memo in Support of the new legislation and a summary report provided to the Bar Executive Committee in August. The Executive Committee will vote at its October 22, 2021 meeting on whether to approve the legislation. The primary goal of this legislative effort is to extend the very successful Brownfield Cleanup Program and associated tax credit incentives for another 10 years.

Vice Chair James Rigano is starting to plan for the EELS Annual Meeting to be held in January 2022. That meeting will focus on energy issues.

The Section's officers will contact committee leaders to help plan these conferences so that the topics most critical to your practices can be included.

I'm looking forward to working with all of you, and seeing you at the meetings.

Linda Shaw

Message From the Issue Editor

By Aaron Gershonowitz

This issue includes six articles that reflect some of the breadth of environmental law. Two of the articles discuss a revision to the Civil Practice Law & Rules (CPLR) addressing the statute of limitations applicable to claims of property damage by public water suppliers. Prior to this statute, when a water supplier perceived contamination in groundwater heading toward a supply well, the statute of limitations began to run when a reasonable water supplier would take action to protect itself. Water suppliers complained that this standard did not provide clear guidance, as evidenced by the fact that defendants argued simultaneously that the statute of limitations had run because the water supplier knew of facts that should have caused it to act years earlier and that the claim was premature because the water supplier had not been injured. David Freeman and Niko Rydelek provide an overview of the new statute and Fred Eisenbud is critical of the new statute, recommending a different solution to the problem.

This issue also contains two articles addressing what might be described as environmental policy. The article by Phillip Ludvigsen, Joshua Heltzer, and Arthur Clarke discusses the use of environmental, social, and governance (ESG) considerations by investors. ESG investing is becoming a global trend and this article discusses both the development of standards for, and the risks and rewards of, such investing. The article addresses economic decision making using environmental considerations. The article by James Rigano and Alyse Delle Fave discusses the status of New York State's offshore wind initiatives. The article discusses the current status of projects, obstacles to implementation, and likely next steps.

This issue also contains two student pieces. The article by Alisha Flaherty addresses lead in drinking water. The article examines the relevant regulations and case law and discusses the issue from the perspective of environmental justice. Ms. Faherty is a student at Pace Law School and is the winner of the NYSBA EELS essay contest. Daniel Bornstein's article discusses the standard for obtaining an injunction in the Endangered Species Act and, particularly, the decision in *Cottonwood Environmental Law Center v. U.S Forest Service*, 789 F. 3d 1075 (9th Cir. 2015), cert. denied, 127 S. Ct. 293 (2016).

Thank you to our authors for their thoughtful articles.

Aaron Gershonowitz

The Virtual Elimination of the Statute of Limitations Applicable to Damage Claims by Public Water Providers by the Legislature Will Cause More Harm Than Good - a Better Solution Was in Plain Sight*

By Frederick Eisenbud

*Originally published in The New York Environmental Lawyer (2021 Vol 41, No. 1), a publication of the Environmental and Energy Section of the New York State Bar Association, under the title "A Better Solution Was in Plain Sight: Amend CPLR 214-c to Conform to the Requirements of CERCLA's Federally Required Commencement Date".

I. Introduction

On November 4, 2019, Governor Andrew Cuomo signed into law New York Civil Practice Law and Rules (CPLR) 214-h, which appears to provide an open-ended statute of limitations for providers of public water claiming injury to their water source from contamination.[1] This article (1) outlines the scope of CPLR 214-c which was enacted in 1986, and how it was applied to water suppliers prior to the adoption of CPLR 214-h; (2) outlines New York State Department of Health (DOH) regulations applicable to water providers and how they impact the running of the applicable statute of limitations; (3) shows that, pursuant to CPLR 214-c, DOH limits for contaminants in potable water do not have to be exceeded in order for the CPLR 214-c statute of limitations to be triggered; (4) discusses the expanded statute of limitations for water suppliers created by CPLR 214-h; (5) analyzes whether CPLR 214-h is to be retroactively applied and if it is, whether it will apply if the statute of limitations in CPLR 214-c otherwise would bar a claim prior to the adoption of CPLR 214-h; (6) argues that the provisions of CPLR 214-h which provide virtually open-ended time for water suppliers to commence an action for damages arising from contamination are inconsistent with sound public policy and may have unintentional adverse consequences for water purveyors; (7) concludes that CPLR 214-h should be rescinded and CPLR 214-c amended to provide a proper balance of rights that will further the goal of permitting water districts to recover their costs from responsible parties without undermining the purpose of having a statute of limitations; and (8) provides, as an Appendix, a proposed amendment to CPLR 214-c that will address the concerns of water providers without the potential adverse impacts created by CPLR 214-h.

II. Overview of CPLR 214-c

When the Legislature enacted CPLR 214-h, one of its purposes was to enable water providers to avoid statute of limitations problems encountered because of CPLR 214-c. An understanding of CPLR 214-c and how it has been applied by state courts in contamination cases will assist the determination whether CPLR 214-h solved problems encountered by water purveyors by the application of CPLR 214-c, and whether CPLR 214-h was needed at all. Although CPLR 214-c is applicable both to personal injury and property damage claims, this article will focus only on its application to property damage claims arising from contamination.

Prior to the enactment in 1986, of CPLR 214-c, claims for property damage were subject to the three-year statute of limitation set out in CPLR 214. As explained by the governor in his memorandum approving the passage of CPLR 214-c in 1986:

> [CPLR 214-c (2)] remedies a fundamental injustice in the laws of our State which has deprived persons suffering from exposure to toxic or harmful substances from having an opportunity to present their case in court. That injustice results from an archaic rule which commences the three-year time period for suit on the date that an exposure occurs. The rule fails to recognize that the adverse effects of many of these toxic substances do not manifest themselves until many years after the exposure takes place . . . This bill . . . repeals that archaic rule and replaces it with a fair and simple rule which permits a person to discover his or her injury before the statutory time period for suit begins to run.[2]

CPLR 214-c(2) provides the core of the statute of limitations applicable, with some limitations, to parties injured by contamination including, prior to the adoption of CPLR 214-h, water providers:

> Notwithstanding the provisions of section 214, the three-year period within which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been

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> discovered by the plaintiff, whichever is earlier.[3]

CPLR 214-c(4) provides limited additional time to injured parties who learn of their injury but do not know the source or cause of the injury. It states:

> Notwithstanding the provisions of subdivisions two . . . of this section, where the discovery of the cause of the injury is alleged to have occurred less than five years after discovery of the injury or when with reasonable diligence such injury should have been discovered, whichever is earlier, an action may be commenced or a claim filed within one year of such discovery of the cause of the injury[.][4]

Thus, if the injured party who is initially unaware of the cause of the injury discovers the cause within five years of discovering the injury, the injured party will have one more year to commence suit. If the cause is not discovered within five years, the statute of limitations will bar recovery.[5] If suit can be filed within the extended period, however,

> [T]he plaintiff or claimant shall be required to allege and prove that technical, scientific or medical knowledge and information sufficient to ascertain the cause of his injury had not been discovered, identified or determined prior to the expiration of the period within which the action or claim would have been authorized and that he has otherwise satisfied the requirements of subdivisions two . . . of this section.[6]

The Court of Appeals has explained that "a causal relationship will be sufficiently ascertained for CPLR 214-c(4) purposes at, but not before, the point at which expert testimony to the existence of the relationship would be admissible in New York courts."[7]

