

# The New York Environmental Lawyer

A publication of the Environmental Law Section of the New York State Bar Association

## Message from the Chair

“It was the best of times, it was the worst of times . . .”

—Opening line of *A Tale of Two Cities*, Charles Dickens

These last several months have been a roller coaster for those who practice Environmental Law. There have been opportunities, but also a host of challenges.

For the Section leadership, we have had to confront the headwinds produced by the following Four Horsemen, who represent perhaps not an apocalypse, but a possible Dark Age:

(a) the State Budget Crisis that has resulted in a significant downsizing of the work



force of the New York State Department of Environmental Conservation (DEC), thereby raising into question the DEC’s ability to continue to perform its mission;

(b) the continuing Recession, which limits the opportunities for younger lawyers to practice environmental law and casts a general pall on the profession by both diminishing the number of development opportunities and the desire and ability of businesses to expand;

(c) the confounding scope of the New York State Gift Ban to State employees, which has made event planning that involves

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our public law Section members increasingly problematic and complex and sends the entirely wrong message to this branch of our Section membership on how important we view their contributions to the voice of the Bar; and

(d) the Democrats' loss of the House in the mid-terms. One could view this as part of the normal cycle of national politics and simply take change in stride. However, based on past statements, the incoming Republican leadership appears certain to take a step backwards in the Climate Change discussion. The passion of politics, while always present in the pre-election discussions, now seems poised to overwhelm any prospect of thoughtful dialogue on Climate Change issues.

So—what can the Section do in response?

*To the Budget Crisis*—NYSBA submitted this fall to the Governor's Counsel and the Director of the Division of the Budget the Section's memorandum that underscores the concern over the reductions in the DEC work force. This memorandum was prepared following the Section's Executive Committee directive at its October 3 meeting that the Section go on record with its concern.

The full text of the memorandum can be found on the Section's web site and the following excerpt from the memorandum underscores our view of the DEC's unique position in New York State government:

New Yorkers face a unique set of economic challenges; however, we are convinced that the State's efforts at economic development cannot be achieved unless they are coupled with efforts to ensure strong environmental protection. Development requires permitting and then monitoring (and as necessary, enforcement) of compliance with permit terms. The result is a business and a natural environment that attracts business owners and allows them to attract and retain employees.

We reached out to Governor Cuomo's transition team to ask that a member of that team attend the Section's Annual Meeting in New York City to provide an update on the Governor's plans for DEC. We intend to be available as a resource for the new Governor as he seeks to close a huge budget gap while still providing New Yorkers with a high quality natural environment that not only serves as a critical component of our health and general well-being but represents an important variable when a business thinks of expanding its operation or setting up shop in New York.

*To the Recession*—We have tried to increase networking opportunities while keeping costs down. The first step in this regard was the series of Regional Programs that were

held throughout the State this past summer. The quality of the presentations was very high and the enthusiasm of the speakers for their subject matter was inspirational. For me, the highlights were the field trips on the *Clearwater* in the Hudson River at both the Region 2 and Region 3 programs.

We had an excellent turnout at the Fall Section meeting in Cooperstown on October 1-3 and I was particularly pleased to see a full audience for the "transitional lawyer" CLE program on October 1. However, attendance by the Section's public bar membership was low.

In response, we held the Section's Annual Meeting in New York City on the evening of January 27 (Thursday), following an EPA Update that was offered at no cost. The customary Section CLE program was held the following day. In addition, we tried to minimize the cost of the Section luncheon on Friday so that the full spectrum of Section membership could afford to attend and hear S. Richard Fedrizzi, the President, CEO, and Founding Chairman of the U.S. Green Building Council, the organization that has driven the LEED (*Leadership in Energy and Environmental Design*) movement.

*To the Gift Ban*—The Annual Meeting on Thursday night was open to all Section members and there was a cocktail reception as part of the meeting. The Public Integrity Commission considered the Annual Meeting one event rather than a series of individual events. As a result, we were able to serve food and drink to public officials at any program held at the Hilton that was included in the program for the meeting. Any event held elsewhere or which was not listed in the program is not subject to this rule, and an individual assessment must be made.

*To the Republicans taking the House in the mid-term elections*—We made Climate Change the focus of our CLE program on January 28 as we kept the issue front and center as the new Congress takes office. New York has been a leader in environmental strategies and that continues to be true in the area of Climate Change. In our CLE program, we addressed the report of the Sea Level Rise Task Force and federal, state and municipal adaptive strategies. Climate Change has already begun to impact upon our daily practice, and private law practitioners at the CLE program offered their insights on select topics.

In closing, I am reminded of the interview that the late Chris Farley of *Saturday Night Live* conducted with Paul McCartney, beginning with—"Remember when you were with the Beatles?" After McCartney's acknowledgment, Farley's follow-up comment was—"That was awesome."

I remember when Environmental Law was king and New York State was acknowledged as both a leader in environmental protection and as a model of economic opportunity. That was awesome. And I believe that it can be awesome again. Join me in working to make it so through the work of the Section.

Barry Kogut

# From the Editor-in-Chief

As the New Year gets underway, I am hopeful that 2011 will see some improvement for the environment, as 2010 was mostly a year of setbacks. As far as efforts to address climate change, the Copenhagen climate meetings failed, and cap-and-trade legislation to combat greenhouse gas emissions did not pass Congress. On top of that, this year saw one of the worst environmental disasters America has ever faced when the Deepwater Horizon exploded and sank causing the largest oil spill in United States history. In addition, the sluggish economy has helped put environmental issues far down the list of priorities. In fact, the New York State Department of Environmental Conservation has been decimated as a result of severe budget cuts. Those cuts mean that many NYSDEC lawyers and other specialists have lost or will lose their jobs. We can anticipate a less efficient Department with slower permitting capabilities and a reduction in enforcement. Environmental noncompliance in New York State is likely to go unchecked for long periods of time. This is not the direction we saw environmental protection taking just a couple of years ago. 2011 may not bring much in the way of improvement, but we as a Section must do what we can to help put the environmental movement back on track.

Budget deficits and a still-sluggish economy may make improvements in green building and clean-energy efforts difficult over the next year. Increasing environmental awareness can help counteract this. Businesses are seeing the impact that a damaged environment can have on the bottom line. Some have learned that “going green” is good for the public image and marketability of the company and its products, and, as a bonus, environmentally friendly practices, including those that are energy-saving and involve recycling, save money in the long run. Making changes to the way business is done, although difficult at the outset, is proving to be not only possible, but profitable as well. In their article in this issue, *Greening the New York Legal Profession—Encouraging a More Sustain-*



Miriam E. Villani

*able Practice*, Megan Brillault and Kristen Kelley Wilson explain how the legal profession can “go green.” We can do our part by continuing to get the word out so that more businesses become environmentally aware and “go green” despite the bad economy, and because of it.

Considering the many economic and environmental benefits of green building, it seems clear that this is a practice that needs to grow once the economy really begins to improve. Since the typical building has an average lifespan of 50 to 100 years, new buildings should be constructed following green practices to maximize energy efficiency and sustainability, and ensure low environmental impact for the decades ahead. In his article in this issue, *An Overview of the Draft Model Green Buildings Ordinance*, Brian Sahn discusses the model green buildings ordinance created by the Columbia Law School’s Center for Climate Change Law (“CCCL”). The draft ordinance is an effort to create a uniform model code for municipalities across the country to use as a framework for their green building codes. It is hoped that such an ordinance will help give the green movement a push in the right direction. Green building is beneficial to developers and building owners, as well as the building occupants. It is also necessary for the future health of the environment.

Given the state of the economy and the State’s budget concerns, it is easy to see that renewable energy development could experience some resistance. In their article, *Offshore Wind: Navigating the Complex Regulatory Landscape*, Kevin Walsh and James Rigano provide an overview of the legal challenges facing the development of an offshore wind farm in the waters off the coast of New York, and what it will take to meet those challenges and get our region’s renewable energy economy moving ahead.

The environment has taken a hit during the current economic downturn. It is up to each one of us to do what we can to keep the green movement from slipping any further, and to ensure the environment becomes a priority again. Here’s to a green 2011.

**Miriam E. Villani**

## From the Issue Editor



Aaron Gershonowitz

This issue, with articles on green building design, permitting of renewable energy projects and the greening of the practice, illustrates the evolution of the practice of environmental law. There was a time when most of what an environmental lawyer did was in response to some disaster. A spill or release of some hazardous chemical threatened some media that placed lives in danger. Yes, there was NEPA and SEQRA, which made us planners and potential problem solvers, but a review of the legislative history of NEPA makes clear that the requirement that agencies examine the environmental consequences of their actions was a response to a number of disasters that resulted from the failure to examine potential harms. The issues dealt with in this issue, however, point out that we have evolved from a practice that largely responds to past problems, to a practice that is or should be at the forefront of the planning process.

I have often wondered why we have statutes that require an examination of environmental consequences and no statute to require an examination of other types of consequences. The answers to that question range from something unique about environmental consequences, e.g., they tend to be more long-range and indirect, to nothing unique about environmental consequences, i.e., environmental has been interpreted broadly to include nearly all consequences. The articles in this issue tend to support the first answer, as they address a planning process with regard to potential consequences that are long-term and indirect.

The articles in this issue generally address a greening theme. Brian Sahn's article assesses a draft model green buildings ordinance. My sense is that the model ordinance project is a bit premature. In most cases where there is a model or uniform law, uniformity came to a mature legal field, where different jurisdictions experimented with a variety of approaches and a sense of uniformity developed over time. In this case, however, most jurisdictions do not have any green buildings ordinance and the draft model code is less about creating uniformity than providing a starting point. Starting with a model in a fairly new area creates a risk that it could reduce the usual experimentation that occurs in the law and impede the development of innovative approaches. Kevin Walsh and Jim Rigano provide a review of the permitting process for offshore wind projects and address an array of issues from who owns the oceans to details of the regulatory process. Megan Brillault and Kristen Wilson address the greening of the practice, with an update on the ABA's climate change program, which primarily addresses waste reduction and reduced energy use. Dan Riesel and Victoria Shiah provide an interesting analysis of ethical considerations for Clean Air Act attorneys. I have looked at many of the sources they cite when preparing to discuss such issues with my firm's ethics partner. I, therefore, appreciate the thorough and insightful way that Dan and Victoria put the sources together.

I want to thank the Editor-in-Chief for all the work she put into the issue and the guidance she provided along the way. Keith Hirokawa and Justin Birzon also played important roles in the development of the issue and their efforts are greatly appreciated.

Aaron Gershonowitz

Catch Us on the Web at  
[WWW.NYSBA.ORG/Environmental](http://WWW.NYSBA.ORG/Environmental)

## From the Student Editorial Board

In this time of great environmental advocacy, we are faced with competition between excitement and uneasiness. As young lawyers, we are excited that environmental law remains an engaging and exciting practice area. At the same time, as environmental advocates, we are concerned that our laws and regulations are inadequate. Publicity of oil spills and other environmental disasters, dwindling polar bear populations, and fascinating but largely untested nanotechnologies raise awareness but also raise concern about whether our predecessors have established effective legislation to guide response efforts, funding, prevention, and allocation of liability.

This generation's law students have witnessed many events that may compel growth across the practice area. For instance, the United States Environmental Protection Agency (EPA) has finally issued its findings characterizing greenhouse gases as an "endangerment" to human health, followed by the preparation of climate change action plans by several state and federal agencies. With the expiration of the Kyoto Protocol in 2012, global pressures to reduce climate-changing emissions will likely have impacts here in New York and across the country. In anticipation of stricter regulations, communities and agencies are organizing as corporations are expanding their in-house environmental counsel and hiring outside environmental firms to assist in compliance.

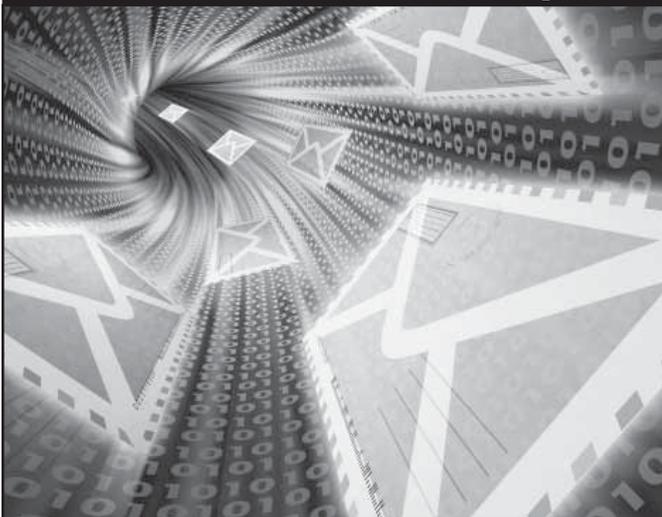
Despite the growth and opportunities, concerns and uncertainty remain. While most will agree that we have come a long way since the Exxon Valdez spill, the BP di-

saster has uncovered many shortcomings among the federal government and our legal system. The presidential oil spill commission, in its preliminary reports, criticized the federal government for creating an impression of inadequacy in its initial response. Additionally, lay citizens who have their fortunes at stake have been unable to have their claims heard in court. The spill has shed light on the lack of emergency planning among most big oil companies. With the reorganization of the Bureau of Ocean Energy Management, Regulation and Enforcement (formerly the Minerals Management Service), we expect that oil and gas companies will be subjected to a stricter regulatory scheme. However, with an apparent lack of urgency in Congress, the question remains whether such legislation will be passed.

As students we are observers and apprentices, but soon we will have the opportunity to practice and influence the direction of environmental law. The imminence of our transition to the profession keeps us humble but also enthusiastic. Whether it is efforts of the EPA to transform business practices, the pressing dialogue on alternative energy solutions, or the uncertain process of remediating the Gulf, there are plenty of controversies to keep practitioners busy. Upon our acceptance to the bar, we will engage other lawyers in these vexing disputes and insure that environmental laws are equitable and effective.

**Genevieve Trigg and Anna Binau on behalf of the Student Editorial Board.**

## Request for Articles



If you have written an article you would like considered for publication, or have an idea for one, please contact one of *The New York Environmental Lawyer* Editors:

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Articles should be submitted in electronic document format (pdfs are not acceptable), along with biographical information.

[www.nysba.org/EnvironmentalLawyer](http://www.nysba.org/EnvironmentalLawyer)

# EPA Update—Year in Review

By Marla E. Wieder and Chris Saporita<sup>1</sup>

## A. Introduction

In 2010 we commemorated a number of important milestones in the environmental field. Not only did we celebrate the 20th Anniversary of the Pollution Prevention Act (discussed below) but on December 11th we also commemorated the 30th Anniversary of the passage of the Comprehensive Environmental Response, Compensation, and Liability Act—otherwise known as



Marla E. Wieder

CERCLA, or Superfund. As of the drafting of this article, a total of 1,627 sites have been listed on the National Priority List (NPL). While we have made considerable progress on the remediation of such sites, having cleaned 67 percent of the sites nationwide, much work remains. Over the years, a total of 346 sites deleted from the NPL with 1,281 sites are in various stages of remediation. As of October 2010, there are 62 proposed sites awaiting final agency action, for a total of 1,343 final and proposed NPL sites. Considering the challenges presented by a number of sites in this EPA region alone—*e.g.*, the Hudson River PCBs site, the Gowanus Canal, Newtown Creek, Onondaga Lake, and the Passaic River—the next few decades will undoubtedly be busy ones.

In 2010 we also marked the 40th Anniversary of Earth Day and the creation of EPA. The first Earth Day in 1970 was one of the largest and arguably most successful grassroots demonstrations in the nation's history. By the end of the year, EPA was created and tasked with both cleaning up the environmental damage already in existence and establishing guidelines to help prevent additional damage. Soon after, Congress passed a series of environmental laws including the Clean Air Act and the Clean Water Act and we embraced the environmental decade. The new laws, policies and innovations that followed vastly improved our environment and benefited every single American. Today our water and air are cleaner and we are diligently cleaning up blighted properties. As a nation, we are recycling more, companies continue to “go green” and the general population is more environmentally aware. However, we cannot afford to become complacent. Every day new chemicals are introduced into our products, food and environment, specialized waste streams increase and we are presented with new and perhaps more complex dilemmas. From climate change, to mountaintop mining, to the proliferation of confined animal feeding opera-

tions, just to name a few, our environmental challenges are both numerous and daunting. We all need to remain committed to confronting the new environmental challenges, encouraging innovation and educating ourselves and others so that we will leave the next generation a cleaner, healthier environment.



Chris Saporita

While we celebrated these anniversaries and our past accomplishments in 2010, we were also focused on our long-range goals. In October EPA released its strategic plan for fiscal years 2011 through 2015. The plan presents five strategic goals for advancing the Agency's mission along with cross-cutting strategies that seek to adapt the EPA's work to meet the anticipated environmental protection needs. The Agency's five strategic goals for advancing its mission are: taking action on climate change and improving air quality; protecting America's waters; cleaning up communities and advancing sustainable development; ensuring the safety of chemicals and preventing pollution; and enforcing environmental laws. In addressing these priorities, EPA will continue to affirm the core values of science, transparency and the rule of law. The plan also includes new benchmarks that track progress against Administrator Jackson's seven priorities such as “taking action to reduce emissions of greenhouse gases and adapt to climate change, protecting America's waters, increasing the use of smart growth and sustainable development strategies in communities, building and maintaining strong state and tribal partnerships, working for environmental justice, and ensuring that chemical health and safety information is available to the public.” More information on EPA's strategic plan is available at <http://www.epa.gov/ocfo/plan/plan.htm>.

## B. Protection and Restoration

### 1. Preventing Pollution

In commemoration of the 20th anniversary of the Pollution Prevention Act, we should each consider how we can minimize pollution and waste in our own lives. While this goal presents considerable challenges, EPA, in conjunction with its partners, has been improving and expanding its many pollution prevention programs over the years to better assist the environmentally conscious consumer. For example:



ENERGY STAR is a joint program of the EPA and the U.S. Department of Energy which helps consumers save money while protecting the environment through energy efficient products and practices. With the help of ENERGY STAR, Americans have saved enough energy in 2009 alone to avoid greenhouse gas emissions equivalent to those from 30 million cars—all while saving nearly \$17 billion on their utility bills. For more on how you can reduce your energy use, see: <http://www.energystar.gov/>.



Programs such as WasteWise (a partnership program that seeks to reduce municipal solid waste through innovative waste prevention and recycling techniques) and 'Plug-In To eCycling' (a partnership program between EPA and leading consumer electronics manufacturers, retailers, and mobile service providers that promotes opportunities for individuals to donate or recycle their electronics) have eliminated billions of pounds of solid waste. For more information on these programs, see: <http://www.epa.gov/wastes/partnerships/wastewise/about.htm> and <http://www.epa.gov/osw/partnerships/plugin/index.htm>.