CPLR 214-c is applicable "to acts, omissions or failures occurring prior to, on or after July first, nineteen hundred eighty-six [the effective date of CPLR 214-c]" unless the action was or would have been barred prior to the effective date of the law.[8]

The discovery trigger for the running of the CPLR 214-c statute of limitations only applies to injury to property "caused by the latent effects of exposure." "This requirement is consistent with the Legislature's desire to offer recourse where the harm attributable to the toxic substance does not manifest itself until years after the exposure."[9] For example, if the harm arose from the discovery of asbestos insulation in a structure that a consultant purportedly removed thirteen years before, the plaintiff will be barred by the three-year statute of limitations from bringing a malpractice claim against the consultant because plaintiff's property damage claim involves no additional damage to its building since the original "implantation of the harmful substance."[10]

> A latent injury occurs at the time of exposure: the reason that the injury is latent is that the injury is concealed, and not visible or otherwise apparent . . . and the property damage "results from the seepage or infiltration of a toxic foreign substance over time." A patent injury, on the other hand, is immediately apparent . . . and there is no interval between the alleged exposure and the resulting harm. [11]

II. DOH Regulations Applicable to Understanding the Statute of Limitations Triggers in CPLR 214-c and CPLR 214-h

When the statute of limitations commences to run for water purveyors under both CPLR 214-c and CPLR 214-h turns in part on an understanding of the standards applicable to the quality of water they may offer to the public. Regulatory agencies such as the DOH establish Maximum Contaminant Level Goals (MCLGs) and Maximum Contaminant Levels (MCLs) for contaminants which set the limit for the presence of contaminants in potable water and water purveyors are required to test for the contaminants and to report their results.[12] DOH defines "Maximum Contaminant Level Goal" as "[t]he level of a contaminant in drinking water below which there is no known or expected risk to health. MCLGs allow for a margin of safety."[13] "Maximum Contaminant Level" is defined by DOH as "[t]he highest level of a contaminant that is allowed in drinking water. MCLs are set as close to the MCLGs as feasible."[14] "MCL" is further defined by DOH as "the maximum permissible level of a contaminant in water, which is delivered to any user of a public water system."[15]

DOH regulations applicable to water purveyors would not permit them to wait until the water they provide to customers violates MCLs. 10 N.Y.C.R.R. § 5–1.12(a), for example, requires water suppliers to take certain investigative actions to determine the cause after determining that one or more MCLs "are or may be exceeded" or that "any deleterious changes in raw water quality have occurred" or "that a change in the character of the watershed or aquifer has been observed which may affect water quality." Under any of these circumstances, water purveyors must "undertake a study to determine the cause or causes of such conditions, independent of known or anticipated treatment technology"; "modify existing or install treatment"; "initiate water sampling as needed to delineate the extent and nature of the cause of concern"; and "investigate all or part of the watershed or aquifer to verify any existing or potential changes in the character of the sources of water supply."

Likewise, 10 N.Y.C.R.R. § 5–1.71(a) requires water suppliers to exercise "due care and diligence in the main-

tenance and supervision of all sources of the public water systems to prevent, so far as possible, their pollution and depletion," and 10 N.Y.C.R.R. § 5–1.72(e) mandates annual reports to customers which "contain information on the quality of the water delivered by the system and characterize the risks (if any) from exposure to contaminants detected in the drinking water in an accurate and understandable manner."[16]

DOH requires that certain remedial actions be taken if one or more MCLs "are or may be exceeded" or if "any deleterious changes in raw water quality have occurred."[17] Under these circumstances, public water suppliers must:

> undertake a study to determine the cause or causes of such conditions, independent of known or anticipated treatment technology;
>
> modify existing or install treatment to comply, to the extent practicable, with sections 51.30, 5-1.50, 5-1.51 and 5-1.60 of this Subpart;
>
> initiate water sampling as needed to delineate the extent and nature of the cause of concern;
>
> investigate all or part of the watershed or aquifer to verify any existing or potential changes in the character of the sources of water supply; and
>
> submit a written report to the State within 30 days of the onset of the foregoing conditions summarizing the findings outlined in paragraphs (1) through (4) of this subdivision.[18]

In addition,

> The State may require the supplier of water to conduct sanitary surveys and to conduct water sampling related to watersheds and ground water aquifers which are sources of water supply to identify and evaluate the significance of existing and potential sources of pollution and to report the results to the State. Also, sanitary surveys shall be used to evaluate the adequacy of the public water system, the source or sources of water supply and the water treatment plant to produce a potable water.[19]

III. The Statute of Limitations in CPLR 214-c May Be Triggered Prior to Any MCL Being Exceeded

The DOH regulations make clear that when water contains one or more contaminants that exceed their applicable MCL, the water may not be offered to the public. For purposes of CPLR 214-c, however, courts have deemed water purveyors to have been injured before contaminants in the water they offer exceeds an applicable MCL. A public water provider may claim it was injured and thus has standing to sue for damages even if none of the contaminants in the raw water entering the distribution system contains any contaminants that exceed applicable MCLs. For purposes of determining when the statute of limitations in CPLR 214-c is triggered, water purveyors may be compelled to commence suit within three years if they comply with applicable DOH regulations and incur costs.

"The MCL is only a regulatory standard which governs conduct in supplying water to the public. While the MCL may be helpful in determining whether an injury has occurred, the MCL does not set a bar below which an injury cannot have occurred."[20] The "MCL does not define whether an injury has occurred, since contamination below that level could result in some injury, such as increased monitoring costs." [21] New York water providers have a statutory duty and common sense obligation to protect or remediate groundwater before contamination reaches the applicable MCL.[22] Thus, it is "illogical to conclude that a water provider suffers no injury-in-fact—and therefore cannot bring suit—until pollution becomes so severe that it would be illegal to serve the water to the public.[23]

The New York Court of Appeals has held that, "[f]or purposes of CPLR 214-c, discovery occurs when, based upon an objective level of awareness of the dangers and consequences of the particular substance, 'the injured party discovers the primary condition on which the claim is based.'"[24] Thus, knowledge of both the "dangers and consequences" posed by contamination and harmful impact are required. Mere detection of contamination is not enough.[25] To trigger the running of the statute of limitations, the contamination must be significant enough to justify "an immediate or specific remediation effort."[26]

CPLR 214-c requires that the injured water purveyor must know the source of the injury within five years of discovery of the injury or its claims will be time barred. As we now show, disagreements as to when this test triggers the statute of limitations pursuant to CPLR 214-c caused the Legislature to conclude that CPLR 214-c was not sufficiently protective of public water purveyors.

IV. CPLR 214-h

CPLR 214-h was enacted in 2019, in significant part because some lawsuits by water purveyors to recover damages caused by contamination of their supply wells were dismissed based on a factual analysis leading to the conclusion that the contamination was significant enough to trigger the running of the statute of limitations more than three years before damage claims were raised by the water purveyors in a lawsuit.[27]

An additional reason for the adoption of CPLR 214-h was the anticipated adoption of MCLs for certain emerging contaminants, specifically, perfluorooctanoic acid

(PFOA), perfluorooctanesulfonic acid (PFOS) and 1,4-dioxane, and the costs that the new regulations would impose on water purveyors. On July 30, 2020, eight months after CPLR 214-h was enacted, Governor Cuomo announced [28] that DOH had adopted an MCL of 1 part per billion ("ppb") for 1,4-dioxane and 10 parts per trillion ("ppt") for PFOA and PFOS in drinking water.[29] The new MCLs became effective on August 26, 2020.[30] The concern about costs to public water purveyors was justified. The Regulatory Impact Statement adopted by DOH when it adopted MCLs for these three contaminants[31] estimated that 21% of all public water suppliers would find that PFOAs and PFOSs in source water would exceed the new MCL when testing was done, at an annual capital maintenance cost of between $25,000 and $15,000,000 depending on the size of the system. Regarding 1,4-dioxane, the Regulatory Impact Statement projects that 89 public water facilities would require treatment at a cost of $3,570,000 per system, with an estimated average annual operation and maintenance cost of approximately $150,000 per system.[32]

CPLR 214-h(2-4) provides the heart of the new statute of limitations applicable to water purveyors:

> 2. Notwithstanding any other law that provides for a shorter limitations period, any civil claim or cause of action brought by a public water supplier or wholesale water supplier against any person to recover damages for injury to property owned, managed or operated by a public water supplier or a wholesale water supplier resulting from the presence of a contaminant in a source of water supply shall be commenced within three years of the latest of any of the following:
>
> (a) the detection of a contaminant in the raw water of each well or plant intake sampling point in excess of any notification level, action level, maximum contaminant level, or maximum contaminant level goal established by the commissioner of health, the department of health or the United States Environmental Protection Agency for that contaminant;
>
> (b) the last wrongful act by any person whose conduct contributed to the presence of a contaminant in a source of water supply or the raw water of each well or plant intake sampling point; or
>
> (c) the date the contaminant is last detected in the raw water of each well or plant intake sampling point in excess of any notification level, action level, maximum contaminant level, or maximum contaminant level goal established by the commissioner of health, the department of health or the United States Environmental Protection Agency for that contaminant.
>
> 3. This three-year period shall apply to each well and each plant intake for each contaminant separately, and the expiration of the three-year period at one well or plant intake shall not affect the three-year period for another well or plant intake.
>
> 4. Nothing in this section shall abridge or limit a public water supplier's or a wholesale water supplier's right to bring an action to abate an imminent threat of contamination of any well or plant intake or to recover as damages the costs of such abatement.[33]

"Contaminant" is defined broadly to mean "any physical, chemical, biological or radiological substance or matter in water and includes but is not limited to an emerging contaminant listed pursuant to section eleven hundred twelve of the public health law."[34]

A "public water supplier" "means a person that owns, manages or operates a community, noncommunity or non-transient noncommunity water system that provides water to the public for human consumption through pipes or other constructed conveyances, if such system has at least five service connections or regularly serves an average of at least twenty-five individuals daily at least sixty days out of the year," and a "Wholesale water supplier" "means a person that owns, manages or operates a public water system that treats a source of water supply as necessary to produce finished water and then delivers some or all of that finished water to a public water supplier."[35] References here to "public water purveyors" are meant to include both public water suppliers and wholesale water suppliers. Other terms defined in 214-h include "source of water supply," "plant intake," "well," and "raw water."[36]

Not defined by CPLR 214-h is "any notification level, action level, maximum contaminant level, or maximum contaminant level goal established by the commissioner of health, the department of health or the United States Environmental Protection Agency (EPA) for that contaminant." As discussed *supra*, the regulations of the DOH do define MCL and MCLG.[37] While "notification levels" are not directly defined by the DOH regulations, public water purveyors are required to notify the state and public of any Tier 1 event within 24-hours of discovery.[38] Because Tier 1 events are defined to mean "an existing or imminent condition which can be responsible for or cause illness, injury or death and for which immediate corrective or remedial action is required," the notification level appears to be no different than the MCL except it also applies to conditions which have not yet occurred but which are "imminent."

With regard to "action levels," the DOH regulations define "action level" only in terms of levels of copper and lead in the water system.[39] Since 2018, however, every community water system serving 3,300 or more people must submit a "water supply emergency plan" to the state which sets out all the actions which must be taken upon discovery of a "water supply emergency."[40] Although "water supply emergency" is not defined, it can be inferred from the requirements for each plan that a water supply emergency occurs when potable water is not available. Thus, once again, "action level" appears to be tied into the MCL for the contaminants discovered.

Because CPLR 214-h applies only to public or wholesale water providers, CPLR 214-c continues to provide the statute of limitations for everyone claiming injury to his or her person or property from the latent effects of contamination, and CPLR 214-h(4) expressly permits a public water purveyor to commence an action to "abate an imminent threat of contamination of any well or plant intake or to recover as damages the costs of such abatement." Such an action would be subject to CPLR 214-c.

The question is, do the provisions of CPLR 214-h resolve the problems arising from the application of CPLR 214-c to water purveyors the Legislature sought to address and if they do not, is there a better solution? A brief analysis of the three triggers for the running of the statute of limitations in CPLR 214-h(2)(a-c) will be helpful.

A. CPLR 214-h(2)(a)

CPLR 214-h(2)(a) triggers the three-year statute of limitations upon the initial discovery of a contaminant that exceeds a "notification level, action level, maximum contaminant level, or maximum contaminant level goal" set by a regulatory agency like the EPA or DOH. This appears to be no different than the trigger provided by CPLR 214-c, but it does not add any time if the source of the contaminant is unknown. Because the three-year statute of limitations runs from the latest of the three triggers set out in CPLR 214-h(2), CPLR 214-h(2)(a), as we show *infra* in the discussion of CPLR 214-h(2)(c), appears to be unnecessary.

B. CPLR 214-h(2)(b)

CPLR 214-h(2)(b) provides a three-year statute of limitations for public water purveyors to commence suit from "the last wrongful act by any person whose conduct contributed to the presence of a contaminant in a source of water supply or the raw water of each well or plant intake sampling point."

The purpose of this trigger for the statute of limitations is not readily apparent. The trigger for the running of the statute of limitations is not dependent on the contaminant causing the supply water to exceed a "notification level" or "action level" or MCL or MCLG. If the level of a contaminant in a source of water supply or the raw water entering a supply well does not exceed any of the triggers referenced in CPLR 214-h(2)(a) and (c), including a finding that exceedance of an MCL is "imminent", it is not likely the public water purveyor will incur any costs beyond the normal monitoring and testing it must do anyway. The presence of the contaminants below the MCL with no exceedance imminent will not render the water unpotable, and DOH regulations will not require the water purveyor to act.

It is not the presence *per se* of a contaminant that triggers the running of the statute of limitations set out in CPLR 214-h(2)(b), it is the date when the last wrongful act by any person which contributed to the presence of the contaminant occurred. It may take decades for contaminants released prior the date the source property is fully remediated to reach the raw water of a public water purveyor. The trigger in CPLR 214-h(2)(b) in that circumstance would have run out decades before the contaminants reach the raw water. This would appear to be no different than the problem facing water purveyors under CPLR 214-c which triggers the running of the statute of limitations from when the water purveyor "knew or should have known" of the injury and the cause of the injury.