By simply looking for the WaterSense label you can easily find and select water efficient products that are backed by third party, independent, testing and certification. Since the program's inception in 2006, WaterSense has helped consumers save a cumulative 46 billion gallons of water and \$343 million in water and sewer bills. For more on how you can save, see: <http://www.epa.gov/WaterSense/>.



EPA's green electronics, green chemistry, green engineering and Design for the Environment (DfE) programs have reduced the use of toxic materials in everyday items like computers and household cleaners, giving consumers a real choice to use less toxic products. From laundry detergents to pet care products, see which products are better for the environment, at: <http://www.epa.gov/dfe/>.

While these programs and initiatives are a step in the right direction, EPA will continue to work with states, local governments, international organizations, environmental groups and industry to identify additional pollution prevention opportunities. For more programs, policies and consumer tools, see EPA's Pollution Prevention page at: <http://www.epa.gov/p2/>.

## 2. Supporting Sustainable Design and Green Building

Good news for local governments trying to go green—EPA has released a Sustainable Design and Green Building Toolkit for Local Governments (the "Toolkit"). The Toolkit is designed to assist local governments in identifying and removing barriers to sustainable design and green building practices.<sup>2</sup> The Toolkit contains an Assessment Tool (to help governments identify barriers or resistance to sustainable design practices), a Resource Guide (which contains links to existing organizations, documents and information that can aid in making codes and ordinances more supportive of sustainable design), and an Action Plan (which will help communities develop their implementation strategy for improving their regulatory and permitting structure. The Toolkit can be downloaded at: [www.epa.gov/region4/recycle/green-building-toolkit.pdf](http://www.epa.gov/region4/recycle/green-building-toolkit.pdf).

## 3. Promoting Environmental Justice and Increased Public Involvement

### a. Draft Policy on Consultation and Coordination with Indian Tribes

Pursuant to Executive Order 13175, in November 2009 President Obama directed all federal agencies to develop plans to assure regular and meaningful consultation and collaboration with tribal officials. Soon after, EPA began soliciting input from tribes on the development of its consultation policy. The "Proposed EPA Policy on Consultation and Coordination with Indian Tribes"<sup>3</sup> seeks to accomplish several objectives: 1) establish clear agency standards for the tribal consultation process; 2) designate individuals across EPA responsible for serving as points of contact for both tribes and agency employees to promote consistency and coordination in the consultation process; and 3) establish a management oversight and reporting structure to help ensure accountability and transparency.<sup>4</sup>

EPA plans to release a subsequent proposed policy after consideration of tribal input received during the comment period. For more information on this policy and related environmental information, see EPA's American Indian Tribal Portal at: <http://www.epa.gov/indian/>.

**b. EPA Releases Rulemaking Guidance on Environmental Justice**

In July 2010, EPA released an interim guidance document to help EPA staff incorporate environmental justice into the agency's rulemaking process. The document, entitled, "Interim Guidance on Considering Environmental Justice During the Development of an Action,"<sup>5</sup> seeks to advance environmental justice for low-income, minority and indigenous communities and tribal governments who have been historically underrepresented in the regulatory decision-making process. The guidance also outlines the multiple steps that every EPA program office can take to incorporate the needs of overburdened neighborhoods into the agency's decision-making, scientific analysis, and rule development.<sup>6</sup>

EPA continues to seek public feedback on how to best implement and improve the guide. To view the interim guidance and submit feedback, see: <http://www.epa.gov/environmentaljustice/resources/policy/ej-rulemaking.html>. For additional information policy and guidance documents, reports and environmental justice grant information, see: <http://www.epa.gov/environmentaljustice/>.

**c. Increased Public Participation in the Hazardous Waste Cleanup Process**

In May 2010, EPA launched an initiative to help communities more effectively participate in government decisions related to land cleanup, emergency preparedness and response, and the management of hazardous substances and waste. The Community Engagement Initiative (CEI) plan lays out specific steps EPA is taking to provide communities with better information and opportunities and influence decisions on environmental cleanups.<sup>7</sup>

The plan includes activities that will help EPA improve transparency and collaboration, enhance technical assistance to communities, better explain the hazards of environmental problems to affected communities, and connect with communities that have been historically underrepresented in this area. The plan is intended to be a working document and specific actions will be refined as EPA receives feedback from the various stakeholders. EPA will periodically evaluate the initiative's progress and results, and will regularly post this information on its website. More information on the CEI, see: <http://www.epa.gov/oswer/engagementinitiative>.

**4. Tracking Toxics**

**a. Greater Access to Chemical Information**

As part of EPA's commitment to increase public access to information on chemicals and their associated risks, in March 2010, EPA began providing free web access to the TSCA Chemical Substance Inventory.<sup>8</sup> This inventory contains a consolidated list of thousands of industrial chemicals maintained by EPA. The data will also be available on Data.Gov, a website developed by the

Obama Administration to provide public access to important government information.

While currently there are more than 84,000 chemicals manufactured, used, or imported in the U.S. listed on the TSCA Inventory, EPA is unable to publicly identify nearly 17,000 of these chemicals because the chemicals have been claimed as "confidential business information" by the manufacturers. EPA has challenged many of those claims and has taken an aggressive stance in order to provide greater transparency on these chemicals and the risks they pose.<sup>9</sup> For more information about EPA's efforts on increasing transparency on chemical information, see: <http://www.epa.gov/oppt/existingchemicals/pubs/enhanchems.html>. For access to the entire TSCA Inventory, please visit, <http://www.epa.gov/oppt/newchemicals/pubs/invntory.htm>.

In April 2010, EPA released a database, called ToxRefDB, which allows scientists and the interested public to search and download thousands of toxicity testing results on hundreds of chemicals. ToxRefDB captures 30 years and about \$2 billion of toxicity testing results and provides the detailed data in an accessible format.<sup>10</sup> Now anyone interested in chemical toxicity can query a specific chemical and find all available public hazard, exposure, and risk-assessment data, as well as previously unpublished studies related to cancer, reproductive, and developmental toxicity.<sup>11</sup> The database's toxicity information forms the basis for pesticide risk assessments when combined with other sources of information, such as those on exposure and metabolism.<sup>12</sup> While providing greater public access to this information is an important goal, it is also hoped that such access can assist with current toxicity research projects and reduce the need for animal testing. To run a search on ToxRefDB, go to: <http://actor.epa.gov/toxrefdb>.

Continuing the trend of increased transparency on chemical information, in May 2010, EPA added more than 6,300 chemicals and 3,800 chemical facilities regulated under TSCA to its public database called Envirofacts.<sup>13</sup> The Envirofacts database is EPA's single point of access on the Internet for information about environmental activities that may affect air, water and land in the U.S.<sup>14</sup> The database includes not only general facility facts and aerial images, but also includes links to other information, such as EPA's inspection and compliance reports. In the months ahead, EPA intends to make additional facility information available to the general public. To run an Envirofacts search, go to: <http://www.epa.gov/enviro/>.

**b. More Chemicals to Be Added to the Toxics Release Inventory (TRI)**

In April 2010, EPA proposed to add 16 chemicals to the TRI list of reportable chemicals, the first expansion of the program in more than a decade. TRI, established as part of the Emergency Planning and Community Right to

Know Act (EPCRA), is a publicly available EPA database that contains information on toxic chemical releases and waste management activities reported annually by certain industries and federal facilities.<sup>15</sup> The TRI currently contains information on nearly 650 chemicals and chemical groups from about 22,000 industrial facilities in the United States. The chemicals that EPA is proposing to add to the TRI have been classified as “reasonably anticipated to be a human carcinogen” by the National Toxicology Program in its Report on Carcinogens.<sup>16</sup> For a list of the 16 chemicals, see: [http://www.epa.gov/tri/lawsandregs/ntp\\_chemicals/index.html](http://www.epa.gov/tri/lawsandregs/ntp_chemicals/index.html). For more information on TRI, see EPA’s TRI homepage at: <http://www.epa.gov/tri>.

## 5. BP / Deepwater Horizon Oil Spill

The BP/Deepwater Horizon oil spill in the Gulf of Mexico ranks as one of the worst man-made environmental disasters in our country’s history. According to recent estimates, the spill is by far the world’s largest accidental release of oil into marine waters.<sup>17</sup> While the well was declared “dead” in September and it is no longer spewing oil into the Gulf, the spill has dramatically affected not only the environment but also the livelihood and futures of millions of the area’s residents. The media attention has subsided but the lawsuits, claims processing and environmental response actions continue.

Since April, EPA has been one of many agencies providing support to the U.S. Coast Guard-led federal response to the oil spill. EPA has been closely monitoring and responding to both actual and potential public health and environmental concerns in the region. The agency has been focusing its efforts on: collecting samples for chemicals related to oil and dispersants in the air, water and sediment; supporting and advising Coast Guard efforts to clean the reclaimed oil and waste from the shoreline and nearby regions; and has been closely monitoring and tracking the effects of the chemical dispersants in the subsurface environment.

EPA will continue to post environmental data from the impacted coastline, including air quality, water and sediment samples, on its website. For links to the data, information on the dispersant use and EPA’s continuing response efforts, see EPA’s BP Spill webpage at: <http://www.epa.gov/bpspill/>. Additional information can be found on the official federal government website for spill response and recovery at: <http://www.restorethegulf.gov/>.

In addition to responding to environmental concerns, in August 2010, EPA announced that it would be providing \$200,000 in environmental justice grants to help support the communities in the Gulf region directly affected by the disaster. The grants will provide funding to help develop educational materials on seafood safety, oil exposure, and how to address and adapt to the spill’s long-term effects. Providing grant funding directly to local

organizations will help to ensure that information is distributed through a trusted network of organizations that will continue to support the region’s rebuilding efforts.<sup>18</sup>

In September 2010, the Obama administration put forward an aggressive restoration plan, including a call for dedicated funds, to help strengthen the Gulf region’s environment, economy, and health. The restoration plan, written by Navy Secretary Ray Mabus, recommended that Congress dedicate a significant amount of any civil penalties obtained from parties responsible for the oil spill into a Gulf Coast Recovery Fund to go toward addressing long-term recovery and restoration efforts.<sup>19</sup> To manage the funds and to coordinate recovery projects, the report recommended that Congress authorize a Gulf Coast Recovery Council, comprised of representatives from the states and federally recognized Gulf tribes, who would work to ensure that local governments and citizen stakeholders also play a critical role in such recovery and restoration. On October 5, 2010, President Obama signed an Executive Order formally creating the Gulf Coast Ecosystem Restoration Task Force.<sup>20</sup> The Task Force, chaired by Administrator Jackson, will coordinate restoration programs and projects in the region.<sup>21</sup> For more on the Report’s recommendations, see: <http://www.restorethegulf.gov/sites/default/files/documents/pdf/gulf-recovery-sep-2010.pdf>.

In November, EPA released two peer-reviewed reports concerning dioxins emitted during the controlled burns of oil (also called in situ burning) during the BP/Deepwater Horizon oil spill. The term “dioxins” is used to describe a group of hundreds of potentially cancer-causing chemicals that can be formed during combustion or burning. The reports found that while small amounts of dioxins were created by the burns, the levels that workers and residents would have been exposed to were below EPA’s levels of concern.<sup>22</sup> Both reports and Q&As about both reports are available at <http://www.epa.gov/research/dioxin/>.

## 6. Cleaning Up Superfund and Brownfield Sites

### a. Superfund Update—Annual Summary and the “Polluter Pays” Principle

In March 2010, EPA released its annual summary of the Superfund program’s fiscal year (FY) 2009 progress. The report shows that the program continues to make significant progress in cleaning up the country’s most complex, uncontrolled or abandoned hazardous waste sites.<sup>23</sup> In FY 2009, which ended on September 30th, EPA completed all of its construction projects at 20 sites, for a cumulative total of 1,080 sites with construction completed. Additionally, EPA listed 20 new sites and proposed adding 23 sites to the NPL.<sup>24</sup>

With the influx of \$582 million in funds from the American Recovery and Reinvestment Act of 2009, EPA began new construction at 26 sites and provided ad-

ditional support to ongoing construction activities at 25 other sites. EPA also conducted or oversaw more than 368 emergency response and removal actions to address immediate threats to communities, such as cleaning up spills and releases of hazardous material.<sup>25</sup> Underscoring EPA's commitment to the "polluter pays" principle, the agency secured commitments from potentially responsible parties to conduct more than \$1.99 billion in future response work, and to reimburse EPA for \$371 million in past costs.<sup>26</sup> For more on the Superfund National Accomplishments Summary, see: <http://www.epa.gov/superfund/accomp/numbers09.html>.

And speaking of the "polluter pays" principle, in June 2010, EPA sent a letter to Congress in support of reinstating the lapsed Superfund taxes. As discussed in the letter, if reinstated, the Superfund tax would provide a "stable, dedicated source of revenue for the program and increase the pace of Superfund cleanup" while ensuring that parties who benefit from the manufacture or sale of substances that typically cause environmental problems at hazardous waste sites, and not taxpayers, help bear the cost of cleanup.<sup>27</sup>

Since the expiration of the Superfund taxes in December 1995, program funding has been largely financed from General Revenue transfers to the Superfund Trust Fund, thus burdening the taxpayer with the costs of cleaning up a considerable number of hazardous waste sites.<sup>28</sup> The current administration is proposing to reinstate the taxes as they were last in effect on crude oil, imported petroleum products, hazardous chemicals, and imported substances that use hazardous chemicals as a feedstock, and on corporate modified alternative minimum taxable income. Under the administration's proposal, the excise taxes and corporate environmental taxes would be reinstated for a period of 10 years beginning in January 2011.<sup>29</sup>

#### **b. Motors Liquidation Company (f/k/a General Motors (GM) Corporation) Bankruptcy Settlement**

As discussed in our prior column, the automotive sector bankruptcies have presented the United States with a unique set of challenges. Aside from the billions of dollars infused into Chrysler and General Motors in order keep the companies afloat through their respective reorganizations, the U.S. and the affected states have been heavily involved in sorting out the real estate, including the contaminated shuttered plants, industrial facilities and other real estate holdings, left with the reorganizing entities. After much effort and negotiation, a settlement has been reached in the Motors Liquidation Company (f/k/a General Motors (GM) Corporation) bankruptcy case.

##### **i. Brief Procedural History**

On June 1, 2009, General Motors and certain subsidiaries filed voluntary petitions for relief under chapter 11

in the United States Bankruptcy Court Southern District of New York. Motors Liquidation Company (MLC or "Old GM") was formed to deal with GM's liabilities.<sup>30</sup> On July 5, 2009, an order was entered approving the sale of substantially all of the debtors' assets to a new and independent company (now known as General Motors Company or "New GM"). The sale closed on July 10, 2009<sup>31</sup> and MLC retained certain real property from the sale to New GM.

On November 28, 2009, DOJ filed Proofs of Claim on behalf of the EPA, the Department of Interior, and the National Oceanic and Atmospheric Administration, alleging that it had incurred past response costs and may incur future response costs under CERCLA at specified properties owned by Old GM. The U.S. also alleged that debtors have liabilities in connection with several properties to implement closure, post-closure work, corrective action, and to perform any necessary action pursuant to any imminent and substantial endangerment to health or the environment as required by RCRA. EPA's claims are mostly attributable to estimated future response costs.<sup>32</sup>

##### **ii. Overview of the Settlement**

On October 20, 2010, EPA, the U.S. Department of Justice, and the United States Attorney for the Southern District of New York, along with 14 states (including New York and New Jersey) and the Saint Regis Mohawk Tribe announced that MLC had agreed to resolve its liabilities at 89 sites for approximately \$773 million.<sup>33</sup> The agreement settles certain proofs of claim of the U.S., the states and the tribe in the GM Corporation bankruptcy matter relating to liabilities under CERCLA, RCRA and the Clean Air Act.

Pursuant to the settlement, MLC has agreed to transfer ownership in 89 properties, 59 of which are known to have been contaminated with hazardous substances or waste,<sup>34</sup> to an Environmental Response Trust (the Trust). The Trust will initially be funded with \$773 million in cash and other assets. The Trust will conduct, manage, and fund the cleanup at sites pursuant to budgets approved by the lead agencies and reimburse the governments for certain costs.<sup>35</sup> In addition, the settlement and the Trust place an emphasis on community involvement and productive reuse that will enable the trustee to potentially redevelop, sell and/or transfer the properties back to the communities for productive use.<sup>36</sup>

This settlement affects only the specified 89 properties and does not affect the Proof of Claims filed against MLC by the U.S. and various states relating to sites other than the 89 properties at issue. Also, it does not affect the general unsecured claims held by the U.S. against MLC for past costs and natural resource damages relating to the properties that are being placed in the Trust.<sup>37</sup>

### iii. Funding of Specific Sites and Public Comment

More than half of the cleanup funds to be paid to the Trust will be provided for the environmental remediation of sites in Michigan and New York. In Michigan, which will have the largest number of properties in the Trust, approximately \$160 million has been allocated for the cleanup of 36 properties containing hazardous wastes or other hazardous substances.<sup>38</sup> Sites in New York State will receive a total of \$154 million. The General Motors (Central Foundry Division) Superfund Site (a/k/a GM Massena), located in St. Lawrence County,<sup>39</sup> will receive approximately \$120.8 million in dedicated cleanup funds. In its filings, the U.S. alleged that GM operated an aluminum diecasting plant at the Massena Site from 1959 to 2009, and that it disposed of hazardous substances including PCBs at the Site. The St. Regis Mohawk Tribe, whose lands are affected by the contamination emanating from the Site, is also a party to the settlement.<sup>40</sup> EPA will remain the lead-agency for, and oversee the cleanup at the Massena Site. In addition to the GM Massena Site, 3 other properties in New York State will receive funding: 1) GM-Inland Fischer Guide ("IFG") Facility, located in Syracuse, New York (\$31,121,812); 2) the adjacent Ley Creek PCB Dredging Site (\$1,882,342); and 3) the Tonawanda Engine Landfill in Tonawanda, New York (\$0). The GM-IFG Facility and the Ley Creek PCB Dredging Site are State-lead sites and are part of the Onondaga Lake Superfund Site.<sup>41</sup> Currently, no environmental remediation is planned at the Tonawanda Engine Landfill; however, should new information arise or should conditions change that require environmental remediation, the site is eligible for certain funds.