Even if the source property is not remediated, CPLR 214-h(2)(b) would bar commencement of a cost recovery lawsuit more than three years after "the last wrongful act." Legal and factual questions in this circumstance will abound should a water purveyor rely on CPLR 214-h(2)(b) to claim its lawsuit is timely. Once the source property is discovered, any wrongful acts presumably will end (be it a leaking underground tank, or intentional discharges) because a regulatory agency likely will compel cessation of releases and remediation. Does the failure of a past owner that took title after contaminants were released to address the soil contamination before selling the property constitute a "wrongful act"?[41] If a new owner becomes aware of contamination after taking title, and promptly agrees to enter into a Consent Order with the New York State Department of Environmental Conservation (DEC) to remediate the property (or enters into a brownfields agreement to do the same), can the current owner be said to be committing any "wrongful act" simply because it takes a long time to remediate the problem created by past owners? CPLR 214-h(2)(b) does nothing to assist water purveyors to avoid the statute of limitation problems created by CPLR 214-c because there inevitably will be litigation concerning when the last wrongful act occurred, and the outcome will be uncertain.

C. CPLR 214-h(2)(c)

The last option provided by CPLR 214-h, which is available to public water purveyors to avoid being barred by the statute of limitations from commencing a cost recovery lawsuit based on contamination of its water supply, is CPLR 214-h(2)(c). This option permits a suit for damages to commence within three years of "the date the contaminant is last detected in the raw water of each well

or plant intake sampling point in excess of any notification level, action level, maximum contaminant level, or maximum contaminant level goal established by the commissioner of health, the department of health or the United States Environmental Protection Agency for that contaminant." Clearly, this date is later than the trigger in CPLR 214-h(2)(a) which commences upon the first discovery of an exceedance of an MCL or of a condition that will make such exceedance imminent,[42] and for the reasons in the previous section, necessarily will occur later than the trigger in CPLR 214-h(2)(b) as well.

V. May CPLR 214-h Be Applied Retroactively to Dischargers if Such Claims Were Time Barred Prior to the Effective Date of 214-h?

The broad statute of limitations established by CPLR 214-h(2)(c) would be even greater but it appears that the law is not to be retroactively applied. We know from the sponsor's memorandum that one of the reasons for the adoption of CPLR 214-h was concern that cost recovery lawsuits brought by several water supply companies against polluters were found to be time barred.[43] The Legislature did not seek to revive these claims when it enacted CPLR 214-h. The bill simply states in section 2 that "This act shall take effect immediately," which would be November 4, 2019, when the Governor signed the bill.

The Court of Appeals fully summarized the law regarding when statutes should be applied retroactively in *Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal*.[44] "Civil liability is always bounded by the public policy of repose embodied in statutes of limitations."[45] Generally, there is a presumption that statutes only apply prospectively out of concern about "'[t]he Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration' and '[i]ts responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals'."[46]

"A statute has retroactive effect if it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed,' thus impacting 'substantive' rights." [47] While it would appear that the mere extension of a statute of limitations where an earlier statute of limitations had not yet run would not be considered to have a retroactive effect, the same cannot be said if a retroactive application would revive a statute of limitation that already passed and barred a substantive claim.[48] The Legislature has the power to apply a statute retroactively, even if a pre-existing statute of limitations has run, but the Legislature is required to make clear its intention to do so:[49]

> When the legislature has intended to revive time-barred claims, it has typically said so unambiguously, providing a limited window when stale claims may be pursued. For example, Jimmy Nolan's Law, which we addressed in Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig. (30 NY3d 377 [2017]), expressly "revived" certain time-barred claims related to World Trade Center cleanup and rescue work, permitting suit during a discrete one-year window period (see General Municipal Law § 50-i [4] [a], as added by L 2009, ch 440, § 2). Similar unequivocal "revival" language accompanied by a limited period for commencement of time-barred claims appears in the statute reviving toxic tort cases, including those arising from exposure to the drug diethylstilbestrol ingested by pregnant women (L 1986, ch 682, § 4), addressed in Hymowitz v Eli Lilly & Co. (73 NY2d 487 [1989]). The legislature has historically acted with deliberation and clarity when upsetting the strong public policy favoring finality, predictability, fairness and repose served by statutes of limitations.

Environmental practitioners are familiar with the broad scope of liability established by CERCLA.[50] The courts have found that Congress intended CERCLA to apply retroactively without limit and that doing so does not violate the due process clause.[51] CPLR 214-h, by contrast, contains no "unambiguous statement of legislative intent" to show that claims already barred by the applicable statute of limitations would be revived. Indeed, the New York Legislature assumed that damage claims by a public water supplier or a wholesale water supplier "to bring an action to abate an imminent threat of contamination of any well or plant intake or to recover as damages the costs of such abatement" would not be abridged.[52] But the Legislature did not alter CPLR 214-c when 214-h was adopted to exclude water purveyors from the trigger for the running of the three year statute of limitations in CPLR 214-c. Accordingly, if a water purveyor was barred from bringing an action for damage to property from contamination by the statute of limitations in CPLR 214-c prior to November 4, 2019, CPLR 214-h does not revive the statute of limitations.

VI. CPLR 214-h Is Not Necessary To Accomplish the Legislature's Goals and May Have Unintended Adverse Consequences for Water Purveyors

The concern of the Legislature when it adopted CPLR 214-h was that the imminent adoption of MCLs for three emerging contaminants would add substantial costs to the operations of public water suppliers, and the discovery trigger for the running of the statute of limitations in CPLR 214-c has served to bar water suppliers in the past from successfully suing those responsible for the contamination of the water supply. The virtually limitless statute of limitations established by CPLR 214-h(2)(c) will clearly

apply if MCLs are exceeded or are imminent. It is inconsistent, however, with the purpose of having a statute of limitations, and it is not needed to protect public water purveyors.

Purpose of a Civil Statute of Limitations

"Civil liability is always bounded by the public policy of repose embodied in statutes of limitations."[53] The balance the Legislature typically seeks to make is between the plaintiff who is injured and wishes to recover for injuries sustained from the date of their first occurrence, and the interest shared both by the defendant and society in avoiding a defendant being potentially liable in perpetuity, thus permitting a plaintiff to sit on his or her rights.[54] Defendants are entitled to a fair opportunity to defend claims against them before their ability to do so has deteriorated."[55] Statutes of limitations are "designed to encourage plaintiffs 'to pursue diligent prosecution of known claims.'"[56] In a property damage case, such as those brought by water suppliers, the cause of action accrues "when the injury occurred or was discovered."[57] CPLR 214-h(2)(c) is contrary to all these purposes. The question is, why was it necessary to ignore the core reasons for having a statute of limitations?

A. A Diligent Water Purveyor Should Be Able To Timely File a Cost-Recovery Action Within the Three-Year Statute of Limitations of CPLR 214-c

1. Establishing the Water Purveyor Knew or Should Have Known of Its Injury

The Second Circuit Court of Appeals has held that, to trigger the running of the CPLR 214-c statute of limitations, the contamination must be significant enough to justify "an immediate or specific remediation effort."[58]

Contaminants, whether emerging or otherwise, will not go undiscovered by water purveyors because regulations require them to test regularly. Testing for PFOS, PFAS and 1,4-dioxane must be conducted quarterly for a year, and if discovered, quarterly testing is required to continue.[59] With the testing and reporting requirements that go along with being a public water purveyor, water purveyors will be fully aware that action is required to prevent contaminants (not just emerging contaminants) in the supply wells from exceeding MCLs. The DOH regulations discussed above [60] require water purveyors to act to avoid loss of a water supply when there is just a threat that it will occur. Thus, knowledge of an injury should not be a problem. Even if the contaminant level does not exceed applicable MCLs, DOH regulations will determine when the water purveyor must act, which will cause the expenditure of money not otherwise required. More difficult is the need to determine the source of the injury within the time constraints set out in CPLR 214-c.

2. Establishing the Cause of the Injury

The three-year statute of limitations established by CPLR 214-c can be extended up to five years to permit discovery of the cause of the injury, and then allows one additional year to commence the lawsuit. The Court of Appeals has explained that "a causal relationship will be sufficiently ascertained for CPLR 214-c(4) purposes at, but not before, the point at which expert testimony to the existence of the relationship would be admissible in New York courts."[61] But for the limitation on the time period a water purveyor has to discover the source of the injury, this test would actually be beneficial to water purveyors. This is because establishing a causal link between an up-gradient suspected source and the water purveyor's water supply will often turn on having sufficient data to satisfy the needs of sophisticated groundwater modeling programs, and until such data are available, the one-year extension from the date the cause is discovered to file suit may not be triggered for a long time. It will be shown that federal law preempts the limitation in 214-c which requires discovery of the cause within a specified period of time, and the water purveyor should not be overly concerned about timely filing suit.

Even with the five-year-one-year limitation for commencing the cost-recover suit in 214-c, discovery of the cause of the injury may not be as difficult as the Legislature apparently assumed it to be. If the water purveyor is diligent in its efforts, it should be able to meet this burden. Pertinent information needed to assess threats to the quality of source water that is not yet imminent may be readily available from the DEC. DER-10, DEC's Technical Guidance for Site Investigation and Remediation, requires that a remedial investigation (RI) be performed if a site characterization identifies groundwater contamination above suggested cleanup goals.[62] The purpose of the RI is to define the nature and extent of the contaminant plume, and, in part, "identify actual or potential impacts to sensitive receptors."[63] If "there is a current or likely release of contaminants to off-site receptors," the RI must identify public supply wells within a half-mile of the site boundary[64] and then "Sample any existing potable and supply wells identified in the well search which are potentially impacted by the site."[65]

Another source of information for water purveyors is a radius map showing upgradient properties that may be a concern to the water purveyor which is readily available within little more than a day through companies that provide environmental database search reports.[66] Once these potential sources are identified, Freedom of Information Law (FOIL) requests to NYSDEC will assist the water purveyor to show a causal connection between the upgradient suspected source and the water supply relied upon by the water purveyor.

3. If Water Purveyors Are Not Cautious, CPLR 214-h May Cause Water Purveyors To Lose Their Right To Recover Damages if the Trigger for CPLR 214-h Is Never Reached

If contaminant levels do not exceed an MCL and the risk of such exceedance is not imminent, but DOH concludes that the water purveyor must investigate, injury sufficient to trigger the running of the statute of limitations likely has occurred. Delaying commencement of a cost recovery suit as soon as evidence sufficient to show the cause of the injury exists in anticipation of levels going up so that the open-ended statute of limitations in CPLR 214-h(2)(c) will apply carries with it grave risks. If the concentration of contaminants never exceeds any MCL and the levels are insufficient to show that such exceedance is imminent, the failure of the water purveyor to commence litigation against known sources may be fatal because the CPLR 214-c statute of limitations will have run, and the CPLR 214-h trigger will never be reached.

Conversely, if testing for contaminants, including emerging contaminants whose MCL was not established until August 24, 2020, is performed, and the concentration of one or more contaminants exceeds the contaminant's MCL, the open-ended statute of limitations in CPLR 214-h(2)(c) will apply. This discovery would trigger the investigative and remedial actions required by N.Y.S. DOH, including trying to identify the source of the contaminant whose MCL was exceeded. The statute of limitations established by CPLR 214-h(2)(c) would apply, and the water purveyor would have virtually open-ended time to commence its cost recovery lawsuit even after it knows the identity of the source of the contaminant. In this instance as well, however, delays in the commencement of a cost recovery suit may have unintended adverse consequences.

4. Once a Water Purveyor Has Sufficient Evidence To Establish Injury and the Cause of Injury to Its Water Supply, Delaying Commencement of a Cost-Recovery Lawsuit May Have Unintended Adverse Consequences

Once sufficient evidence to establish liability (injury and causation) is gathered, delay in the commencement of the cost recovery lawsuit has little benefit, for water purveyors may obtain a judgment for past, present and future damages.[67] Moreover, seeking, and securing, a judgment as soon as possible has multiple benefits which may be lost if the lawsuit is delayed.

The sooner a judgment is obtained, the sooner the water purveyor can seek to recover on the judgment and interest on the judgment can be earned. Further, by commencing the lawsuit, the water purveyor is in a better position to protect against the defendant destroying relevant documents, either intentionally or in the normal course of its business, and the risk that the defendant will sell its assets and disappear altogether can also be avoided. If litigation commences and a responsible party passes away, the water purveyor will be in a better position to file appropriate claims against the estate, helping to assure assets will be available once a judgment is obtained. Another risk that may be minimized or avoided is that the responsible party may declare bankruptcy. If the water purveyor has a judgment, it will have a secured interest in the bankrupt estate, putting it ahead of all other creditors whose interests are not secured. In addition, the closer to the events that caused the condition on the defendant's property that is contaminating the water entering the water purveyor's supply wells, the more likely it will be that witnesses can be identified who have personal knowledge of relevant events.

CPLR 214-h then may have two unintended consequences: (1) it may lull public water purveyors into a false sense of security which may prohibit the recovery of significant damages because the trigger for the CPLR 214-h(2) statute of limitations is never reached and the statute of limitations in CPLR 214-c has run; and (2) it may lull public water purveyors to delay the commencement of litigation against responsible parties when one or more contaminants exceed their applicable MCLs or the exceedance is imminent and the source is known, thereby risking many adverse impacts on the water purveyor's ability to prove its case or to collect on a judgment.

Unless there is a way around it, if a water purveyor cannot establish sufficient evidence to prove the cause of its injury within the five-year-one-year limit for finding such proof established by CPLR 214-c, its cost recover lawsuit would be time barred but for the existence of CPLR 214-h(2)(c). Although not yet recognized by any New York State court, a Federal law enacted the same year as CPLR 214-c clearly establishes that the water purveyor is not bound by the five-year-one-year limit on the time to prove the cause of its injury.

B. A Better Solution Has Been There All Along: The Provisions of CPLR 214-c, Which the Legislature Felt Placed Unreasonable Restrictions on the Ability of Water Purveyors to Timely Establish Cost Recovery Lawsuits, Were Preempted by Federal Law the Same Year CPLR 214-c Was Enacted

Policy and the public would be better served by repealing CPLR 214-h and amending CPLR214-c to reflect cases interpreting its provisions. Most important of these is the Second Circuit's decision in *Freir v. Westinghouse Elec. Corp*.[68] where the Court determined that certain provisions of CPLR 214-c, which was adopted in 1986, were preempted by provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which were adopted by Congress the

same year.[69] CERCLA created a "federally required commencement date" (FRCD) for all State actions for injury to person or property from the release of hazardous waste, which means "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." [70] The FRCD preempts state law accrual rules if, under those rules, accrual would occur earlier than the date required by the FRCD.[71]

Certain holdings by the Second Circuit in *Freir* regarding how CPLR 214-c should be interpreted considering the FRCD provide guidance as to how the New York Legislature might amend CPLR 214-c and thereby obviate the need for the open-ended statute of limitations in CPLR 214-h. Nothing prohibits the New York Legislature from putting the requirements of the FRCD into CPLR 214-c so that they will apply to damage claims for latent damages from hazardous substances or waste or petroleum or any other contaminant which can render drinking water unpotable.