The settlement, filed with the U.S. Bankruptcy Court for the Southern District of New York, is subject to a 30-day public comment period and final court approval. For more information on the settlement and the funding of particular properties, see EPA's website at: <http://www.epa.gov/compliance/resources/cases/cleanup/cercla/mlc/index.html>.

### c. National Priorities List (NPL) Sites

#### i. Hudson River PCBs Dredging Update

The first phase of the long-awaited dredging of the Upper Hudson River, which was conducted by General Electric Company (GE) and overseen by EPA, concluded in November 2009. At the end of Phase 1, nearly 300,000 cubic yards of PCB-contaminated sediment and debris had been removed from the river. Although the volume of dredged sediment exceeded established goals for Phase 1, not all of the dredge areas originally targeted for Phase 1 were completed (10 out of 18 areas were completed), due to sediment contamination in some areas that was deeper than expected and the presence of woody debris.<sup>42</sup> Phase 2 will begin with the dredge areas that could not be completed during Phase 1. Habitat reconstruction work began

in the completed Phase 1 areas in spring 2010, and will continue in 2011.

In March 2010, EPA released a detailed technical assessment of the Phase 1 dredging to a panel of independent scientific experts for review. The EPA report and a similar one prepared by GE were submitted to the panel in accordance with the agreement under which GE performed the first phase of the dredging. The EPA and GE reports evaluated the first phase of the dredging with respect to EPA-established engineering performance standards for resuspension of PCBs, residual contamination, and the dredging production rate. The reports detailed the effectiveness of the first phase of dredging, as well as the challenges encountered during the project. EPA's report also laid out the Agency's proposed modifications to the engineering performance standards for Phase 2. During the independent peer review, EPA also sought public comments on the reports. These comments were provided to the panel members for consideration during their evaluation.

The peer review panel publicly discussed its views on the reports in May 2010. On September 10, 2010, the panel issued a report in which the panel recommended changes to each of the performance standards for Phase 2 of the project. EPA is currently considering the panel's recommendations as it determines the changes to the performance standards that should be made for Phase 2. EPA will inform GE about any modifications required during the second phase of the dredging project, and GE will then have the option to agree to conduct Phase 2. If the company agrees to perform Phase 2, the work will be carried out under the terms of the consent decree. If GE does not agree to conduct the Phase 2 dredging, EPA fully reserves all of its enforcement authorities, including its right to direct the company to perform the dredging and/or sue in district court to require GE to perform Phase 2 or to reimburse EPA for its costs if the Agency conducts Phase 2 using government funds.

EPA's report is available at <http://www.hudson-dredgingdata.com/report>; GE's report can be found at <http://www.hudsondredging.com>. The peer review panel's report is available on both websites. Additional information on the Hudson River PCBs Superfund Site can be found at: <http://www.epa.gov/hudson>.

#### ii. Newtown Creek Is Added to the NPL

On September 27th, EPA added Newtown Creek in New York City to the NPL. The listing will allow EPA to conduct a comprehensive evaluation of the creek to determine the appropriate remedial response.<sup>43</sup>

In the mid-1800s, the area adjacent to the 3.8-mile Newtown Creek was one of the busiest hubs of industrial activity in New York City. More than 50 industrial facilities were located along its banks, including oil refineries,

petrochemical plants, fertilizer and glue factories, saw-mills, and lumber and coal yards. The creek was crowded with commercial vessels, including large boats bringing in raw materials and fuel and taking out oil, chemicals and metals. In addition to the industrial pollution that resulted from all of this activity, in 1856 the city began dumping raw sewage directly into the creek. Despite the contamination, the creek remained one of the busiest ports in the nation through World War II. Some factories and facilities still operate along the creek, and various adjacent contaminated sites have contributed to its contamination. Today, as a result of its industrial history, including countless spills, the creek is horribly polluted.<sup>44</sup> Potentially harmful contaminants such as pesticides, metals and PCBs have been detected in the creek along with volatile organic compounds.<sup>45</sup>

EPA had previously evaluated specific sites along the creek and published a report in September 2007 that contained a review of past and ongoing work being conducted to address the Greenpoint oil spill as well as recommendations regarding future work.<sup>46</sup> The state of New York referred the site to EPA due to the complex nature of the contamination. EPA's investigations and cleanup are expected to focus on the sediments in the creek and on identifying and addressing sources of pollution that continue to contribute to the contamination.

For more information on the Site, visit <http://www.epa.gov/region02/superfund/npl/newtowncreek/>.

### iii. Work continues at the Gowanus Canal

Since the Gowanus Canal, located in Brooklyn, was listed on the NPL in March 2010, EPA has completed the primary fieldwork for the remedial investigation. The Canal has been severely impacted by contamination in the sediment as a result of its long industrial history. Over 1,300 samples have been collected and over 9,000 analyses will be conducted by various laboratories to determine the extent of the contamination.

EPA recently finished collecting deep sediment, surface sediment and surface water samples. Specifically, EPA collected 517 deep sediment samples, 54 surface sediment samples, and 81 surface water samples. EPA has also taken water and sediment samples from the combined sewer overflow (CSOs) pipes that discharge stormwater and sewage into the canal during storm events. In addition, more than 200 fish specimens (including striped bass, eel, white perch, blue crab, etc.) were collected from the canal for tissue analysis. Air samples were collected at street level and boater's breathing level along the canal. All of this data will be used to perform an ecological and human health risk assessment, which EPA anticipates completing in early 2011.

Additionally, 88 monitoring wells were installed along the canal and sampled in order to study the ground

water influence on the contamination and to obtain data about possible sources of contamination from the properties abutting the waterway. Soil samples were collected while installing certain monitoring wells and groundwater samples were collected from all wells. The sampling effort was completed in late July 2010, when water level measurements were taken in all 88 wells. During the Fall, EPA continued to investigate the sources of approximately 200 non-CSO pipes which discharge into the Canal.

For the latest news and information on the Gowanus Canal, visit EPA's website at <http://www.epa.gov/region2/superfund/npl/gowanus>.

### iv. The Black River Is Listed on the NPL

In September 2010, EPA placed a section of the Black River, which runs through the villages of Carthage and West Carthage in Jefferson County, New York, on the NPL. The Black River empties into the eastern end of Lake Ontario.<sup>47</sup> Sediment in the river and along its banks is contaminated with PCBs and other chemicals. PCBs, which can accumulate in the tissue of fish, may cause cancer and can affect the immune, reproductive, nervous and endocrine systems. The Black River is a popular location for recreation and fishing and people often consume the River's fish.<sup>48</sup>

Active and inactive paper mills, a machine shop, the Carthage/West Carthage sewage treatment plant, and a hydroelectric power plant are currently located along the Black River. In February 2000, the New York State Department of Environmental Conservation (NYSDEC) issued a report that evaluated the sediment in the Black River, its tributaries, and other tributaries discharging directly into the Eastern Lake Ontario drainage basin. The report identified the presence of PCB-contaminated sediment immediately downstream of the sewage treatment plant. As a follow-up to this study, NYSDEC issued another report that focused on the sediment contamination in the Black River and confirmed the presence of elevated levels of PCBs.<sup>49</sup>

The state referred the Site to EPA for further investigation in 2006. The Agency subsequently collected sediment samples from the River, as well as along the banks. Results confirmed the presence of elevated levels of PCBs. In addition to PCBs, polychlorinated dibenzo-p-dioxins, and polychlorinated dibenzofurans were found in river sediments. A full investigation will be conducted to determine the nature and extent of the contamination.

The listing of the Black River brings the number of Superfund sites in New York state to 86. For more information about the Site, visit <http://www.epa.gov/region02/superfund/npl/blackriver/index.html>. For more information on other Superfund sites in New York State, visit <http://www.epa.gov/region02/cleanup/sites/>.

#### v. The Passaic River Cleanup

In January 2009, EPA announced the selection of a cleanup plan for the first stage of a two-phased project to remove dioxin-laden sediment from the lower Passaic River. The cleanup plan, outlined in a January 2009 Action Memorandum, involves mechanical dredging of 40,000 cubic yards of sediment with mechanical dewatering of the sediments. The plan implements a 2008 agreement between EPA, Occidental Chemical Corporation and Tierra Solutions, Inc. under which the companies agreed to remove, in two phases, a total of 200,000 cubic yards of contaminated sediment from the portion of the river in front of the Diamond Alkali Superfund Site in Newark. The removal design plan was recently submitted to EPA and field work for first phase is scheduled to start in 2011. The work is expected to take approximately one year to complete. Further information on this project can be found at EPA's Passaic River website at <http://www.epa.gov/region2/passaicriver/>.

#### vi. Raritan Bay Slag Superfund Site

In April 2010, EPA announced that it will begin a full investigation of the contamination at the Raritan Bay Slag Superfund Site in Old Bridge and Sayreville, New Jersey.<sup>50</sup> The Site currently consists of three areas that contain lead slag from blast furnace bottoms, a byproduct of metal smelting, which was used to construct a seawall and a jetty along the southern shore of the Raritan Bay in Old Bridge Township and Sayreville, and areas of Margaret's Creek in Old Bridge. The Site was listed on the NPL in November 2009 after sampling revealed elevated levels of lead in portions of the Site. Some samples contained between 15 to 20 percent lead.<sup>51</sup>

On September 25, 2009, EPA entered into an Inter-Agency Agreement with the U.S. Army Corp of Engineers to conduct the Remedial Investigation/Feasibility Study (RI/FS). The remedial investigation is under way and it is estimated that it will be completion in winter 2012. EPA will then develop a cleanup plan for public review after completion of the full RI/FS.<sup>52</sup>

#### d. Brownfields Job Training Program

In April 2010, EPA announced that it was awarding more than \$2 million in job training grants for environmental cleanups in communities across the country.<sup>53</sup> EPA's Brownfields Job Training Program helps train people for jobs in the assessment, cleanup and redevelopment of brownfields properties, including abandoned gas stations, old textile mills, closed smelters, and other abandoned properties. In New York State, The Research Foundation of the State University of New York in Buffalo and the Workforce Investment Board of Herkimer, Madison and Oneida Counties, New York have each been selected to receive \$200,000 in federal grant funds under

this program. Both organizations will recruit students from among unemployed and underemployed residents in local areas, and provide them with the skills they need to find environmental jobs cleaning up contaminated sites in their communities.<sup>54</sup>

Since 1998, EPA has awarded more than \$33 million in brownfields job training funds. The program prepares workers for employment in the new green economy, and ensures that the economic benefits derived from brownfields redevelopment remain in the affected communities. As of February 2010, more than 5,300 individuals have been trained through the Brownfields Job Training Grant Program, and 3,400 have been placed in full-time employment in the environmental field.<sup>55</sup>

More information on brownfields job training grants: <http://www.epa.gov/brownfields/job.htm>.

More information on EPA's Brownfields Program: <http://www.epa.gov/brownfields/>.

### C. Science and Regulation

#### 1. Air

##### a. Reducing Greenhouse Gas Emissions

#### EPA Finalizes the 2008 National U.S. Greenhouse Gas Inventory

In April, EPA released the 15th annual U.S. greenhouse gas inventory report, which shows a drop in overall emissions of 2.9 percent from 2007 to 2008.<sup>56</sup> The downward trend is attributed to a decrease in carbon dioxide emissions associated with fuel and electricity consumption. Total emissions of the six main greenhouse gases in 2008 were equivalent to 6,957 million metric tons of carbon dioxide. The gases include carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride. Though overall emissions dropped in 2008, emissions are still 13.5 percent higher than they were in 1990.<sup>57</sup>

#### EPA Rejects Claims of Flawed Climate Science

In July, EPA denied 10 petitions challenging its 2009 endangerment finding about the threat of greenhouse gases.<sup>58</sup> The petitions to reconsider EPA's endangerment finding claim that climate science cannot be trusted, and assert a conspiracy that allegedly invalidates the findings of the Intergovernmental Panel on Climate Change (IPCC), the U.S. National Academy of Sciences, and the U.S. Global Change Research Program. After months of serious consideration of the petitions and of the state of climate change science, EPA found no evidence to support these claims. In contrast, EPA's review concluded that climate science is credible, compelling, and growing stronger.<sup>59</sup>

## **EPA and DOT Announce Next Steps Toward Tighter Tailpipe and Fuel Economy Standards for Passenger Cars and Trucks**

In October, the U.S. Department of Transportation's (DOT) National Highway Traffic Safety Administration (NHTSA) and EPA announced that they will begin the process of developing tougher greenhouse gas and fuel economy standards for passenger cars and trucks built in model years 2017 through 2025.<sup>60</sup> This will build on the success of the first phase of the national program covering cars from model years 2012-2016. A recent Notice of Intent (NOI) issued by the agencies, in cooperation with the California Air Resources Board (CARB), includes an initial assessment for a potential national program for the 2025 model year and outlines next steps for additional work the agencies will undertake. Next steps include issuing a supplemental NOI that would include an updated analysis of possible future standards by the end of 2010. As part of that process, the agencies will conduct additional study and meet with stakeholders to better determine what level of standards might be appropriate. The agencies aim to propose actual standards within a year. For more information on the NOI, the technical assessment, and submitting comments: <http://www.nhtsa.gov/fuel-economy> and <http://www.epa.gov/otaq/climate/regulations.htm>.

## **EPA and DOT Propose First Greenhouse Gas and Fuel Efficiency Standards for Trucks and Buses**

EPA and DOT recently announced the first national standards to reduce greenhouse gas emissions and improve fuel efficiency of heavy-duty trucks and buses.<sup>61</sup> EPA and DOT's National Highway Traffic Safety Administration (NHTSA) are proposing new standards for three categories of heavy trucks: combination tractors, heavy-duty pickups and vans, and vocational vehicles. The categories were established to address specific challenges for manufacturers in each area. For combination tractors, the agencies are proposing engine and vehicle standards that begin in the 2014 model year and achieve up to a 20 percent reduction in carbon dioxide (CO<sub>2</sub>) emissions and fuel consumption by 2018 model year. For heavy-duty pickup trucks and vans, the agencies are proposing separate gasoline and diesel truck standards, which phase in starting in the 2014 model year and achieve up to a 10 percent reduction for gasoline vehicles and 15 percent reduction for diesel vehicles by 2018 model year (12 and 17 percent respectively if accounting for air conditioning leakage). Lastly, for vocational vehicles, the agencies are proposing engine and vehicle standards starting in the 2014 model year which would achieve up to a 10 percent reduction in fuel consumption and CO<sub>2</sub> emissions by 2018 model year. The program is projected to reduce GHG emissions by about 250 million metric tons, save 500 million barrels of oil over the lives of the vehicles produced within the program's first five years, and provide

\$41 billion in net benefits over the lifetime of model year 2014 to 2018 vehicles.

## **EPA Proposes Rules on Clean Air Act Permitting for Greenhouse Gas Emissions**

In August, EPA proposed two rules to ensure that businesses planning to build new, large facilities or make major expansions to existing ones will be able to obtain Clean Air Act permits that address their greenhouse gas (GHG) emissions.<sup>62</sup> In the spring of 2010, EPA finalized the GHG Tailoring Rule, which specifies that beginning in 2011, projects at large industrial facilities, like power plants and oil refineries, that will increase GHG emissions substantially will require an air permit. The recently proposed rules are a critical component for implementing the Tailoring Rule.

In the first rule, EPA has proposed to require permitting programs in 13 states to make changes to their implementation plans to ensure that GHG emissions will be covered. All other states that implement an EPA-approved air permitting program must review their existing permitting authority and inform EPA if their programs do not address GHG emissions. Because some states may not be able to develop and submit revisions to their plans before the Tailoring Rule becomes effective in 2011, in the second rule EPA has proposed a federal implementation plan, which would allow EPA to issue permits for large GHG emitters located in these states. This would be a temporary measure that is in place until the state can revise its own plan and resume responsibility for GHG permitting.

### **b. Reducing Pollution from Mobile Sources**

#### **EPA Promulgates New Emissions Limits for Stationary Diesel Engines**

Early in 2010, EPA promulgated the first standards for formaldehyde, benzene, acrolein and other toxic air pollutants from certain stationary diesel engines.<sup>63</sup> These pollutants are known or suspected to cause cancer or other serious health problems and environmental damage. The emission limits apply to existing diesel engines meeting certain criteria for age, size, and use. EPA estimates that more than 900,000 of the engines generate electricity and power equipment at industrial, agricultural and other facilities. The engines also are used in emergencies to produce electricity and pump water for flood and fire control. Emergency engines used at most residences, hospitals and other institutional facilities, and commercial facilities such as shopping centers are not covered by this rule. To meet the emissions requirements, owners and operators of the largest of the engines will need to install emissions controls, such as catalysts, to engine exhaust systems. Emergency engines covered by this rule need to comply with operating requirements that will limit emissions. EPA estimates that the rule will reduce annual air toxics emissions by 1,000 tons, particle pollution by 2,800

tons, carbon monoxide emissions by 14,000 tons, and organic compound emissions by 27,000 tons when fully implemented in 2013.

### c. Reducing Pollution from Stationary Sources

#### EPA Proposes to Cut Mercury Emissions from Sewage Sludge Incinerators

EPA recently proposed cuts in emissions of mercury, particle pollution and other harmful pollutants from sewage sludge incinerators, the sixth-largest source of mercury air emissions in the United States. Sewage sludge incinerators are typically located at wastewater treatment facilities. The proposed standards would apply to both multiple hearth and fluidized bed incinerators. Units incinerating sewage sludge at other types of facilities such as commercial, industrial and institutional incinerators will be covered under different air pollution standards. Overall, the proposal would cut mercury emissions from these units by more than 75 percent. EPA estimates that the proposal would yield health benefits ranging from \$130 million to \$320 million in 2015, with annualized costs estimated at approximately \$105 million for all currently operating units to comply with the proposal standards. The rule will be finalized in 2011 and become effective in 2015. For more information, visit: <http://www.epa.gov/ttn/oarpg/new.html>.

#### EPA Issues First National Limits on Mercury and Other Toxic Emissions from Cement Plants

EPA is issuing final rules that will protect Americans' health by cutting emissions of mercury, particle pollution and other harmful pollutants from Portland cement manufacturing, the third-largest source of mercury air emissions in the United States.<sup>64</sup> This action sets the nation's first limits on mercury air emissions from existing cement kilns, strengthens the limits for new kilns, and sets emission limits that will reduce acid gases. This final action also limits particle pollution from new and existing kilns, and sets new-kiln limits for particle and smog-forming nitrogen oxides and sulfur dioxide. The rules are expected to yield \$7 to \$19 in public health benefits for every dollar in costs. When fully implemented in 2013, EPA estimates that the rules will reduce mercury pollution by 16,600 pounds per year (92%), total hydrocarbons by 10,600 tons per year (83%), particulate matter by 11,500 tons per year (92%), acid gases by 5,800 tons per year (97%), sulfur dioxide by 110,000 tons per year (78%), and nitrogen oxides by 6,600 tons per year (5%).