The key holdings of the *Freir* court are as follows: First, "Section 214-c, as modified by the FRCD, gives the plaintiff one year from the date of discovery of the cause of the injury to commence a lawsuit (or three years from the date of discovery of the injury, if longer) and that provision satisfies the requirements of the FRCD."[72] Thus, the statute of limitations cannot bar recovery until the time specified by CPLR 214-c runs out after both the injury and the cause of the injury are known to the plaintiff.

Second, the discovery-of-cause standard set by the FRCD, defined as "the date the plaintiff knew (or reasonably should have known) that the personal injury" was caused or contributed to by the hazardous materials, focuses on knowledge, actual or imputed, not on suspicion. Mere suspicion, whatever its reasonableness, cannot be equated with knowledge; and the fact that a claimant had only a "reasonable suspicion" that the injuries were caused by [the defendant] is not a sufficient basis for ruling as a matter of law that the claimant "reasonably should have known that the injuries were caused by the [defendant]."[73]

Third, the provision of CPLR 214-c(4), which permits an action to be commenced within one year of the discovery of the cause of an injury, but only if the plaintiff can:

> allege and prove that technical, scientific or medical knowledge and information sufficient to ascertain the cause of his injury had not been discovered, identified or determined prior to the expiration of the period within which the action or claim would have been authorized means that the [the] requisite scientific knowledge [was] reasonably available to the plaintiff during the three-year discovery period.[74]

Fourth, the New York Court of Appeals subsequently was asked by the Second Circuit on a certified question, "What standards should be applied to determine whether a genuine issue of material fact exists for resolution by a trier of fact as to whether 'technical, scientific or medical knowledge and information sufficient to ascertain the cause of [the plaintiff's] injury' was 'discovered, identified or determined' for N.Y. CPLR. 214-c(4) purposes?" The Court of Appeals held that "the test is one of general acceptance of that relationship in the relevant technical, scientific or medical community" and "a causal relationship will be sufficiently ascertained for CPLR 214-c(4) purposes at, but not before, the point at which expert testimony to the existence of the relationship would be admissible in New York courts."[75] When injury to property is at issue, and the injury is incurred by a public water purveyor whose water supply becomes contaminated by an unknown source, sufficient information must exist to permit the expert to testify without speculating as to the facts.

Another important ruling by the Second Circuit in *Freir* is that scientific knowledge is not reasonably available to the plaintiff if the knowledge cannot be obtained without "the expenditure of huge sums of money to commission independent studies" or if the information is "obtainable only through the private commissioning of expensive studies."[76] "To the extent, however, that the scientific-knowledge provision of CPLR § 214-c(4) imposes an accrual date earlier than the date on which the plaintiff knew or reasonably should have known the cause of the injury, it is . . . preempted by the FRCD."

Annexed to this Article is a proposed revision to CPLR 214-c which incorporates the revisions to CPLR 214-c which the *Freir* court deemed required by the FRCD, and interpretations of CPLR 214-c by the New York Court of Appeals. If enacted by the Legislature, the open-ended extension of the statute of limitations for water purveyors established by CPLR 214-h no longer will be needed, and 214-h should be rescinded as an unnecessary intrusion on the policies underlying statutes of limitations. These changes, mandated by the FRCD anyway, would apply to everyone injured by the latent effects of exposure to any substance or combination of substances.

VII. Conclusion

When the Legislature adopted CPLR 214-h, it felt it unfair that a public water purveyor should be time-barred from recovering its costs from the polluters. While this sounds like motherhood and apple pie, singling out pubic water purveyors to receive the perceived benefits of having an open-ended statute of limitations to recover their damages ignores certain realities. First, any practitioner who has defended a client sued by a water purveyor knows that anyone and everyone who is upgradient of the supply wells who used the contaminant of concern entering the supply wells typically is named. Frequently, parties are named because they took title to property which may have been contaminated by a former owner

or tenant, sometimes without proof the property was contaminated when the defendant took title. No matter what that property owner's actual liability, it will be very expensive to defend against the lawsuit. Second, unlike most plaintiffs who incur damages from contaminants released from the property of others who remain subject to the statute of limitations in CPLR 214-c, water suppliers may spread the cost of treatment of the contaminated water over many years by obtaining financing secured by the ability to pass the cost of the financing on to their customers.

Once enough evidence is found to provide a provable connection between the injury and the cause of the injury, a claim may be timely brought without concern that a statute of limitations defense may successfully be raised. The adoption of CPLR 214-h was well-intended, but it must be recognized that it is not necessary to address the concerns of public water purveyors, and it may lull them into delaying litigation which can lead to adverse consequences for their goal of recovering damages. CPLR 214-h should be rescinded, and the amendments to CPLR 214-c proposed in the attached Appendix should be enacted by the Legislature.

Appendix: Proposed Amendments to CPLR 214-c

CPLR § 214-c
§ 214-c. Certain actions to be commenced within three years of discovery.

1. In this section:

A. "exposure" means direct or indirect exposure by absorption, contact, ingestion, inhalation, implantation or injection.

B. "discovery of the injury" refers to the date when the plaintiff first learns or should have learned through the exercise of reasonable diligence of both the injury and the cause of the injury.

C. "exercise of reasonable diligence" for purposes of this section refers to information which may reasonably be obtained which shows a relationship between the injury and the alleged cause of the injury which is not speculative and for which there is general acceptance of that relationship based on the available facts in the relevant technical, scientific or medical community. A causal relationship will be sufficiently ascertained for purposes of CPLR 214-c at, but not before, the point at which expert testimony to the existence of the relationship would be admissible in New York courts.

D. Scientific knowledge is not reasonably available to the plaintiff if the knowledge cannot be obtained without the expenditure of sums of money to commission independent studies of:

(1) the causal connection between the personal injury from latent effects of exposure and the chemical or substance which is alleged to have caused injury from latent effects of exposure; or

(2) environmental conditions beyond the borders of the plaintiff's property alleged to be injured from the latent effects of exposure, except

(a) This restriction on when scientific knowledge is reasonably available shall not be applicable if the plaintiff is required by existing laws or regulations to undertake such studies under the supervision of a regulatory agency, in which case exercise of reasonable diligence shall be determined by the time it reasonably takes to establish data sufficient to establish the cause of the injury to property, taking into account the financial ability of the party injured to undertake off-site independent studies, reasonable time required to prepare and obtain approval of work plans or amendments to work plans for the investigation, and reasonable time to install and monitor groundwater wells at appropriate locations and depths.

2. Notwithstanding the provisions of section 214, the three year period within which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.

3. For the purposes of sections 50-e and 50-i of the general municipal law, section thirty-eight hundred thirteen of the education law and the provisions of any general, special or local law or charter requiring as a condition precedent to commencement of an action or special proceeding that a notice of claim be filed or presented within a specified period of time after the claim or action accrued, a claim or action for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property shall be deemed to have accrued on the date of discovery of the injury by the plaintiff or on the date when through the exercise of reasonable diligence the injury should have been discovered, whichever is earlier.