#### EPA Proposal Cuts Pollution from Power Plants in 31 States and D.C.

In July, EPA proposed regulations to replace and improve upon the 2005 Clean Air Interstate Rule (CAIR), which the U.S. Court of Appeals for the D.C. Circuit ordered EPA to revise in 2008. The new proposal, called the transport rule, would target power plant pollution that

drifts across the borders of 31 eastern states and the District of Columbia, and would reduce power plant emissions of sulfur dioxide (SO<sub>2</sub>) and nitrogen oxides (NO<sub>x</sub>) to meet state-by-state emission reductions. By 2014, the rule and other state and EPA actions would reduce SO<sub>2</sub> emissions by 71 percent, and NO<sub>x</sub> emissions by 52 percent, over 2005 levels, resulting in more than \$120 billion in annual health benefits, including avoiding an estimated 14,000 to 36,000 premature deaths, 23,000 nonfatal heart attacks, 21,000 cases of acute bronchitis, 240,000 cases of aggravated asthma, and 1.9 million days of missed school or work. The transport rule also would help improve visibility in state and national parks and would increase protection for ecosystems that are sensitive to pollution, including streams in the Appalachians, lakes in the Adirondacks, estuaries and coastal waters, and red maple forests. These benefits would far outweigh the annual cost of compliance with the proposed rule, which EPA estimates at \$2.8 billion in 2014. EPA expects that the emission reductions will be accomplished by proven and readily available pollution control technologies already in place at many power plants across the country. For more information, visit: <http://www.epa.gov/airtransport>.

#### EPA Sets Stronger National Air Quality Standard for Sulfur Dioxide

In June, EPA issued a final new, one-hour health standard for sulfur dioxide (SO<sub>2</sub>), to reduce short-term exposure to SO<sub>2</sub>. The new standard is 75 parts per billion (ppb), a level designed to protect against short-term exposures ranging from five minutes to 24 hours. EPA is revoking the current 24-hour and annual SO<sub>2</sub> health standards because the science indicates that short-term exposures are of greatest concern and the existing standards would not provide additional health benefits. EPA is also changing the monitoring requirements for SO<sub>2</sub> to ensure that monitors will be placed where SO<sub>2</sub> emissions impact populated areas no later than Jan. 1, 2013, and changing the Air Quality Index to improve states' ability to alert the public when short-term SO<sub>2</sub> levels may affect their health. EPA estimates that, upon full implementation, the rule will provide health benefits worth between \$13 billion and \$33 billion annually, including the prevention of 2,300 to 5,900 premature deaths and 54,000 asthma attacks a year, at an estimated cost of \$1.5 billion. EPA expects to identify or designate areas not meeting the new standard by June 2012. For more information, visit: <http://www.epa.gov/air/sulfurdioxide>.

#### EPA to Cut Mercury, Other Toxic Emissions from Boilers, Solid Waste Incinerators

In June, EPA proposed a number of rules that would, among other things, cut U.S. mercury emissions by more than half and significantly cut other pollutants, including several air toxics, from boilers and process heaters at large industrial facilities and smaller facilities, including commercial buildings, hotels, and universities, and from

commercial and industrial solid waste incinerators.<sup>65</sup> The rules would also require facilities with boilers to conduct energy audits to find cost effective ways to reduce fuel use and emissions. Smaller facilities, such as schools, would not be included in these requirements, but they would be required to perform tune-ups every two years. The proposed rules are estimated to yield more than \$5 in public health benefits for every dollar spent, and when fully implemented, would yield combined health benefits estimated at \$18 to \$44 billion annually, at an estimated annual costs of \$3.6 billion for installing and operating pollution controls required under these rules. In September, EPA announced that it would postpone the planned issuance of the rules for one month, until January 16, 2011, to consider additional emissions data collected during the initial comment period.

## 2. Water

### a. Surface Water Quality

#### EPA Issues New Guide to Improving Stormwater Management

EPA recently issued a new guide for improving the effectiveness of urban stormwater permits in the Chesapeake Bay watershed and the mid-Atlantic Region.<sup>66</sup> The permits are issued by the states and EPA to local municipalities and other permit holders to control water pollution from runoff. EPA evaluated the effectiveness of dozens of stormwater permits, and found that many municipalities' stormwater management plans are out of date and have not been fully implemented, and that permits don't always contain clear milestones for assessing progress or ensuring that water quality standards for local streams and water bodies would be met. The guide calls for, among other things, municipal storm sewer system permits to address 11 elements, including post construction performance standards, accounting for discharges from federal facilities, reducing turf grass fertilizer, retrofitting to reduce existing discharges, clear accountability mechanisms, implementing limitations to meet water quality standards and local waterways and Bay pollution budgets (TMDLs), and clear and enforceable action milestones.

#### EPA Proposes New Permit Requirements for Pesticide Discharges

In June, in response to the Sixth Circuit Court of Appeals' 2009 ruling in *National Cotton Council, et al. v. EPA*, EPA proposed a new NPDES permit for pesticide discharges to waters of the United States.<sup>67</sup> The proposed permit, released for public comment and developed in collaboration with states, would require all operators to reduce pesticide discharges by using the lowest effective amount of pesticide, preventing leaks and spills, calibrating equipment, and monitoring for and reporting adverse incidents. Additional controls, such as integrated pest

management practices, are built into the permit for operators who exceed an annual treatment area threshold.

EPA estimates that the pesticide general permit will affect approximately 35,000 pesticide applicators nationally that perform approximately half a million pesticide applications annually. The draft permit covers the following pesticide uses: (1) mosquito and other flying insect pest control; (2) aquatic weed and algae control; (3) aquatic nuisance animal control; and (4) forest canopy pest control. It does not cover terrestrial applications to control pests on agricultural crops or forest floors. The agency plans to finalize the permit and have it take effect by April 9, 2011. For more information on the draft permit, visit: <http://www.epa.gov/npdes>.

#### EPA Initiates Rulemaking to Reduce Harmful Effects of Sanitary Sewer Overflows

In May, EPA initiated a rulemaking to better protect the environment and public health from the harmful effects of sanitary sewer overflows (SSOs) and basement backups. EPA is considering two possible modifications to existing regulations: (1) establishing standard National Pollutant Discharge Elimination System (NPDES) permit conditions for publicly owned treatment works (POTWs) permits that specifically address sanitary sewer collection systems and SSOs; and (2) clarifying the regulatory framework for applying NPDES permit conditions to municipal satellite collection systems. Municipal satellite collection systems are sanitary sewers owned or operated by a municipality that convey wastewater to a POTW operated by a different municipality. As a part of this effort, the agency is also considering whether to address long-standing questions about peak wet weather flows at municipal wastewater treatment plants to allow for a holistic, integrated approach to reducing SSOs while at the same time addressing peak flows at POTWs. For more information, visit: [http://cfpub.epa.gov/npdes/home.cfm?program\\_id=4](http://cfpub.epa.gov/npdes/home.cfm?program_id=4).

#### EPA and New York State Announce Ban on Boat Sewage Disposal to New York Canal System

In May, EPA Region 2 and the New York State Department of Environmental Conservation (DEC) announced that the entire New York State Canal System is now a "no discharge zone," which means that boats are banned from discharging sewage into the canals. Boaters must instead dispose of their sewage at specially designated pump-out stations. This action is part of a comprehensive strategy by EPA and New York State to eliminate the discharge of sewage from boats into any of the state's waterways. In June, New York State petitioned EPA for a determination on whether adequate facilities exist for the pumping and disposal of vessel sewage on the New York side of the Long Island Sound, so that the State can add the Sound to its designated no discharge zones. That petition is under consideration. For more information about no discharge

zones, visit <http://www.epa.gov/region02/water/ndz/index.html>.

## **b. Drinking Water Quality**

### **EPA Proposes Updating Drinking Water Rule to Better Protect Public Health**

EPA is proposing to revise a national primary drinking water regulation, the 1989 Total Coliform Rule, to achieve greater public health protection against water-borne pathogens in the distribution systems of public water systems. The revised rule will better protect people from potential exposure to dangerous microbes because it requires water systems to take action when monitoring results indicate that contamination or a pathway to contamination may be present. Water utilities are required to regularly monitor for microbial contamination in the distribution system. Although microbes detected in monitoring are not necessarily pathogens themselves, the detection can indicate that there is a pathway that would allow pathogens to enter the system, such as a water main break or an opening in a storage tank. Under the proposed rule, when monitoring results are positive, systems must find and fix any pathways leading to microbial risk. For more information about the proposed rule, visit: [http://water.epa.gov/lawsregs/rulesregs/sdwa/tcr/regulation\\_revisions.cfm](http://water.epa.gov/lawsregs/rulesregs/sdwa/tcr/regulation_revisions.cfm).

## **3. Waste and Toxic Substances**

### **EPA Rule Increases Protection from Lead-Paint Poisoning**

In July, EPA issued a new final rule requiring all contractors performing renovation, repair or painting work in homes built before 1978 to follow lead-safe work practice requirements. The lead-safe work practices include dust control, site cleanup and work area containment. The new rule removes a provision from existing regulations that allowed owner-occupants of pre-1978 homes to “opt out” of having their contractors follow lead-safe work practices if there were no children under six years of age in the home. EPA has eliminated the so-called opt-out provision because improper renovations in older homes can create lead hazards resulting in harmful health effects for residents and visitors in these homes, regardless of age. The rule also requires certification of training providers and lead-safe work practice certification for individuals involved in the construction and remodeling industry. To date, EPA has certified 254 training providers who have conducted more than 16,000 courses and trained an estimated 320,000 renovators in lead-safe work practices. For more information, visit: <http://www.epa.gov/lead>.

## **D. Compliance and Enforcement**

The following is a small sample of the enforcement actions taken by EPA Region 2 in New York State over the past year. For a statistical summary of Region 2’s com-

pliance and enforcement activities for 2010, please visit: <http://www.epa.gov/region02/capp/10results.html>.

## **1. Multimedia**

### **EPA Region 2 Continues Multimedia Enforcement Action Against Tonawanda Coke Corporation**

As discussed in the last EPA Update, Region 2 discovered numerous violations of the Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act at the Tonawanda Coke Corporation (TCC) coke plant, in Tonawanda, New York. Since the last article, the Region has issued numerous information requests and administrative orders directing TCC to come into compliance with the applicable laws.

In January 2010, EPA issued an Administrative Compliance Order to TCC, under Section 113(a)(3) of the Clean Air Act, for violations of Sections 112 and 114 of the Act, and of provisions in the National Emission Standard for Benzene Emissions from Coke By-Product Recovery Plants, 40 C.F.R. Part 61, Subpart L; the National Emission Standard for Equipment Leaks (Fugitive Emission Sources), 40 C.F.R. Part 61, Subpart V; the National Emission Standard for Benzene Waste Operations, 40 C.F.R. Part 61, Subpart FF; the National Emission Standards for Coke Oven Batteries, 40 C.F.R. Part 63, Subpart L; and the facility’s title V operating permit. The order required TCC to take actions to comply with these regulations, including, among other things: enclose and seal all openings on various coking process units and duct gases from these units to a control system that will recover or destroy benzene in the gas; properly calibrate leak detection equipment and perform the required leak detection monitoring; properly calculate the facility’s total annual benzene quantity in the facility’s waste streams and report the results to EPA; and submit approvable emission test protocols for measuring the facility’s total fugitive benzene emissions and the facility’s stack emissions.

In February 2010, Region 2 issued another Administrative Compliance Order to TCC, under Section 113(a)(1) of the Clean Air Act, for violations of 6 N.Y.C.R.R. Part 214, the federally enforceable New York State Implementation Plan (SIP) for by-product coke oven batteries. The order requires TCC to comply with the SIP by operating both of the facility’s wet quench towers with a baffle system designed to effectively reduce particulate emissions during quenching. The order also required TCC to submit engineering drawings of its recently installed baffle systems, along with a detailed engineering analysis of the baffle systems’ effectiveness in reducing particulate emissions during quenching, to demonstrate compliance with the SIP, as well as conduct sampling of its quench tower make-up water, and using the arithmetic average of the four samples to determine its compliance with the SIP.

In April, EPA issued an Administrative Compliance Order to Tonawanda Coke Corp. regarding violations

of the “General Duty Clause” of Section 112(r)(1) of the Clean Air Act at Tonawanda Coke’s facility in Tonawanda, New York. The Order finds that Respondent failed to satisfy Section 112(r)(1) by failing to properly inspect, maintain, and/or keep in good repair equipment at the facility which would prevent future releases of substances which are regulated pursuant to Section 112(r), and by failing to comply with government regulations at the facility. The Order requires Respondent to undertake certain actions to come into compliance with Section 112(r)(1), including the repair and maintenance of certain equipment, conducting an assessment into the root causes of two incidents at the facility and submittal of a report and schedule to EPA.

In July, EPA and TCC entered into a Consent Agreement and Final Order to resolve TCC’s violations of the Resource Conservation and Recovery Act. The CAFO requires TCC to correct its improper handling of coal tar sludge (a hazardous waste). Under the terms of a follow-up agreement, TCC has agreed to remove four damaged tar storage tanks and contaminated soil, stop dumping and mixing tar sludge inappropriately, and properly recycle or dispose of associated materials.

In August, Region 2 ordered the coke manufacturing facility to comply with its Clean Water Act permit. Specifically, the order directs TCC to remedy its ongoing discharges of excessive amounts of cyanide in its process wastewater into the Town of Tonawanda’s sanitary sewer system, which ultimately discharges from the town’s wastewater treatment facility into the Niagara River. EPA also ordered TCC to properly monitor and treat the wastewater that results from the coke-making process, and to complete the overdue installation of pollution controls and control contaminated stormwater runoff from its coal piles.

And, in September, TCC concluded air pollution testing, under order from EPA, which showed that the plant is a major source of hazardous air pollutants, specifically benzene, under the Clean Air Act, and that the majority of benzene being emitted from the facility is from fugitive emissions from leaks in the process area.<sup>68</sup> The Region is working with TCC and DEC to ensure that the plant installs all appropriate air pollution controls.

## 2. Air

### Region 2 Settles Clean Water Act Civil Complaint for Violations at Chromium Plating Facility

In April, EPA Region 2 signed a judicial Consent Judgment (CJ) with Nassau Chromium Plating Co., Inc. to resolve past violations of the Clean Air Act and the National Emission Standards for Chromium Emissions from Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks, 40 C.F.R. Part 63, Subpart N (Chromium Regulations). The violations occurred at

the defendant’s chromium electroplating facility in Mineola, New York, and include: (1) failing to properly monitor chromium electroplating tanks to ensure they are in compliance with emissions limits; (2) failing to operate and maintain the tanks, including air pollution control equipment and monitoring equipment, in a manner consistent with good air pollution control practices and with a maintenance plan to minimize emissions of hexavalent chromium; and (3) failing to maintain required records, including records of maintenance, malfunctions, and ongoing compliance.

Prior to signing the CJ, defendant came into compliance with the Chromium Regulations by ensuring that all tanks are properly monitored, by submitting an operation and maintenance plan for the tanks, which EPA approved in September 2009, and by ensuring that all required records are maintained. Because the defendant is now in compliance with the Chromium Regulations, the CJ does not require further injunctive relief, but requires the defendant to maintain compliance with all applicable requirements of the Chromium Regulations, and provides for stipulated penalties for violations of these requirements while the CJ is in effect. The CJ also requires the defendant to pay a \$4,000 civil penalty to resolve the past violations. EPA and DOJ agreed to this penalty amount only after the defendant demonstrated significant financial hardship in accordance with EPA’s “ability to pay” policy.

## 3. Water

### Region 2 Settles Clean Water Act Administrative Complaint for Violations at a Concentrated Animal Feeding Operation in Copake Falls, New York

In March, 2010, Region 2 entered into a Consent Agreement and Final Order with Berkshire Valley Dairy, LLC, settling an administrative complaint for violations of the Clean Water Act and the regulations governing the operation of large concentrated animal feeding operations. The Respondent is a dairy farm that confines approximately 1,000 mature dairy cows and 300 heifers and heifer calves. On April 21, 2009, and again on May 7, 2009, EPA conducted Compliance Evaluation Inspections of the facility and observed numerous violations of the CWA and its implementing regulations, including the discharge of manure to a tributary of Roeliff Jansen Kill and numerous failures to adequately document and implement a comprehensive nutrient management plan, best management practices, inspections, and proper operations and maintenance of the facility. On June 29, 2009, EPA issued an Administrative Order directing the Respondent to correct its violations, and on January 12, 2010, EPA issued an administrative Complaint, proposing to assess a penalty of \$12,000. Under the March 10, 2010 settlement, the Respondent paid a penalty of \$8,100.

## **Region 2 Settles Clean Water Act Administrative Complaint for Construction Stormwater Violations in the Bronx**

In April, Region 2 issued a Consent Agreement and Final Order settling its administrative complaint against Vornado Realty Trust for violating the Clean Water Act by failing to obtain a New York State Construction General Permit for a construction project that disturbed more than 1.5 acres at 1770-1778 East Gunn Hill Road, in the Bronx, and discharged polluted stormwater to the Hutchinson River. Under the terms of the agreement, Vornado will pay a civil penalty of \$28,000.

## **City of Oswego, New York, to Invest \$87 Million in Upgrades to Sewer System to Comply with Clean Water Act**

In May, EPA and the New York State Department of Environmental Conservation announced that, to resolve long-standing problems with unpermitted sewer overflows, the city of Oswego, New York, will invest an estimated \$87 million in improvements to its west side sewer system, which includes both combined and sanitary components. The system, which serves approximately 10,000 people, is designed to transport the city's sewage to a wastewater treatment plant for treatment prior to discharge into Lake Ontario. Overflows from the system discharge raw sewage directly to water bodies and can be a major source of water pollution. The improvements to the city's sewer system, to be implemented under the settlement lodged in federal court in Syracuse, N.Y., will significantly reduce the number of sewer overflows. Specific measures include at least 75 percent separation of the combined system into sanitary and stormwater components, in order to prevent high volumes of rainwater from overwhelming the treatment plant, a 50 percent expansion of the west side waste water treatment plant's treatment capacity, disconnection of catch basins to reduce the inflow of rain water into the existing sanitary sewer system, major improvements to its operation and maintenance program, and sewer financing reforms.

The city also will pay a penalty of \$99,000. The settlement resolves claims against the city by both the United States and the State of New York.

## **4. Waste and Toxic Substances**

### **Region 2 Settles RCRA Complaint for Violations at Gasoline Service Stations in the Adirondack Region**

In June, Region 2 entered into a Consent Agreement and Final Order with P.J. Hyde & Son ("Hyde") for its failures to comply with RCRA regulations relating to underground storage tanks at six service stations. Under the terms of the settlement, Hyde is required to come into compliance, pay a penalty of \$16,000, and undertake a three-pronged Supplemental Environmental Project ("SEP"). The first prong of the SEP requires Hyde to

conduct two annual independent third party audits of the four facilities it still owns and an audit at two other service stations it does not own or operate. The second prong requires Hyde to install and operate for at least one year electronic line leak detectors ("ELLDs") on all pressurized pipes at the four facilities which it owns and to install ELLDs on piping at the other two stations. The final prong requires Hyde to install and operate, for at least one year, a central monitoring system for the four facilities it owns.

### **Region 2 Settles RCRA Complaint for Violations at Ceramics Facility in Olean, New York**

In September 28, 2010, Region 2 settled a RCRA administrative complaint which had alleged violations of the regulations concerning hazardous waste at a facility owned and operated by Advanced Monolithic Ceramics, Inc., in Olean, New York. Respondent stored hazardous waste without a permit, failed to make hazardous waste determinations, and failed to comply with hazardous waste manifest requirements. Under the terms of the settlement, Respondent agreed to correct its violations and pay a penalty of \$33,000.

### **Region 2 Settles TSCA Administrative Complaint for Violations at Chemical Supplier in New York, New York**

On March 23, 2010, Region 2 entered into a Consent Agreement and Final Order with Special Materials Company (SMC) regarding its failure to submit information on the company's importation of chemicals. Under the terms of the agreement, SMC agreed to pay a penalty of \$65,000.

### **Region 2 Settles TSCA Administrative Complaint for Violations by Residential Landlord in Brooklyn and Manhattan**

In March, Region 2 entered into a Consent Agreement and Final Order with Wolfe Landau, a residential landlord of property in Brooklyn and Manhattan, regarding its failure to provide required lead warning statements, lead-based paint disclosure statements, statements of risk assessment, and certifications. Under the terms of the agreement, Respondent came into compliance, and paid a \$20,000 penalty.

### **Region 2 Settles TSCA Administrative Complaint for Violations by a Chemical Importer in Tarrytown, New York**

In August, Region 2 entered into a Consent Agreement and Final Order resolving an administrative complaint against Ampacet Corporation of Tarrytown, New York, for its failure to submit information on the company's importation of chemicals. Under the terms of the agreement, Respondent corrected its violations, developed an ambitious environmental management systems plan for several of its domestic facilities, and paid an \$80,000 penalty.

## EPA Orders Removal of PCB-Contaminated Materials from Massena, New York Site and Decontamination of Buildings before Demolition

On August 26, 2010, EPA ordered Motors Liquidation Company (MLC), formerly the General Motors Corporation (GM), to remove materials and soil contaminated with PCBs from portions of the General Motors Central Foundry Division Superfund site in Massena, New York.<sup>69</sup> MLC intends to demolish several buildings at the site, a former GM plant, that are contaminated with PCBs, which pose significant threats to human health and the environment. Under the order, MLC will be responsible for additional sampling, decontamination of the building and their contents, demolition of the buildings, and removal of PCB-contaminated soil beneath the buildings. PCBs have been found in the plant's equipment, the piping and concrete flooring, and in tunnels and soil located underneath the buildings.

Additionally, in connection with the facility closure and GM's bankruptcy (discussed above), GM or MLC donated and auctioned off manufacturing equipment and office furniture from the facility, some of which has been shown to contain PCBs. MLC will be collecting these items at no cost to the buyer or recipient. EPA encourages those who have received such items to contact MLC's hotline at 1-800-414-9607 to arrange for return of the items.<sup>70</sup>

### E. Conclusion

EPA's first year under a new President, a new Administrator and a new Regional Administrator has yielded significant improvements in the quality of the environment and human health, and in the empowerment and engagement of all Americans in the work for a healthier world. As EPA celebrates its 40th anniversary, it is reflecting on its incredible successes and recommitting to addressing the remaining challenges. For more information on what's new in EPA, Region 2, to report environmental violations or to sign up to follow us on Twitter or Facebook, visit our website at <http://www.epa.gov/region2/>.

### Endnotes

1. Any opinions expressed herein are the authors' own, and do not necessarily reflect the views of the U.S. Environmental Protection Agency.
2. EPA Press Release, New Toolkit to Help Local Governments with Green Building Practices, July 21, 2010.
3. Proposed EPA Policy on Consultation and Coordination with Indian Tribes, June 9, 2010, available at <http://www.epa.gov/indian/pdf/consultation-letter-policy-0610.pdf>.
4. EPA Press Release, EPA Seeks Comments on Consultation Policy with Indian Tribes, June 21, 2010.
5. Interim Guidance on Considering Environmental Justice During the Development of an Action, July 2010, available at <http://www.epa.gov/compliance/ej/resources/policy/considering-ej-in-rulemaking-guide-07-2010.pdf>.

6. EPA Press Release, EPA Releases Rulemaking Guidance on Environmental Justice, July 26, 2010.
7. EPA Press Release, EPA Expands Public Participation on Hazardous Waste Cleanup, May 20, 2010.
8. EPA Press Release, EPA Makes Chemical Information More Accessible to Public/For the first time TSCA chemical inventory free of charge online, March 15, 2010.
9. *Id.*
10. EPA Press Release, EPA Opens Access to Chemical Information/Searchable database on chemical hazard, exposure and toxicity data now available, April 29, 2010.
11. *Id.*
12. *Id.*
13. EPA Press Release, EPA Adds More Than 6,300 Chemicals and 3,800 Chemical Facilities to Public Database/Unprecedented access provided for the first time, May 17, 2010.
14. *Id.*
15. EPA Press Release, EPA Proposes Adding More Chemicals to Toxics Release Inventory List/First program chemical expansion in more than a decade, April 6, 2010.
16. See Addition of National Toxicology Program Carcinogens-Proposed Rule, at [http://www.epa.gov/tri/lawsandregs/ntp\\_chemicals/index.html](http://www.epa.gov/tri/lawsandregs/ntp_chemicals/index.html).
17. Robertson, Campbell and Krauss, Clifford, *Gulf Spill Is the Largest of Its Kind, Scientists Say*, The New York Times (The New York Times Company), August 2, 2010 at [http://www.nytimes.com/2010/08/03/us/03spill.html?\\_r=1&fta=y](http://www.nytimes.com/2010/08/03/us/03spill.html?_r=1&fta=y).
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19. EPA Press Release, Obama Administration Moves Long-Term Gulf Plan Forward/Mabus recovery plan focuses on funding, governance, involvement/EPA Administrator to lead ecosystem task force, September 28, 2010.
20. EPA Press Release, President Obama Signs Executive Order Officially Forming Gulf Coast Ecosystem Restoration Task Force/EPA Administrator Lisa P. Jackson to oversee national transition from emergency response to coastal recovery in the gulf, October 5, 2010.
21. *Id.*
22. EPA Press Release, EPA Releases Reports on Dioxin Emitted During Deepwater Horizon BP Spill/Reports find levels of dioxins created during controlled burns were below levels of concern, November 12, 2010.
23. EPA Press Release, EPA Announces Superfund Cleanup Progress for FY 2009, March 4, 2010.
24. *Id.*
25. *Id.*
26. *Id.*
27. EPA Press Release, EPA Supports Superfund "Polluter Pays" Provision/Agency submits administration's guidance to Congress, June 21, 2010.
28. *Id.*
29. *Id.*
30. On June 5, 2009, an order was entered in the bankruptcy court approving the sale of substantially all of GM's assets to MLC; the sale closed on July 10, 2009. As per the Master Sale and Purchase Agreement, the sale included 115 properties (99 non-manufacturing properties and 16 manufacturing properties). Note that the number of properties has since been refined.

31. See, the Motors Liquidation Company website at < <http://www.motorsliquidationdocket.com/> >.
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33. *Id.*
34. Press Release, United States Attorney, Southern District of New York, United States Announces Approximately \$773 Million Settlement with GM to Resolve Environmental Liabilities, October 20, 2010, available at <http://www.justice.gov/usao/nys/pressreleases/October10/gmenvironmentalsettlementpr.pdf>.
35. EPA's MLC Bankruptcy Settlement website at <http://www.epa.gov/compliance/resources/cases/cleanup/cercla/mlc/index.html>.
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38. Press Release, United States Attorney, Southern District of New York, United States Announces Approximately \$773 Million Settlement with GM to Resolve Environmental Liabilities, October 20, 2010, <http://www.justice.gov/usao/nys/pressreleases/October10/gmenvironmentalsettlementpr.pdf>.
39. For more information on the General Motors Central Foundry Division Superfund Site, see <http://www.epa.gov/region02/superfund/npl/0201644c.htm>.
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41. For more information on the Onondaga Lake Superfund Site, see NYSDEC's website at <http://www.dec.ny.gov/chemical/8668.html> and EPA's website at <http://www.epa.gov/region02/superfund/npl/onondagalake/index.html>.
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47. EPA Press Release, EPA Places a Section of the Black River in Jefferson County, N.Y. on the Superfund List, September 27, 2010.
48. *Id.*
49. *Id.*
50. EPA Press Release, EPA to Begin Full Investigation at Raritan Bay Slag Superfund Site, April 7, 2010.
51. *Id.*
52. EPA's NPL Fact Sheet, Raritan Bay Slag, available at <http://www.epa.gov/region02/superfund/npl/0206276c.pdf>.
53. EPA Press Release, Administrator Jackson Announces \$2 Million in Brownfields Job Training Funds to Clean Up Our Communities, April 10, 2010.
54. EPA Press Release, EPA to Provide Grants to Support Brownfields Job Training: Programs Will Prepare Upstate New York Residents for Green Jobs, April 14, 2010.
55. *Id.*
56. EPA Press Release, EPA Finalizes the 2008 National U.S. Greenhouse Gas Inventory, April 15, 2010.
57. See <http://www.epa.gov/climatechange/emissions/usinventoryreport.html>.
58. EPA Press Release, EPA Rejects Claims of Flawed Climate Science, July 29, 2010.
59. See <http://epa.gov/climatechange/endangerment/petitions.html>.
60. EPA Press Release, EPA and DOT Announce Next Steps Toward Tighter Tailpipe and Fuel Economy Standards for Passenger Cars and Trucks, October 1, 2010.
61. EPA Press Release, DOT, EPA Propose the Nation's First Greenhouse Gas and Fuel Efficiency Standards for Trucks and Buses/A win for the environment, economy and energy efficiency, October 25, 2010.
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63. EPA Press Release, Final Rule Reduces Air Toxics from Existing Stationary Diesel Engines, February 18, 2010.
64. EPA Press Release, EPA Sets First National Limits to Reduce Mercury and Other Toxic Emissions from Cement Plants, August 10, 2010.
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66. EPA Press Release, EPA Issues New Guide to Improving Stormwater Management: Local Streams, Chesapeake Bay to Benefit, August 3, 2010.
67. EPA Press Release, EPA Proposes New Permit Requirements for Pesticide Discharges, June 2, 2010.
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69. EPA Press Release, EPA Orders Removal of PCB-Contaminated Materials from Massena, N.Y. Site and Decontamination of Buildings Before Demolition, August 26, 2010.
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# DEC Update

By John Louis Parker

## DEC Today: Fiscal Challenge/Fiscal Reality FY 10/11

Readers of my recent columns may see this item as a recurring theme. It is. The Department of Environmental Conservation continues to deal with the challenges of the fiscal situation confronting New York. On September 28, 2010, 260 men and women retired from the Department, taking advantage of the administration's early retirement incentive, known internally as ERI. Their contributions, and now their collective loss, are significant to the Department. Collectively they represent over 8,200 years of DEC staff experience. The far-reaching implications of these losses are unknown and further reductions likely through the commencement of the layoff process may result in approximately 150 additional DEC staff losses by the early part of 2011.

As earlier DEC Updates have discussed, these staff reductions will result in an agency that has the lowest staffing levels since the early 1980s. It is unclear what level of service and programmatic objectives will be possible with the reduced staffing levels. As is well known, there has been a dramatic increase in the Department's mission and responsibilities over the past 25-plus years. There is not a community, resource, or business interest that is not in some way touched by the Department's jurisdiction and responsibilities. All will be affected by these reductions. Protecting the State's economy, its environment, and its natural resources—the air and the water and addressing hazardous waste and substances and brownfield sites—requires a significant amount of work and appropriate staff levels to implement necessary environmental programs. The need to efficiently and effectively deliver the mission of DEC remains a key priority of Department staff.

On October 21, 2010, Commissioner Alexander "Pete" Grannis was fired. On October 28, 2010, Peter Iwanowicz was named as the Acting Commissioner of the Department of Environmental Conservation.

Despite these tumultuous times and significant DEC staff losses, the important mission and role of the Department continues. DEC staff has continued to advance important initiatives and projects in every DEC region of the State, and here is a brief update of some of the highlights of recent DEC staff accomplishments.

### State of Green Blog

The Department launched its first (and we believe the only one in New York State government) blog, State of Green, on the 40th anniversary of the first Earth Day celebration—April 22, 2010. The blog provides an opportunity for the Commissioner to spotlight pressing environmental issues and the diverse work of DEC staff.

The rationale behind State of Green is simple: since most people get their information online, the blog is an effective, low cost, and efficient way to educate the public and spur them to take individual and community action.

At the date of this writing, the blog included postings by the former Commissioner on a range of topics, including climate change, E-waste, invasive species, and sustainable purchasing. Whenever possible, the blog links readers to related information on the DEC website—including video on the topic on our own DEC TV.

Here, in its entirety, is the inaugural blog posting of State of Green.

### Welcome

Welcome to State of Green, our new blog on New York's environment.

It's a great privilege to be Commissioner of DEC and to be able to work with extraordinarily committed men and women—professionals whose passion for preserving and protecting New York's environment continues to inspire me. This is a key moment in environmental history, and our to-do list at DEC is long: combating climate change, protecting our air and water and preserving New York's incredible natural areas and abundant wildlife are just a few of the many critical issues we tackle each day.

Through State of Green, I'll be commenting on a wide range of environmental issues and giving insight into the actions DEC is taking and headway we're making to improve New York's environment and create a more sustainable future. I hope you'll join the discussion.

**Pete Grannis**

Please participate and get involved with this effort. Visit the State of Green blog at <http://decstateofgreen.blogspot.com>.

### Peter Berle Memorial Award—Inaugural Award Winners

The Peter Berle Memorial Award was established in 2010 by former Commissioner Alexander "Pete" Grannis to recognize DEC staff members who have made an outstanding contribution to environmental stewardship through their work on a project or a program. The teamwork spirit and collaborative nature of the award was celebrated in the nominations, which included individuals from other partner agencies—state, federal, and non-

governmental agencies. The diversity and composition of the teams further underscore the importance of key partnerships between the Department and other organizations that are necessary to help further the purpose and mission of the Department. There were over twenty nominations of groups of Department staff from all divisions and regions across the agency during this inaugural competition.

For 2010, two teams were selected as co-winners of the first annual Peter Berle Memorial Award. The winning teams' initiatives were implementing Executive Order 4 and Operation Shellshock.

### **Executive Order Number 4—Development and Implementation Team**

A core team of DEC experts in toxics use reduction, solid waste reduction and recycling, energy use, and natural resource management and procurement, worked together for the past three years to implement Executive Order No. 4—Green Procurement and Agency Sustainability. The challenge for the team was to work collaboratively with nine agencies and the Governor's office, both to develop the initial concepts behind the Order and to establish the infrastructure necessary for implementation. Another challenge was the amount of technical expertise required, from the state contracting and procurement process, to tracking energy use, solid waste disposal, and the wide variety of products—light bulbs, asphalt, and other types of products available in the marketplace. The New York State agency green purchasing and sustainability program is one of the most comprehensive in America. The requirements of Executive Order 4 now govern the purchase of over 36 products and services, including paper, computers, appliances, pest management, and printing—and green specifications for an additional 36 products will be developed each year.

The team established a groundbreaking new focus on the sustainability of state government operations and purchasing and created the infrastructure necessary to improve and innovate well into the future. The Executive Order is one of the most comprehensive sustainability and environmentally conscious purchasing initiatives in North America, and it served as a model for a similar executive order issued by President Obama in October 2009.

Please visit the Office of General Service's Website at <http://www.ogs.state.ny.us/EO/4/Docs/FirstAnnual-ProgressReport.pdf> for a copy of the First Annual Progress Report.

### **Operation Shellshock**

The DEC Update, Summer 2009, noted that Operation Shellshock resulted from an extensive investigation by the Division of Law Enforcement into the international black market for poaching and selling protected New York species. The species investigated included turtles, rattlesnakes, and salamanders that are sold overseas.

The investigation was the most far reaching undercover operation ever undertaken by DEC and involved several jurisdictions and entities including Pennsylvania, New Jersey, Florida, U.S. Immigration and Customs, the Attorney General's Office, Environment Canada, and Ontario Ministry of Natural Resources. The list of confiscated species included snakes (timber rattlesnakes, copperheads, and eastern hognose snakes) and turtles (snapping turtles, Blandings turtles, box turtles, North American wood turtles, and two Yellow Spotted Amazon River Turtles). The investigation involved more than 2,400 individual turtles, snakes, and salamanders.

Congratulations to DEC staff involved with these significant accomplishments. The awarding of the Inaugural Peter Berle Memorial Award was well earned by these DEC teams.

### **Draft Solid Waste Management Plan: Beyond Waste: A Sustainable Materials Management Strategy for New York**

The "Beyond Waste" Draft solid waste management plan takes a new approach to dealing with waste for New York State. The Draft plan shifts the focus of State policy from "end of pipe" waste management to reducing waste production from the start—with the goals of minimizing waste, increasing the use of materials that can be reused or recycled, reducing greenhouse gas emissions, and increasing green jobs. A recent EPA report shows that while waste facilities are only 2 percent of the national greenhouse gas emissions inventory, and slightly higher in New York at 4 percent, over 35 percent of the greenhouse gases produced are related to the products and packaging that become waste. With product stewardship as the focus, and addressing recycling and waste prevention secondarily, the proposed plan will have potentially significant impacts on the State's climate change and greenhouse gas reduction obligations.