4. Notwithstanding the provisions of subdivisions two and three of this section, where the discovery of the cause of the injury is alleged to have occurred more than three years after discovery of the actual injury despite the exercise of reasonable diligence, an action may be commenced or a claim filed within one year of such discovery of the cause of the injury but the plaintiff or claimant shall

be required to allege and prove that technical, scientific or medical knowledge and information sufficient to ascertain the cause of his injury was not reasonably available to the plaintiff prior to the expiration of the period within which the action or claim would have been authorized and that he has otherwise satisfied the requirements of subdivisions two and three of this section until the cause of the injury is discovered.

5. This section shall not be applicable to any action for medical or dental malpractice.

6. This section shall be applicable to acts, omissions or failures occurring prior to, on or after July first, nineteen hundred eighty-six, except that this section shall not be applicable to any act, omission or failure:

A. which occurred prior to July first, nineteen hundred eighty-six (July 1, 1986), and

B. which caused or contributed to an injury that either was discovered or through the exercise of reasonable diligence should have been discovered prior to such date, and

C. an action for which was or would have been barred because the applicable period of limitation had expired prior to such date.

Endnotes

1. N.Y. Session Laws: 2019, N.Y. Civil Practice Law & Rules, Art. 2, § 214-h (Codified as CPLR 214-h).
2. *Jensen v. General Electric Company*, 82 N.Y.2d 77, 84, 603 N.Y.S. 2d 420, 423 (1993), *citing* 1986 NY Legis Ann, at 287.
3. CPLR 214-c(2).
4. CPLR 214-c(4).
5. *Freier v. Westinghouse Elec. Corp*., 303 F.3d 176 (2d Cir. 2002).
6. CPLR 214-c(4).
7. *Giordano v. Market Am., Inc.*, 15 N.Y.3d 590, 601-602, 915 N.Y.S.2d 884, 890 (2010). "[W]e hold that the test is one of general acceptance of that relationship in the relevant technical, scientific or medical community. That test is familiar to New York lawyers and judges. Our courts follow *Frye v United States* (293 F 1013 (D.D.C. 1923)) in making 'general acceptance' the test for admitting expert testimony about scientific principles or discoveries."
8. CPLR 214-c(6).
9. *Germantown Cent. School Dist. v. Clark, Clark, Millis & Gilson*, 100 N.Y.2d 202, 206, 761 N.Y.S.2d 141, 143 (2003).
10. *Id. at* 206-207.
11. *Suffolk County Water Auth. v. Dow Chem. Co.*, 121 A.D.3d 50, 58, 991 N.Y.S.2d 613, 619 (2d Dep't 2014), *citing Germantown Cent. School Dist. v. Clark, Clark, Millis & Gilson*, 100 N.Y.2d 202, 206, 761 N.Y.S.2d 141, 143 (2003).
12. N.Y. Comp. Codes R. & Regs. tit. 10, §§5-1.50–5-1.52 (N.Y.C.R.R.).
13. 10 N.Y.C.R.R. § 5-1.72(f).
14. 10 N.Y.C.R.R. § 5-1.72(f).
15. 10 N.Y.C.R.R. §§ 5-1.1(b-g).
16. 10 N.Y.C.C.R. §§ 171(a), 172(e).
17. 10 N.Y.C.R.R. §§ 5–1.12(a).
18. *Id*.
19. 10 N.Y.C.R.R.§ 5–1.12(b).
20. *Suffolk County Water Auth. v. Dow Chem. Co.*, 121 A.D.3d 50, 58, 991 N.Y.S.2d 613, 619 (2d Dep't 2014), *citing In re Methyl Tertiary Butyl Ether (MTBE) Prods.*, 458 F Supp 2d 149, 154-58 (S.D.N.Y. 2006).
21. *Id., citing In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig*, 725 F3d 65, 105-106, 458 (2d Cir. 2013)*; City of Greenville, Ill. v. Syngenta Crop Protection, Inc.*, 756 F. Supp. 2d 1001, 1006-1008 (S.D. Ill. 2010); *LaFleur v. Whitman,* 300 F.3d 256, 269 (2d Cir. 2002)*; Cunningham v. Spitz,*218 A.D.2d 639, 630 N.Y.S.2d 341 (2d Dep't 1995).
22. *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig*, 725 F3d 65, 105-106, 458 (2d Cir. 2013), *citing* 10 N.Y.C.R.R. § 5–1.12(a) (requiring water suppliers to take certain remedial actions after determining that one or more MCLs "are or may be exceeded" or that "any deleterious changes in raw water quality have occurred); and § 5–1.71(a) (requiring water suppliers to exercise "due care and diligence in the maintenance and supervision of all sources of the public water systems to prevent, so far as possible, their pollution and depletion").
23. *Id.* at 105.
24. *Bethpage Water District v. Northrop Grumman Corporation,* 884 F.3d at 125 (2d Cir. 2018), *quoting MRI Broadway Rental, Inc. v. U.S. Min. Prods. Co*., 92 N.Y.2d 421, 429, 681 N.Y.S.2d 783, ___ (1998) (internal citation omitted).
25. *Id.*
26. *Bethpage Water District v. Northrop Grumman Corporation,* 884 F.3d at 128 (2d Cir. 2018).
27. *See* Senator's Sponsor's Mem., Bill Jacket, L 2019, S.3337C. *See, e.g., Bethpage Water District v. Northrop Grumman Corporation, supra,* 884 F.3d at 128-29 ("indisputable facts show that [more than three years before commencing its lawsuit], the District took a myriad of substantial and specific steps to address the contamination"); *Suffolk County Water Auth. v. Dow Chem. Co*., 121 A.D.3d 50, 991 N.Y.S.2d 613 (2d Dep't 2014) (Granting motion by 151 defendants for summary judgment because the contaminants of concern were in the county's supply wells more than three years before suit commenced); *but see Hicksville Water District v. Philips Electronics North America Corporation*, No. 2:17-cv-04442 2018 WL 1542670 (E.D. N.Y. Mar. 29, 2019) where the Eastern District applied the Second Circuit's analysis in *Bethpage Water District* and in *In re MTBE Prod. Liab. Litig*., but found that where the concentration of 1,4-Dioxane was below a level which would require the plaintiff to take action to protect the public health under New York Department of Health regulations, the trigger for the commencement of the running of the statute of limitation was not present.
28. N.Y. Office of the Governor, *Governor Cuomo Announces First in the Nation Drinking Water Standard for Emerging Contaminant 1,4-Dioxane*, https://www.governor.ny.gov/news/governor-cuomo-announces-first-nation-drinking-water-standard-emerging-contaminant-14-dioxane (July 20, 2020).
29. One "part per trillion" is one drop in an Olympic sized swimming pool, or one second in 31,688 years. When the author first began practicing environmental law as an environmental prosecutor in 1984, labs generally were testing for parts per million. At the time, the author expressed concern to regulators that if laboratories could ever test for parts per trillion, some amount of everything would be found when groundwater (Long Island's only source of potable water) is tested, the public would become totally paranoid, and the cost of cleanups would increase exponentially. Without reference to the MCLs for the emerging contaminants referenced here, it is the author's belief that this may be the case. *See* Merril Eisenbud, *How Clean Is Clean? How Safe Is Safe? A Review of Environmental Priorities,* 47 (1993) ("We must take steps to assure that billions of dollars [in 1993 dollars] are not wasted on trivial environmental health risks while major environmental health problems are ignored"). Compare the expected excess death rates from drinking water that

exceeds the new MCLs to excess death rates for a higher MCL, and then look at the number of people who die from a lack of medical insurance or from hunger, and ask whether the difference in cost to achieve the new MCLs compared to some higher level might be better used to save far more lives. That is a discussion for another day.