In 1987, New York issued a Solid Waste Management Plan that placed a priority on preventing waste, and by 1988, recycling became mandatory. Despite the increase in the awareness of recycling and reuse among the public and significant efforts by local governments, New York still generates about the same amount of waste today as it did in 1990, and only 20 percent of the municipal solid waste is being recycled. The Draft plan proposes to change that reality by bringing together municipalities, businesses, and individuals to significantly reduce the amount of materials destined for landfills and municipal waste combustion. Through a combination of recycling, composting, preventing waste, and maximizing reuse, the plan aims to reduce the amount of solid waste needing disposal from the current 4.1 lbs/person/day down to .6 lbs/person/day by 2030.

The public comment on the proposed Draft Solid Waste Management Plan closed in Summer 2010. Hundreds of comments were received by the Department,

which are being reviewed, and the Department expects to release the responsiveness summary by the end of the year. The adoption of the “Beyond Waste” Draft plan is particularly important because many municipal governments in New York are or soon will be subject to the periodic and regular update of their solid waste plans. Please visit the DEC’s Website at <http://www.dec.ny.gov/chemical/41831.html>.

## **DEC Adopts Commissioner’s Policy: Climate Change and DEC Action**

Climate change and its implications for the Department’s mission and its programs has been an enduring topic. Under the impetus of the Governor’s Executive Orders, including No. 4—Green Procurement and Agency Sustainability—and Executive Order 24—Goal To Reduce Greenhouse Gas Emissions Eighty Percent By The Year 2050 And Preparing A Climate Action Plan—State agencies have been directed to address the impacts of climate change. The Commissioner’s Policy affects the Department’s core mission by requiring climate change considerations to be incorporated into all aspects of DEC activity and business operations. These activities are far-reaching and include decision-making, planning, permitting, remediation, rulemaking, grants administration, natural resource management, enforcement, land stewardship and facilities management, internal operations, contracting, procurement, and public outreach and education.

There are five components to the Policy that are intended to integrate climate change considerations into DEC activities:

1. Department staff are directed to make greenhouse gas (GHG) reductions a fundamental goal and integrate specific mitigation objectives into DEC programs, actions and activities, as appropriate.
2. Department staff are directed to incorporate climate change adaptation strategies into DEC programs, actions, and activities, as appropriate.
3. Department staff are directed to consider climate change implications as they perform their daily DEC activities.
4. Each Department Division, Office, and Region is directed to designate an individual to act as a coordinator for climate change integration. DEC will form an internal workgroup consisting of these coordinators to assist with climate change integration and to address data, information, and training needs.
5. As part of its annual planning process, each Department Division, Office, and Region is directed to identify specific actions that will be taken to further this Policy’s climate change goals and objectives for both mitigation and adaptation, and to report progress of the prior year’s climate-related actions.

The Climate Change and DEC Action Policy calls for climate coordinators and a climate action team to be set up within DEC to implement the policy. All offices and regions of the Department are directed to integrate mitigation and adaptation into their programmatic objectives. Specifically, the policy requires DEC to take into account mitigation of climate change, through reductions in greenhouse gas emissions and enhancement of carbon sinks, and adaptation for effects of climate change. Please visit the DEC’s Website at <http://www.dec.ny.gov/regulations/65034.html>.

## **Hudson River Sustainable Shorelines Project**

The Hudson River Sustainable Shorelines Project is an initiative to better understand options to protect the Hudson River’s shoreline habitats and communities in the face of climate change. There are approximately three hundred miles of tidal shoreline on the Hudson River, consisting of about forty-seven percent natural shoreline and forty-one percent hard engineered shoreline. Among other things, the project will analyze the benefits provided to humans by naturally functioning ecosystems, known as “ecological services,” when the riverfront is used in different ways. In particular, the project will analyze shoreline stability under likely future conditions, and the costs associated with shoreline uses.

The Sustainable Shorelines Project is assessing the Hudson River at a time of great change. Sea level rise will occur throughout the estuary, and storm surges are expected to move one-hundred-fifty-two miles upriver. These changes will occur in the context of powerful forces that continually exert their influence on the river, such as human changes to the shoreline, and will change the ecosystems services provided by the river. The project will examine the human effects on shorelines, which are significant, and include compressed shore zones, hardened shorelines, increased physical energy impinging the shoreline, and increased numbers of invasive species. At the same time, the project will assess the role of ecosystem services, such as providing vital habitat, dissipating wave and storm energy, processing nutrients, and supporting high biodiversity. There are four goals of this ongoing project:

- Goal 1—better understanding of tradeoffs in ecosystem services;
- Goal 2—assessing tradeoffs in performance of shoreline treatments;
- Goal 3—learning short and long-term costs of shoreline options; and
- Goal 4—transferring useful information and tools to key stakeholders.

The project will develop scientific information about ecological services of Hudson River tidal shorelines. For example, the highest diversity of fish species is found on the most structurally complex shoreline types. The project

will also look at key decision-making points for legal and policy decisions, and will look at examples of strategies that work. Ultimately, the project seeks to develop practical ways to bring these sustainable shoreline ideas into business practices and government policies.

A consortium of partners, from government and the research community, is involved in the Sustainable Shorelines Project. These partners include the Department of Environmental Conservation—Hudson River National Estuarine Research Reserve, the Hudson River Estuary Program, Cary Institute of Ecosystem Studies, Cornell University, Stevens Institute of Technology, Consensus Building Institute, Pace University Land Use Law Center, Nature Conservancy, New York Sea Grant, Sustainable Hudson Valley, Department of State Coastal Program, New York State Energy Research and Development Authority, and the Hudson River Valley Greenway.

### **Hudson River Environmental Conditions Observing System (HRECOS)**

The Hudson River estuary is a highly dynamic system. The Hudson River Environmental Conditions Observing System, or Hudson River ECOS, is a network of near real-time water quality and weather station monitors. The system is made up of six fixed stations, from Schodack Island State Park (River Mile 131) to the New York/New Jersey Harbor (River Mile 3) and one mobile station on the Hudson River Sloop *Clearwater*. Hudson River ECOS is the first (and at present only) monitoring system that provides a comprehensive view of environmental conditions in the Hudson River Estuary. The data are transmitted for public display, and interpretive displays and stories are all available to the public. Please visit the Hudson River ECOS (HRECOS) Website at <http://www.hrecos.org>.

The Hudson River ECOS project advances our understanding of the linkages between watersheds, the atmosphere, and the ocean. Starting in 2008, Hudson River ECOS has been used for river navigation, emergency response, assessing sea level rise and the impact of invasive species, establishing water quality benchmarks, detecting pollution events, and mapping fish habitat. The system conducts frequent measurements, approximately every 15 minutes, to let researchers observe and analyze data in ways that traditional monitoring techniques cannot. The system allows for detection of environmental responses to extreme, episodic, or rare events—such as pollution discharges or storm events—as well as high frequency processes such as ecosystem metabolism. The system will also aid in the establishment of environmental baselines to detect future change.

A consortium of partners, from government and from the research community, operates Hudson River ECOS. The partners include DEC, Hudson River National Estuarine Research Reserve, Stevens Institute of Technology, Lamont-Doherty Earth Observatory, Hudson River Sloop

*Clearwater*, Hudson River Foundation, U.S. Geological Survey, and the Cary Institute. The Hudson River ECOS staff are sponsored by DEC's Hudson River Estuary Program with additional funding coming from the U.S. Environmental Protection Agency and the National Oceanographic and Atmospheric Administration.

### **New York State Climate Action Plan**

The Climate Action Council was tasked with developing a draft Climate Action Plan. The Plan was to be based upon robust public involvement and to be flexible enough to be modified annually. The requirement, set forth in Executive Order 24—Goal To Reduce Greenhouse Gas Emissions Eighty Percent By The Year 2050 And Preparing A Climate Action Plan—brings the leaders of many State agencies together to specifically address the impacts of climate change on the State. This Order, among other things, sets forth the “goal of the State of New York to reduce current greenhouse gas emissions from all sources within the State eighty percent (80%) below levels emitted in the year nineteen hundred ninety (1990) by the year two-thousand fifty (2050),” which is commonly referred to as the 80-by-50 goal.

The process led to the following key findings:

- Meeting the 80-by-50 goal will require investments in new energy systems and infrastructure that have very low or no net carbon emissions. Patterns of energy use will also need to change.
- A broad shift from reliance on burning fossil fuels to electricity and other carbon free energy carriers generated from low- or no-carbon sources with a concurrent increase in generation capacity will be needed.
- Energy efficiency is an essential, but not sufficient, strategy.
- Transportation systems and buildings (residential and commercial) will have to move away from reliance on combustion of fossil fuels to alternate sources with significantly lower carbon or no carbon emissions.

The Climate Action Plan was released for public comment in November 2010. Please visit the Website at <http://nyclimatechange.us>.

### **Sea Level Rise Task Force Report**

In 2007, the New York State Legislature created the Sea Level Rise Task Force. Located in DEC, it consists of sixteen members charged with addressing sea level rise and proposing recommendations to protect communities in New York's coastal marine zones. The purpose of the effort was to evaluate ways of protecting New York's remaining coastal ecosystems and natural habitats, to increase coastal community resilience in the face of sea level rise, and to apply the best available science on sea level rise and its associated impacts. The Task Force's diverse

membership included government agencies, governments of affected communities, non-governmental organizations, and other stakeholder groups, such as the Nature Conservancy.

Based upon the best available science to estimate potential sea level rise scenarios, it is clear that all regions of the marine coast will not be impacted in the same way. Estimates focused on two areas: the lower Hudson Valley and Long Island, and the Mid-Hudson Valley and Capital Region. These areas could see an increase of almost a foot to over four feet by 2080. The conservative prediction for an inch or two at the minimum over the next decade may not seem significant. However, the conservative prediction of between 7 or 8 inches by the 2050s is in the range of those changes New York has already witnessed since the 1960s. The past increases were witnessed before the our record high temperature changes associated with climate change.

Sea level rise will continue to increase the risk to developed areas, future developments, and coastal habitats, which are all already highly vulnerable to powerful coastal storms. Every community from the dam at Troy to New York Harbor to the Long Island Sound and Atlantic Coastline will be affected. Many of our neighborhoods, communities, and the associated buildings, roads, and utilities will be directly impacted. At some point, the most vulnerable communities could be inundated with water that will not recede to the ocean.

The Task Force has convened and deliberated, and over the two-year effort has produced a Report that explains sea level rise and its implications for New York in the 21st Century. It contains 9 findings and 14 specific recommendations for action. The Sea Level Rise Task Force delivered its final report to the Legislature on December 31, 2010. Please visit the DEC's Website at <http://www.dec.ny.gov/energy/45202.html>.

## Do Not Move Firewood When Camping in New York State

In May 2008, DEC took an active role addressing northern snakeheads (*Channa argus*), an invasive fish species, in Orange County. The DEC Update, Spring 2009, noted DEC efforts to address the problem of this invasive species. This non-native species can cause harm to the environment or to human health and is a threat to biodiversity that has been judged second only to habitat loss. The invasive species threat continues, and New York's rural and urban forests are increasingly threatened by a host of exotic tree insects and diseases, many of which are unstoppable killers.

Ironically, human use, enjoyment, and involvement in our environment can aid the spread of invasive species. Firewood, enjoyed by countless campers around the State, is one such example. DEC regulations now prohibit the

importing of firewood into New York unless it has been heat treated to kill pests.

The campers, hunters and other users of our forests may, unwittingly, be moving throughout New York forests eggs or larvae of pest species, which may be hidden on or under the bark or buried deep within firewood logs—from the trees killed by invasive species. Once transported to new locations, eggs may hatch or larvae may mature and emerge to attack host trees in and around the camping areas. Too often these new infestations are not detected until numerous trees start to die, and the infestation has spread beyond the ability to effectively eradicate it or control it. DEC staff have observed boaters and campers checking into state campgrounds with trunkloads and even boatloads of firewood brought in from other states. DEC keeps daily logs of visitors that bring wood into the campgrounds, and they are shared with Forest Rangers, who then seek out these campers and provide educational information about the invasive species threat. Camping is an important and beloved activity; yet the scale of the potential invasive species threat becomes clear considering that DEC manages 42 campgrounds in the Adirondack Park and 8 campgrounds in the Catskills, and hosts over 1,000,000 visitor nights each season.

On July 22, 2010, Emerald Ash Borer (*Agrilus planipennis*) occurrences were confirmed in Steuben and in Ulster Counties. The Emerald Ash Borer causes significant ecological and economic damage to specific ash trees. On numerous occasions, the Emerald Ash Borer has shown up far removed from previous known infestations, transported by ash trees, at or near campgrounds and forest recreation areas. The Department fears that the Saugerties infestation may be the worst such infestation in New York's history. The potentially impacted ash species makes up about 7 percent, or approximately 900 million, of the trees found in New York. After infestation, an ash tree can die in between 2 and 4 years. In the lake states, and specifically in Detroit, Michigan, this exotic invasive caused the loss of over 70,000 trees. This species has spread throughout Michigan, and into Ontario, Illinois, Indiana, and Ohio. Those familiar with the tragic loss of Elm trees caused by Dutch Elm disease know well the likely result for ash trees located in infested communities.

In September a quarantine addressing the Emerald Ash Borer infestation was declared in Steuben and Ulster Counties, adding to the July 2009 quarantine declared for this species in Cattaraugus and Chautauqua Counties. Currently, the New York State quarantines in place restrict the movement of untreated ash firewood and other ash tree products in 7 counties where infestations were found, and in the 11 adjacent counties. Please visit the DEC's Website at <http://www.dec.ny.gov/animals/47761.html>.

Invasive species will continue to be of concern to the Department well into the future, and the threat is real and

significant. In the past, New York has been devastated by Chestnut blight, European gypsy moth, Dutch Elm disease, and Beech bark disease. Recently, Department staff discovered Asian long-horned beetles, Hemlock wooly adelgids, Pine shoot beetles, and Sirex wood wasps infesting New York's urban and rural forests and killing thousands of trees. See 6 NYCRR § 192: Forest Insect Disease Control, and specifically 6 NYCRR § 192.5—Firewood restrictions to protect forests from invasive species—that specifically address this threat to New York forests. Please visit the DEC's Website at <http://www.dec.ny.gov/animals/44008.html> for answers to Frequently Asked Questions (FAQs) regarding the regulatory prohibition on the importation of firewood into New York.

### DEC and Catskill Partners Build an Interpretive Kiosk at the Site of the Proposed Catskill Center

New York's Catskill Forest Preserve Park is a jewel. The Catskill Park is located in Ulster, Greene, Delaware, and Sullivan Counties and consists of approximately 286,000 acres of mountainous public and private state lands. The phenomenal park is a natural treasure readily made up of an impressive skyline formed by ninety-eight peaks over 3,000 feet in elevation. The Catskill Park, and the Catskill region, however, have long been without an interpretive museum or visitor center. In the early 1990s a site on Route 28, the most traveled corridor to the heart

of the Catskills, was selected for a proposed interpretive center. The project, however, was never completed.

In 1995, the Catskill Interpretive Center project was put on hold for fiscal reasons. Former Commissioner Grannis and U.S. Representative Maurice Hinchey, working with New York State Assemblyman Kevin Cahill and local partners worked to update the 1995 design plans to create plans for a green, LEED certifiable center. The "Friends of the Catskill Interpretive Center" have taken an active role in this process. The Center has yet to be built. Until it is built, local groups including the Catskill Center for Conservation and Development, the Friends Group, the State University of New York-Delhi, and the Department have worked together to design and construct the roadside interpretive kiosk with 16 informative educational panels. The public is encouraged to stop by and visit this fledgling gateway center.

**John L. Parker is a Regional Attorney with the Department of Environmental Conservation, Region 3.**

**The DEC Update was compiled by John Parker solely in his individual capacity. The Update is not a publication prepared or approved by the Department of Environmental Conservation, and the views expressed here are not to be construed as an authoritative expression of the DEC's official policy or positions.**

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# Member Profile

For this issue of *The New York Environmental Lawyer*, we focus our member profile on Janice Dean. Ms. Dean graduated from the College of Natural Resources at the University of California, Berkeley in 1999, and with honors from Pace University School of Law in 2005, where she served as Editor-in-Chief of *Pace Law Review*.



Janice Dean

She is currently the Section Chief of the Toxics and Cost Recovery Section of the Environmental Protection Bureau of the Office of the New York State Attorney General, where she has worked since 2005. As Section Chief, she oversees the State's docket of hazardous waste-related cases in the New York City area, including Long Island. She also handles litigation in State and federal court, and at the federal administrative level, regarding bankruptcy and nuclear regulatory matters, among others.

Prior to attending law school, Ms. Dean worked in the Office of California's then-Governor Gray Davis as a California Executive Fellow, where she drafted policy measures to implement California's first piece of environmental justice legislation and surveyed local land use policies statewide.

Ms. Dean's aptitude for understanding and addressing complex environmental issues is complemented by her scientific background. She credits the U.C. Berkeley's pioneering interdisciplinary program in the College of Natural Resources for allowing her to obtain a Bachelor of Science degree while integrating public policy and environmental ethics into her curriculum, giving her a background not only in environmental science but also in the policy arena, in which solutions to environmental problems can be created. She complemented her undergraduate studies with a law degree from Pace Law School, consistently ranked one of the top environmental law programs in the country.

Ms. Dean is also heavily involved within the legal community. Besides serving as Co-Chair of the Membership Committee for the NYSBA's Environmental Law Section, where she focuses on recruiting young and newly admitted lawyers to the Section, she is a graduate of the

New York City Environmental Law Leadership Institute (NYCELLI), a member of Pace University's Sustainability Committee, and she mentors law students interested in practicing environmental law.

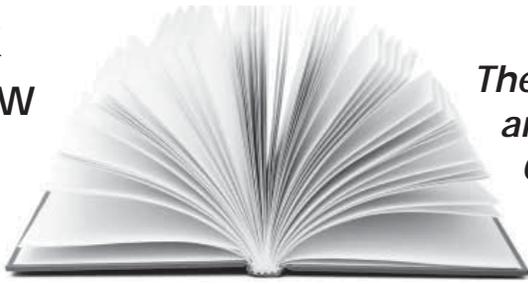
An accomplished author as well as speaker, Ms. Dean has lectured attorneys and law students alike on environmental law. For example, she spoke on "The Future of Citizen Litigation in the Environmental Field" during Pace Law School's 30th Anniversary Program, as well as on Climate Change Litigation at the Practicing Law Institute, and Electronic Discovery at the New York State Bar Association. Her article, "Remembering the Forgotten Community: Supplemental Environmental Project and Environmental Justice," was published by the New York State Bar Association in 2004, and in 2007 she co-authored an article entitled "SEQRA's Alarm Rings for Climate Impact Considerations," which was published in the *New York Law Journal*.

During the course of Ms. Dean's career, she has observed several progressions in the field of environmental law. For example, traditional environmental education, which focused on discrete areas like air quality, water quality, endangered species, and hazardous substances, is giving way to a holistic view of interconnected systems. She also believes climate change is a game-changer for environmental practitioners. Environmental law and energy law are arguably now one and the same, and this can be a challenge for traditional environmental practitioners. Another observation Ms. Dean has made, and anticipates addressing during the course of her career, includes the intersection of bankruptcy and environmental law, which is one of the most significant changes in the field of environmental law. Economic changes have resulted in the abandoning of contaminated sites throughout New York and the country, which pose environmental and human health threats and leave taxpayers on the hook for the cleanup, which can amount to millions or even billions of dollars.

Janice Dean has made great contributions to the field of environmental law during the course of her young career. We are lucky to have such a dedicated environmental lawyer as a member of this Section and we look forward to working with Ms. Dean through the rest of her career.

**Justin Birzon**

## BOOK REVIEW



### *The Law of Green Buildings: Regulatory and Legal Issues in Design, Construction, Operations and Financing*

Michael B. Gerrard and J. Cullen Howe, Editors

Reviewed by Justin Birzon

As environmental attorneys, part of our job is to stay abreast of developments and trends in environmental law. By now we are all familiar with the terms “green building,” “alternative energy,” and “carbon footprint.” But, how many of us are aware of the federal financing options for alternative energy projects, know what comprises a green construction contract, or can explain why businesses should consider retrofitting their buildings? Truthfully, probably only a handful of people in the United States can comprehensively answer all three of those questions. However, thanks to J. Cullen Howe and Michael B. Gerrard’s new book, *The Law of Green Buildings: Regulatory and Legal Issues in Design, Construction, Operations and Financing*, the number of people able to answer those questions is growing every day.

*The Law of Green Buildings* was published in August 2010 by the ABA Section of Environment, Energy, and Resources and the Environmental Law Institute. The editors, J. Cullen Howe and Michael B. Gerrard, are, by this point, household names in the home of most any New York environmental lawyer. Thus it is no surprise that the contributing authors, of which there are 29 in total, form the “who’s who” of contemporary environmental law. Drawing from all corners of the professional spectrum, this book combines the expertise of attorneys in government, academia, and private practice.

A brief introduction of the editors will nonetheless familiarize any newcomers as well as refresh the rest of our members. J. Cullen Howe is an environmental law specialist with Arnold & Porter LLP’s environmental practice group and a LEED AP. He is also an adjunct professor at Pace University School of Law, where he teaches a course on, you guessed it, the law of green buildings. Mr. Howe, always busy with multiple projects, serves as an editor or author of too many journals, practice guides, and law reviews to comprehensively mention here. Michael B. Gerrard is Andrew Sabin Professor of Professional Practice at Columbia Law School, where he teaches courses on energy and environmental law and serves as Director of the Center for Climate Change Law. He is also senior counsel to Arnold & Porter, LLP, where he was a managing partner until 2008. Mr. Gerrard has authored articles for *The New York Law Journal*, edits *Environmental Law in New York*, a monthly newsletter, and has written and published seven other books, two of which were named Best Law

Book of the Year by the Association of American Publishers. Mr. Howe and Mr. Gerrard also received assistance from Frederick R. Fucci, a partner in the New York City office of Arnold & Porter, LLP. Mr. Fucci has expertise in the installation of distributed generation facilities, and in advising energy service companies on energy efficiency projects.

Because of their intrinsic commitment to and holistic understanding of the law of green buildings, the preface and introductory chapter, written by the authors, clearly presents the scope of the book in a candid, yet comprehensive and exciting manner. Did you know that by the year 2035, it is estimated that approximately 75 percent of the building environment will be either new or renovated? Neither did I, but now that I’m aware of that fact I feel the desire to ensure that the above-referenced buildings will be energy efficient and comprised of environmentally sourced materials.

This book covers the practical and necessary aspects of green building at the federal, state, local, and private levels, including the major green building rating systems; financing options; performance contracting for new buildings; integrating alternative energy into construction projects; site selection and land use planning; water consumption, conservation, and recycling; retrofit projects; legal issues in marketing green building projects; and practical issues in environmental review.

I was interested to learn that the Leadership in Energy and Environmental Design (LEED) program was only one of several green building rating systems. “Green Globes” and “Green Guide for Healthcare” are rating systems similar to LEED, while myriad regional rating systems have emerged across the country, and the American Society of Heating, Refrigeration, and Air-Conditioning Engineers (ASHRAE) provides standards and recommendations to which the entire construction industry adheres.

For most readers of *The New York Environmental Lawyer*, the day-to-day practice of environmental law does not address a distinct area of law. Rather, many environmental lawyers actually practice the environmental aspects of standard, non-environmental law. This book reflects the reality of being a practicing attorney, and conveys the heart of sustainability in the language of law. If you are anything like me, you appreciate when an author

makes foreign concepts accessible and easy to understand. In that sense, this book is more than a conglomeration of laws and trends. It is a focused message that the positive change we all want to see is happening—and we need to be talking about it.

This book marks a milestone in the evolution of environmental law. The one-time lofty ideal of “sustainability” is now finding legal pillars on which to stand. The analyses and discussions contained within this book

serve more than one essential purpose. They inform and educate the reader about the developments in the law of green buildings and construction up to this point in history. Secondly, though, this book can serve as the cornerstone of a new series of discussions and analyses, which should involve not only top legal experts, but the hundreds or thousands of people who have yet to have their eyes opened to the fact that we currently have the tools to build greener.

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# Fall 2010 Meeting of the Environmental Law Section

The Section held its Fall Meeting at the Otesaga Hotel in Cooperstown during the first weekend in October. The more than 90 registrants enjoyed crisp, clear fall weather, a wide range of CLE offerings, and a glimpse into the history of the environmental gem known as the Village of Cooperstown.

On Friday afternoon, the Section offered a four-hour CLE program geared toward recently admitted “transitional” attorneys, with presentations on the Clean Water Act, managing the media, climate change law and alternative dispute resolution. Friday evening, attendees were treated to a presentation by Hugh MacDougall, Esq., the Cooperstown Village Historian, on the “Early Days of Cooperstown, New York—The Makings of an Environmental Crown Jewel.” Mr. MacDougall traced the history of Cooperstown from its founding shortly after the Revolutionary War by William Cooper, its popularization through the writings of William’s son, James Fenimore Cooper, and James’s daughter, Susan Fenimore Cooper, to the further shaping of the Village and its environs by generations of the Clark family. Mr. MacDougall outlined the common threads of environmentalism that wove together these developments. In addition to Mr. MacDougall, the Section welcomed as a dinner guest Henry S. Fenimore Cooper, who is a great-great-grandson of James Fenimore Cooper. Mr. MacDougall was kind enough to provide us with a copy of his fascinating comments for publication in this issue.

The Saturday morning CLE presentation provided a historical perspective on one of the major federal environmental statutes—the Comprehensive Environmental Response, Compensation, and Liability Act—and its New York State counterpart, as well as an overview of the evolution of common law environmental jurisprudence. The morning session was capped off by a panel discussion on ethical considerations in the conduct of investigations. Saturday afternoon offered free time for attendees to explore the Baseball Hall of Fame, Farmers’ Museum, Fenimore Art Museum, and other area attractions.

Saturday’s dinner speaker was James Moorman, Esq., who was the first Executive Director of the Sierra Club Legal Defense Fund and also served as Assistant Attorney General for Lands and Natural Resources in the U.S. Department of Justice. Mr. Moorman spoke on the “Early Days of Environmental Law and CERCLA.” Stephen Younger, President of the State Bar Association, also provided brief remarks, outlining important issues that he planned to address during his presidency and praising the Section’s activities.

The Fall Meeting was a great success and many thanks go to our program chairs, Barry Kogut, Philip Dixon, and Terresa Bakner, as well as to all of our speakers for their dedication and hard work.



Marla Wieder, Nick Ward-Willis, Jonathan Kalmuss-Katz



Walter Mugdan, Janice Dean, Hugh MacDougall



View of Lake Otsego from the Otesaga Resort Hotel, Cooperstown, NY

# “Early Days of Cooperstown, New York: The Makings of An Environmental Crown Jewel”

By Hugh MacDougall, Cooperstown Village Historian

Prepared for the Environmental Law Section of the New York State Bar Association  
Fall 2010 Meeting at the Hotel Otesaga, Cooperstown, October 1, 2010

Welcome to Cooperstown. It is a special pleasure for us to receive Mr. Kogut and the members of the Environmental Law Section of the New York State Bar Association, because it is to you that we of the Cooperstown area must often look to protect Otsego Lake, the center and focal point of our environmental crown jewel.

That we are a crown jewel in the New York environment you have already seen. You saw some of that beauty from your car windows as you approached Cooperstown, and you have had an opportunity today to see our lake from the Otesaga Hotel in which you are meeting this weekend. This evening I want to talk to you briefly about Cooperstown’s history, and a few of the people here who have worked over two centuries to preserve it.

Not surprisingly, perhaps, I shall begin with the **Cooper family**, for whom the Village of Cooperstown is named. In 1785 an ambitious young man from Burlington, New Jersey named William Cooper visited Otsego Lake, the source of the Eastern Branch of the Susquehanna River. Here, as he later wrote, “[I] explored the country, formed plans for future settlement, and meditated upon the spot where a place of trade or a village should afterwards be established.” But he saw what he called the “melancholy Wilderness” as something to be conquered and replaced.

The following year William Cooper acquired some 30,000 acres of land around the southern part of the Lake, quickly sold it off on easy payment terms, and founded the village that soon bore his name. Settlers poured in, many of them from overcrowded New England, and after a few rough years William Cooper began to prosper. In 1791 the Legislature created Otsego County, with Cooperstown as its county seat. William Cooper was named as its First Judge, and for some years dominated its politics on behalf of the Federalist Party. But while Cooperstown prospered as a judicial and commercial town, William’s hopes of establishing a major transportation route down the winding Susquehanna River never panned out.

In 1792 William Cooper brought his wife and children to Cooperstown, including his infant youngest son, James Fenimore Cooper. In 1799 their first home was replaced by a handsome brick mansion called Otsego Hall, on the site of today’s Cooper Statue in the center of the Cooper Park next to the Baseball Hall of Fame.

William Cooper sought to make his little village as urban as possible, with a regular and compact street plan and small village lots for craftsmen, merchants, and professionals, including lawyers drawn to the county seat and its courts. Such a village, he believed, would most effectively serve the farmers living around it, since village residents would work full time at their trades. He promoted the establishment of two churches—Presbyterian and Episcopal—and of a community-supported academy.

William’s concern with the environment was economic. He was concerned that wasteful cutting would dangerously reduce supplies of wood. And he was instrumental in passing New York’s first fisheries law to protect the Otsego Bass, long prized but today virtually extinct.

William Cooper died in 1809, and it would be left to his youngest son James Fenimore Cooper, America’s first great novelist, to describe the beauties of Otsego Lake to a worldwide audience. James Fenimore Cooper had lived in Cooperstown as a child, returned here to a farm on the site of the Fenimore Art Museum from 1813 to 1817, and returned here again in 1834 to live permanently at Otsego Hall in the center of the village, until his death in 1851. He thus spent over half his life as a resident of our village, and also more than half of a writing career that produced 32 novels—many of them worldwide best sellers - as well as a dozen other books including the first major history of the United States Navy. Cooper remains popular in many parts of the world, especially in Scandinavia, Germany, and Russia. About a quarter of the “hits” on the Cooper Society website come from outside the United States.

Today Cooper remains best known as the creator of one of literature’s great characters, Natty Bumppo, sometimes called Hawkeye, who is the hero of five novels known as the Leatherstocking Tales, in most of them accompanied by his Native American friend Chingachgook. In three of those novels, Cooper sets forth—perhaps for the first time in American literature—the basic tenets of the modern environmental movement.

Natty Bumppo first appeared in 1823 in *The Pioneers*, as an old man living on Otsego Lake just outside what Cooper calls the village of Templeton. Set in 1793, and based on the early history of Cooperstown, the novel was a runaway American and international bestseller. In it, Judge Marmaduke Temple of Templeton bewails

the wasty ways of the settlers in chopping down maple and other valuable trees for firewood, and catching huge quantities of fish in Otsego Lake only to let most of them die on the shore. But it is Natty Bumppo, the wilderness-bred hero of the five Leatherstocking Tales, who goes beyond economic considerations to propose the immorality of wantonly destroying the beauties of nature and its wild creatures, as well as the problematic ethnic cleansing of America's original human inhabitants.

In *The Prairie*, published in 1827 and set on the vast prairies beyond the Mississippi shortly after the Louisiana Purchase, with Natty Bumppo as a very old man who has fled the wasty ways of the East, Cooper suggests a third basic tenet of the modern environmental movement, that mankind has the fearsome ability, through those wasty ways, of turning his surroundings into a barren desert.

But it is Cooper's 1841 novel, *The Deerslayer*, set on a wilderness-surrounded Otsego Lake in the 1740s, that has most moved generations of readers to a love of the kind of natural beauty that Otsego Lake and its surroundings represent. Here, on what Cooper calls *The Glimmerglass*, a very young Natty Bumppo attains manhood amidst surroundings of incredible beauty. Of this novel the famous British writer and critic D. H. Lawrence once wrote:

Deerslayer is, indeed, one of the most perfect books in the world.... From the first words we pass straight into the world of sheer creation, with so perfect a transit that we are unconscious of our translation. The world—the pristine world of Glimmerglass—is, perhaps, lovelier than any place created in language....

James Fenimore Cooper made Cooperstown and Otsego Lake famous around the world, and for over a century his writings have brought thousands here to admire their beauties, and sometimes to stay—whether as summer residents, or to settle and live out their lives. During his lifetime visitors sought to catch a glimpse of him amidst the surroundings he had described, and after his death in 1851 they visited his grave in the Cooper family plot next to Christ Episcopal Church. From the Civil War until after World War I dozens of publishers came out with edition after edition of Cooper's 32 novels. Most of them are still in print around the world, and in many languages.

If James Fenimore Cooper played an important role in awakening America to a love of nature, and to sympathy for Native Americans, his daughter Susan Fenimore Cooper also played an important role in making Cooperstown and its lake known to the world. She spent almost all her life here in Cooperstown, and became an eloquent writer with a voice of her own. She is best known today for *Ru-*

*ral Hours*, published in 1850 and based on her diaries kept during the previous few years. In it she describes, day by day and week by week, the life of Cooperstown and its surroundings, with its changing seasons, varied people, and its birds and plants, described in loving terms. For Susan, it is not untamed wilderness that is the value, but human beings living and coexisting with nature. *Rural Hours* went through many editions during her lifetime, and has in recent years been reissued, and Susan Fenimore Cooper's writings are today commanding growing interest within the literary environmental community.

The Cooper family has remained closely tied to Cooperstown. Among them is Henry S. Fenimore Cooper, a longtime *New Yorker* magazine writer about the American space program, who founded and has for three decades led Otsego 2000, a local organization devoted both to preservation of our natural and human-built past, and to promoting a viable future that respects our agricultural and small-town heritage. I have had the honor and pleasure of serving on its Board for twenty years, and Henry is here with us tonight.

But preserving a wonderful natural environment, and a beautiful village and the way of life it makes possible, does not happen by itself—even with famous writers and modern journalists singing its praise. Much of what we have in Cooperstown and around Otsego Lake today is owing to the devoted activities, since about 1850, of another family—who have poured both immense wealth and careful thought into our village and our area.

It began with **Edward Clark**, a New York attorney who became both the legal advisor to and partner of Isaac Singer, the inventor of the modern sewing machine. It was Edward Clark who added commercial practicality to the inventive genius of the erratic Singer. And this—as I understand it—was in two ways. The first was in the use of the patent pool, which brought together many individuals who had, or thought they had, contributed to the machine that Singer made practical, and thus avoided interminable lawsuits. The second, perhaps even more important, was to allow American housewives to buy sewing machines by paying for it in installments *after*, rather than before, receiving it. This made it possible for them to buy the Singer sewing machine, and then pay for it over months or years with products they could sell to their neighbors or local businesses. It proved an enormous success, and Edward Clark became a very wealthy man.

In 1835 Edward Clark had married Caroline, daughter of a former Cooperstown attorney named Ambrose Jordan, whose yellow frame home still stands on the northwest corner of Main and Chestnut streets. Caroline brought her new husband here to visit, and he fell in love with it, and with Otsego Lake as well. Over the many years since, Edward Clark and his descendants made enormous contributions to the village and the life of its people. One of the first was to buy up most of the land

along the steep eastern side of Otsego Lake, and keep it preserved as virtual wilderness with the aid of a few resident caretakers.

Edward Clark and his descendants also helped shape the village itself, bringing distinguished architects here to design some of our most imposing buildings, including the Kingfisher Tower, a half-sized replica of a Rhine River castle on the eastern shore of Otsego Lake at Point Judith, the pillar-fronted stone Village Library building on Main Street—built as a YMCA in 1898 and donated to the village in 1932—and the Otesaga Hotel, opened in 1909, where we are meeting tonight.

Four generations of Clarks have followed in Edward's philanthropic and business footsteps, down to Jane Forbes Clark, the present family representative.

The Clark Foundation has for many years provided generous four-year college scholarships to a high percentage of the graduates of ten public high schools in our area, including that of Cooperstown. And it is the Clarks whose greenhouses provide the changing displays of flowers that grace the entranceways to each of our churches, as well as the hanging baskets along Main Street.

Perhaps most important, however, were the actions that the Clark family took during the 1930s, when Cooperstown languished with rest of the nation in the Great Depression. Stephen Carlton Clark, a grandson of Edward, sought to come to its rescue, in ways which would preserve its character as a beautiful rural village. Stephen was, like his brother Robert Sterling Clark, who established the world famous Sterling and Francine Clark Art Institute in Williamstown, Massachusetts, a great collector of fine art. He was instrumental in the founding of the Museum of Modern Art in New York City. For Cooperstown's plight in the 1930s he came up with three solutions, which have forever changed both our village and our county.

One was to support our struggling Mary Imogene Bassett hospital, and begin to build it into what it has become today, a major health institution spread over many counties, and pioneering both in medical education and in the special needs of rural medicine. It is today the largest employer in Otsego County. A second was to bring down from Ticonderoga the equally struggling New York State Historical Association, to occupy the stone mansion that is now the Fenimore Art Museum, and the great Stone Barn across the highway that became the nucleus of the Farmers' Museum. These museums, plus the Association's important Research Library, attract thousands of visitors here—and greatly enrich the lives of those of us who live here.