30. NYS Register August 24, 2020, p. 5, amending 10 N.Y.C.R.R. § 5-1.

31. N.Y.S. Department of Health, Amendment of Subpart 5-1 of Title 10 NYCRR (Maximum Contaminant Levels (MCLs)) NOTICE OF REVISED RULEMAKING, https://regs.health.ny.gov/sites/default/files/pdf/recently_adopted_regulations/Maximum%20Contaminant%20Levels%20%28MCLs%29.pdf, (Jan. 22, 2020).

32. *Id*. at pp. 34-35; *see also* Senator's Sponsor's Mem., Bill Jacket, L 2019, S.3337C (James Gaughran, the Senate sponsor of the bill that enacted CPLR 214-h, explains the justification for the bill).

33. CPLR 214-h(2-4).

34. CPLR 214-h(1)(a).

35. CPLR 214-h(1)(c-d).

36. CPLR 214-h(1)(e-h).

37. *See* notes 12-19 *supra*.

38. 10 N.Y.C.R.R. § 5-1.78(c). A "Tier 1 Notification" is defined to mean "the category for public notifications that are required within 24 hours of learning of a public health hazard" (10 N.Y.C.R.R. § 5-1.1(c-x)) and "public health hazard is defined in relevant part to mean "an existing or imminent condition which can be responsible for or cause illness, injury or death and for which immediate corrective or remedial action is required. Public health hazards include, but are not limited to, the following: "hazardous or toxic chemical contamination." 10 N.Y.C.R.R. § 5-1.1(b-x).

39. 10 N.Y.C.R.R. § 5-1.1(b).

40. 10 N.Y.C.R.R. § 5-1.33.

41. Federal circuits generally have found that passive migration of contamination from soil constitutes is insufficient basis to make a past owner of contaminated property liable as an owner at the time of disposal under CERCLA. *See, e.g., ABB Indus. Systems, Inc. v. Prime Tech., Inc.,* 120 F.3d 351, 358-59 (2d Cir.1997) (Disposal does not include "the gradual spreading of hazardous chemicals already in the ground," and therefore, "prior owners and operators of a site are not liable under CERCLA for mere passive migration (citation omitted); *Carson Harbor Village, Ltd. v. Unocal Corp*., 270 F.3d 863 (9th Cir. 2001) (No CERCLA or RCRA liability for past owner of already contaminated property). New York courts have not addressed the liability of property owners for passive migration, or whether an act must be proven to hold the property owner liable for the discharge.

42. For the reasons set out in the previous section, the trigger in CPLR 214-h(2)(c) necessarily will be later than the trigger in CPLR 214-h(2)(b) because the last wrongful act most likely will have occurred long before any MCLs in source water are exceeded.

43. *See* note 27, *supra.*

44. 35 N.Y.3d 332, 359, 130 N.Y.S.3d 759, 770-71 (2020).

45. *Id*. at 360 (internal citations deleted).

46. *Id*. at 370, *quoting Landgraf v. USI Film Products*, 511 US 244, 266 (1994).

47. *Id*. at 365, *quoting Landgraf*, 511 U.S. at 278-80.

48. *Id.*

49. *Id.* at 470.

50. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended, 42 U.S.C. §§ 9601–9675.

51. *See, e.g., ASARCO LLC v. Goodwin*, 756 F.3d 191, 200 (2d Cir. 2014) (citations omitted).

52. CPLR 214-h(4).

53. *Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal*, 35 NY3d 332, 359 130 N.Y.S.3d 759, 770-71 (2020).

54. *Jensen v. General Electric Company*, supra, 82 N.Y.2d 77, 87, 603 N.Y.S. 2d 420, 424 (1993).

55. *Snyder v. Town Insulation*, 81 N.Y.2d 429, 435, 599 N.Y.S.2d 515, 518 (1993).

56. *Bethpage Water District v. Northrop Grumman Corporation*, 884 F.3d 118, 128 (2d Cir. 2018), *citing California Public Employees' Retirement System v. ANZ Sec., Inc.*, __ U.S. __, 137 S.Ct. 2042 (2017).

57. *Id.*

58. *Bethpage Water District v. Northrop Grumman Corporation, supra*, 884 F.3d at 128 (2d Cir. 2018).

59. 10 NYCRR 5-1.52 revised Table 9C; Found at N.Y.S. Department of Health, *Amendment of Subpart 5-1 of Title 10 NYCRR (Maximum Contaminant Levels (MCLs)) NOTICE OF REVISED RULEMAKING*, https://regs.health.ny.gov/sites/default/files/pdf/recently_adopted_regulations/Maximum%20Contaminant%20Levels%20 %28MCLs%29.pdf, (Jan. 22, 2020).

60. *See* notes 12-19.

61. *Giordano v. Market Am., Inc.*, 15 N.Y.3d 590, 601-602, 915 N.Y.S.2d 884, 890 (2010). "[W]e hold that the test is one of general acceptance of that relationship in the relevant technical, scientific or medical community. That test is familiar to New York lawyers and judges. Our courts follow *Frye v. United States* (293 F 1013 (D.D.C. 1923)) in making 'general acceptance' the test for admitting expert testimony about scientific principles or discoveries."

62. N.Y.S. Department of Environmental Conservation (DEC), DER-10, § 3.7.2(a).

63. *Id*. at § 3.7.2(a)(1)(ii) and 3.7.2(a)(7)(1)(i).

64. *Id*. at § 3.7.2(a)(7)(1)(i).

65. *Id.* at § 3.7.2(a)(8).

66. *See, e.g.*, About EDR, EDR, https://edrnet.com/edr/; Toxics Targeting, http://www.toxicstargeting.com/.

67. *MPM Silicones, LLC v. Union Carbide Corporation*, 966 F.3d 200, 231-37 (2d Cir. 2020) (district court did not abuse its discretion when it allocated 95% of future liability to defendant in a CERCLA case*); Boomer v. Atlantic Cement Co*., 26 N.Y.2d 219, 226, 309 N.Y.S.2d 312, __ (1970) (where permanent injunction is inappropriate, permanent damages based on past, present and future damages are appropriate); *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, 725 F.3d 65, 111 (2013) "[T]here is nothing unusual about such a claim."

68. 303 F.3d 176 (2d Cir. 2002).

69. While the FRCD and the Second Circuit's decision in *Freier* have been largely ignored by New York's Courts and practitioners, this is not important; certain provisions of CPLR-214-c have been preempted. Nor does it matter that CERCLA excludes petroleum from coverage under CERCLA. The New York Legislature can amend CPLR 214-c to reflect all the requirements which the *Freier* court ruled were already applicable to CPLR 214-c, which would make those requirements applicable to all cost recovery actions regardless of the type of contaminant that caused injury.

70. 42 U.S.C. 9658 (CERCLA § 309).

71. *Freier v. Westinghouse Elec. Corp.*, 3 F.3d 176, 196 (2d Cir. 2002).

72. *Id*. at 210.

73. *Id*. at 205–206.

74. *Id*. at 206-207.

75. *Giordano v. Market Am., Inc.*, 15 N.Y.3d 590, 601-602, 915 N.Y.S.2d 884, 890 (2010).

76. *Freier v. Westinghouse Elec. Corp*., 303 F.3d 176, 207 (2d Cir. 2002).