And the third solution was to take advantage of the legend that General Abner Doubleday of Civil War fame

had invented the modern American game of baseball here in Cooperstown about 1839. A National Baseball Museum and Hall of Fame was therefore established—the first Sports-based Hall of Fame in America—and in 1939 installed with great fanfare in a new brick building on Main Street. It has expanded greatly since then, and become a Mecca for baseball lovers everywhere, even though the Doubleday legend is no longer given credence.

In the direction of all three of these institutions, the Clarks continue to play a major role.

And finally, I should mention the family of **Adolphus Busch**, co-founder of the Anheuser-Busch Beer Company. Drawn to Cooperstown in the late 19th Century, when Otsego County was at the center of American hops production, members of the Busch family have continued to play important cultural roles here since, most notably perhaps in their sponsorship of the Alice Busch Opera Theatre, opened in 1987 near the head of Otsego Lake, to house the local Glimmerglass Opera Company that has since become one of America's most important summer festival opera companies.

The State University of New York College at Oneonta is also important to our way of life. Its Otsego Lake Biological Field Station has for decades made Otsego Lake one of the most studied small bodies of water in America. And its Graduate School of Museum Education is pre-eminent in educating students for careers in historically oriented museums around the nation.

Hundreds of other Cooperstown residents have, of course, played important parts for over two centuries, both in village life and in the creation and preservation of the natural and human environment we cherish.

In recent decades, of course, small towns everywhere have seen the collapse of their commercial main streets, as buyers with automobiles have come to prefer the greater variety and cheaper prices of big-box chain stores surrounded by parking lots. Cooperstown's Main Street remains filled, although largely by baseball souvenir shops and facilities patronized by the tens of thousands of visitors who come here every year to visit the Hall of Fame and our other Museums. A few years ago, however, the Clark family subsidized the creation—next door to the Hall of Fame—of a General Store committed to providing a wide range of goods needed by Cooperstown's permanent residents—who today number just under 2,000.

But the story of Cooperstown is not just of big institutions and philanthropists. Visitors admire our tree-lined back streets, with their wide variety of well-preserved homes from the 19th and early 20th centuries. Cooperstown is today a National Historic District, now part of a larger Glimmerglass Historic District, and we have enacted increasingly effective local laws to preserve and protect our architectural heritage. We have several very

active local environmental organizations. The Otsego County Conservation Association has for years promoted the ecological wellbeing of our area, particularly in relation to our often struggling agricultural sector. Otsego 2000, which I have already mentioned, seeks to defend our environment, through both educational and legal action. And the Otsego Land Trust promotes protective easements on a growing number of acres in our county.

But Cooperstown has remained what it is largely because—as I like to say—we are centrally isolated. Over our two centuries we have been bypassed by the canals, railroads, and super-highways that linked modern New York together. And Cooperstown is almost equidistant from the three nearest major cities, Binghamton, Syracuse, and Albany, and just too far from each to be drawn within its magnetic field of commuting and commerce. Surrounded by high hills on the east and west, and on the lake to the north, we have little room for industrial or other major economic expansion. So old residents have stayed on, often for generations, and many old homes have survived that would have fallen to progress in other communities.

This has been a necessarily cursory account of one village, set on a beautiful lake, that is now well over two hundred years old, and of a few of the people who have helped to make it what it is. But it summarizes, I think, some of the things that have helped to make Cooperstown an environmental crown jewel, in terms both of nature and of human living. You can admire our Lake from the porch of this great hotel, and I hope that you will have the time, between your meetings, to explore some of the other aspects of the village I have described.

Above all, however, I hope that as you pursue your careers as attorneys concerned with environmental matters, you will both help us to continue to preserve what we have and—even more importantly perhaps—aid those communities which have not been as fortunate. If you have any questions, I will be glad to try to answer them now or after this dinner concludes. We are glad you came and hope that you will enjoy your stay here.

## Member News

**Jason Kaplan** of Sahn Ward Coschignano & Baker and **Robert Stout** of Whiteman Osterman & Hanna have been appointed co-liaisons from the Young Lawyers Section to the Environmental Law Section. Welcome aboard gentlemen! We look forward to working with you.

**Yvonne Hennessey** and her husband Eric welcomed their first baby on September 15, 2010 at 6:05 a.m. Ella Maeve Hennessey was 5 lbs., 8.6 oz. and 18.5 inches when she was born. Congratulations to the proud parents!



Ella Maeve Hennessey

### Do You Have News You Want to Share with Your Colleagues?

E-mail your news and photos (jpg or tif format, please) to one of our Editors:

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# 2010 Anniversary Program of the Environmental Law Section

In 2010, the New York State Bar Association's Environmental Law Section marked its 30th anniversary. This same year also represented the 40th anniversary of the New York State Department of Environmental Conservation (DEC). In celebration of these two anniversaries, the Environmental Law Section hosted seminars in several of the DEC regions on critical environmental issues. As discussed by Section Chair Barry R. Kogut in announcing this statewide event, New York State has achieved much success in improving and enhancing our environment. He noted, however, that challenges remain, many of which are more complex than those of the past. Various of these challenges were the focal points of the seminars, including issues relating to Marcellus Shale exploration, the SEQRA review process, urban site development (both in terms of waterfront considerations and brownfields), storm water management, and impacts on such significant New York waterbodies as the Great Lakes and Onondaga Lake.

The seminar panels included a wide range of environmental practitioners from private practice, environmental organizations, and municipal and state government. At each seminar event, there was also a luncheon speaker who focused on a "cutting edge" environmental topic. These luncheon presenters included:

- Professor Michael B. Gerrard, Director, Center for Climate Change Law, Columbia Law School;
- Joseph Martens, President, Open Space Institute;
- Cornelius B. Murphy, Jr., President, SUNY-ESF;



View of the Hudson River from the *Clearwater*

- Julie O'Neill, Executive Director, Buffalo Niagara Riverkeeper;
- Peggy Shepard, Executive Director and Co-Founder, WE ACT For Environmental Justice; and
- Dr. Anahita Williamson, Director, New York State Pollution Prevention Institute.

Each of the presenters offered a thoughtful and compelling review, and also outlined necessary considerations for State environmental policy

as New York evaluates environmental issues now and in the future.

Over the past two decades, one of the significant developments in environmental advocacy has been the emergence of the environmental justice movement. At the Section's DEC Region 2 seminar in New York City, Peggy Shepard, the executive director and co-founder of WE ACT, outlined the progress, as well as the challenges, of the environmental justice movement. In addition to her leadership of WE ACT, which is a nationally recognized organization working to improve environmental policy, public health and quality of life in communities of color, Ms. Shepard has served as the first female chair of the National Environmental Justice Advisory Council to the U.S. Environmental Protection Agency, and is an active member of a number of environmental organizations. Her luncheon remarks are reproduced below.

**Louis A. Alexander**

# Remarks of Peggy M. Shepard

Executive Director, WE ACT for Environmental Justice

Presented to

New York State Bar Association Environmental Law Section

DEC Region 2 Program

August 6, 2010

Good Afternoon.

We are very lucky that we have a 40-year history of environmental stewardship in this state. Thank you to the committed staff at the New York State Department of Environmental Conservation who work to maintain healthy ecosystems, ensure a pollution-free and carbon neutral environment, and expose our kids to the wonders of the outdoors and open space. Thank you to the New York State Bar Association's Environmental Law Section and its 30 years of educating and engaging legal leaders so they can emerge as thought leaders as well.

As you have been building this legacy, the Environmental Justice Movement celebrates its past 22 years of building its capacity, its voices and presence into a global movement. It is one that challenges the disproportionate burden of pollution and environmental degradation borne by low-income and communities of color, and it works to engage residents in environmental decision making that affects policy and practice.

Out of the small and seemingly isolated environmental struggles emerged a potent grassroots community-driven movement. Many of the on-the-ground environmental struggles in the 1980s, 1990s and through the early years of this decade have seen the quest for environmental and economic justice become a unifying theme across race, class, gender, age and geographic lines. What is the goal? To reduce health disparities, build healthier safe communities, achieve effective enforcement of existing environmental laws, regulations, and statutes, and to translate science into policy and practice as our knowledge grows. Grassroots struggles have advanced public policy at the state and federal level. They have spurred the development of an academic field, the application of civil rights laws and other legal tools, and a series of convenings aimed at hosting dialogue between impacted communities, activists and policy makers.

"Environmental racism" was the rallying cry in Warren County, N.C. where, in 1982, 500 people were arrested protesting the dumping of PCB-contaminated soil in an African-American community. Two decades of community activism finally resulted in the government spending \$18 million to detoxify 81,500 tons of contaminated soil. The struggle gained national attention, resulting in a series of studies and conferences on the disproportionate exposure of people of color and low-income communities to environmental and public health hazards in the United States.

In 1983, Dr. Robert Bullard found that the siting of landfills and incinerators in Houston, Texas disproportionately affected African-American communities. This research led Bullard to a prolific academic career in environmental justice research, advocacy and activism, and to author over 16 books documenting Environmental Justice struggles. The United Church of Christ Commission for Racial Justice published its study *Toxic Waste and Race in the United States* in 1987. This study verified that race was the primary predictor of where a toxic waste facility was sited and income was a secondary indicator.

It has now been 23 years since *Toxic Wastes and Race* was published, and the perspective of environmental justice has become a household word in many communities, universities, and government agencies. Yet, all communities are still *not* created equal. As the EPA prepares to celebrate the 40th Anniversary of the Clean Air Act, the American Lung Association reports that 71 percent of African-Americans and 80 percent of Latinos live in areas that fail to meet air quality standards set by the EPA.

Climate researchers report that vulnerable communities, even in the most prosperous nations, will be the first and worst hit. In this country, the most impacted areas will be communities-of-color, indigenous peoples, and low-income communities that are disproportionately burdened by poor environmental quality and are least able to adapt. They will be the first to experience extreme heat events, respiratory illness, vector-borne infectious diseases, food insecurity, and natural disasters.

Locally and globally, these vulnerable communities are the ones that have produced the multi-racial, multi-ethnic Environmental Justice Movement of which WE ACT is an active partner. As a result of global warming, we will experience impacts on our water bodies as well as other parts of our ecosystems, our food systems, and our health. Vulnerable areas face multiple stresses that affect their level of exposure, sensitivity, and capacity to adapt.

To address these concerns of Climate Justice, WE ACT has organized and staffs the EJ Leadership Forum on Climate Change composed of 40 organizations nationally to voice concerns that have been absent from the urgent debate on how to achieve carbon reductions quickly, efficiently, and with equity. We have come together over the past three years as a coalition of environmental justice organizations, urban and rural from Appalachia to Harlem, from Alaska to the Gulf Coast, to acknowledge and communicate the impacts that communities and indigenous

peoples are experiencing, to participate in determining the future of our economy and our environment, and to advocate for a price on carbon, and a renewable energy future.

On the path toward a renewed environment, there have been many winners and losers. Our communities have generally been on the losing side. As a nation, we cannot embark on climate action legislation and policies anchored by the notion that there will always be winners and losers. We have the vision, commitment and opportunity to lift all boats. As the debate deepens, we must mobilize the will to support, develop and implement effective climate and energy policies.

That will is a necessity as we near the fifth anniversary, August 29, 2005, when Hurricane Katrina made landfall and the levee breach flooded New Orleans, creating “one of the worst environmental disasters” and disruption of civil society in U.S. history. The devastation was the result of tremendous storms, but also the result of decades of discriminatory policies, an ambivalent U.S. Army Corps of Engineers to construct a levee system that would be sufficiently protective of human life and property, and the lack of engagement and information to the most affected and impoverished communities. Some of the most toxic and hazardous facilities in the nation were then and remain now in the Gulf Coast region, clustered in poor, indigenous and communities of color, one of which was highlighted by CNN in its special, *Toxic Town and Toxic Kids*.

The causes of the current environmental justice crisis embrace a complex legacy, one of housing segregation, discrimination in land use and zoning policy, and the disparate enforcement of environmental laws, that remains a hurdle to equal environmental protection. To successfully remedy the disparity in environmental health borne by people of color and low-income communities, the federal and state governments must play a leadership role. The federal and state government’s ability to impact these conditions through regulation, enforcement, monitoring, and appropriations is extremely broad, and in some respects, unique, yet government’s efforts have fallen far short. Perhaps the high-water mark for federal advancement of environmental justice was in 1994, when President Clinton signed Executive Order 12898—Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.

Executive Order 12898 ordered each Federal agency to make achieving environmental justice part of its mission by identifying and addressing disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States.

A dozen environmental justice networks exist today that were not around in 1987. In a short time, environ-

mental justice advocates have had a profound impact on public policy, industry practices, national conferences, private foundation funding, research, and curriculum development. Environmental justice courses and curricula can be found at nearly every university in the country. Groups have been successful in blocking numerous permits for new polluting facilities and forced government and private industry buyout and relocation of several communities impacted by Superfund sites and industrial pollution.

Since the Executive Order 12898, environmental justice has made some headway within federal and state agencies, but the letter and spirit of the Executive Order have not been fulfilled. Perhaps most illustrative of the federal government’s shortcomings in reducing disparities in environmental protection is the lack of enforcement of Title VI of the Civil Rights Act of 1964 at the U.S. Environmental Protection Agency (EPA). Title VI can be a powerful tool in advancing environmental justice because it authorizes federal agencies to withdraw funds from any recipient of federal funding whose activities have a discriminatory impact on people of color. The EPA’s Title VI enforcement efforts had been abysmal. According to legal scholars Clifford Rechtschaffen, Eileen Gauna, and Catherine O’Neill, by the close of 2008 the EPA had processed a total of 211 Title VI complaints since 1993 (15 years). Of those, 40 (19%) were still pending, and 171 (81%) had been closed. Of the closed cases, 127 (60%) had been rejected and 44 (21%) had been dismissed.

During the reign of the past EPA administrator, EPA’s own Office of the Inspector General (OIG) issued a critique of EPA’s environmental justice programs, concluding—the Agency cannot determine whether its programs cause disproportionately high and adverse human health or environmental effects on minority and low-income populations, and needed to further examine whether EPA was one of the factors contributing to environmental racism and classism. Early indications from the Obama Administration are encouraging. We applaud EPA Administrator Lisa Jackson for expressly identifying environmental justice as one of 7 top priorities for EPA’s future. EPA is developing an EJ Strategic Plan, and they say they aim to incorporate disproportionate and cumulative environmental impact in actions that include Rulemaking, Findings of Significant Environmental Impact rulings, NEPA assessments, and in EPA interpretations of its existing legal and statutory authority to address, account for, and resolve issues of environmental justice where they occur. We hope these early positive steps lead to concrete action at the federal and state levels.

That 2006 Inspector General report recommended the following:

- require the EPA’s program and regional offices to identify which programs, policies, and activities need environmental justice reviews;

- ensure that environmental justice reviews determine whether the programs, policies, and activities may have a disproportionately high and adverse environmental or health impact on minority and low-income populations;
- require each program and regional office to develop, with the assistance of the Office of Environmental Justice, specific environmental review guidance, which includes protocols, a framework, or directions for conducting environmental justice reviews; and
- designate a responsible office to (a) compile the results of environmental justice reviews, and (b) recommend appropriate actions to review findings and make recommendations to the decision making office's senior leadership.

To achieve Environmental Enforcement, there are many existing laws and regulations that provide great opportunities. In 1999, Law Professor Richard Lazarus and Stephanie Tai published a law review article entitled, "Integrating Environmental Justice into EPA Permitting Authority," based on the NEJAC Enforcement Subcommittee's 1996 memo. In their article, Lazarus and Tai examined how existing federal laws provide environmental permitting agencies with substantial authority to address environmental justice concerns in their permitting decisions. Amazingly and unfortunately, most of Lazarus' observations are still relevant in 2010. In summary, we recommend EPA and state agencies to identify sensitive and vulnerable populations which suffer from disproportionately high and adverse human health or environmental effects. DEC should clearly define what constitutes such a community of concern, and ensure that these populations are receiving the full protections afforded them under state and federal law. In order to think out of the box and advance environmental quality for all, DEC must diversify its staff. If WE ACT can find qualified environmental attorneys and scientists of color, surely the Department of Environmental Conservation, the Environmental Defense Fund (EDF), the Natural Resources Defense Council (NRDC), and others can as well.

Many of us understand the need to advance environmental justice through the use of legal tools. There was a great, very helpful report in 2004, from the American Bar Association, *A Fifty-State Survey of Legislation, Policies and Initiatives*, which reviewed how over 35 states have given force of law—through varied and wide-ranging policies, statutes or other commitments—to address environmental justice concerns.

Key litigation battles and the continued support of legal clinics and advocates have helped to ensure environmental justice. The case of Kettleman City is one of the earliest examples in which a small, predominantly Latino community in California successfully used the provi-

sions of the California Environmental Quality Act to fight against the toxic waste incinerator proposed by Chemical Waste Management, Inc., the world's largest toxic waste company. This lawsuit was a significant win for the Environmental Justice movement because it showed that communities could successfully demand the enforcement of existing environmental laws. The court ruled that the environmental impact report was incomplete in its analysis of the environmental and economic effects of the project, and that residents were not meaningfully included in the permitting process.

In contrast, the Chester case was a difficult moment for the EJ Movement. Chester, a small community of people of color within the majority white county of Delaware, hosts an important cluster of industrial and waste processing facilities while also suffering from poor health and mortality rates that are 40% higher than in the rest of Delaware County. In response to a proposal to site an infectious medical waste sterilization plant next to one of the largest incinerators in the country housed in their community, residents formed the Chester Residents Concerned for Quality Living (CRCQL). The group turned to legal action to combat the issuance of a new permit for the construction of another waste facility. After a flurry of legal activity and decisions overturning and restoring the permit for the waste treatment facility, the case went to Pennsylvania Supreme Court which validated the permit and allowed the facility to reopen.

Later, in 1997, CRCQL was able to settle a lawsuit under the Clean Air Act against the county's sewage treatment plant, and in 1998, they sued the Pennsylvania DEP under Title VI of the Civil Rights Act, alleging that its permitting pattern in the county allowed the proliferation of toxic facilities in an African-American community—constituting racial discrimination. The federal court ruled in favor of the CRCQL, but the U.S. Supreme Court reversed the federal court ruling.

More recently, the *Hartford Tenants Association v. Rhode Island Department of Environmental Management (DEM)* decision ruled that the "environmental equity" provision of the Industrial Property Remediation and Reuse Act (IPRARA) was violated as the DEM approved a petition by the city of Providence to build schools at a former illegal municipal landfill. The court ruled that environmental equity was not considered and that this primarily African-American and Latino community had not been properly notified or meaningfully involved in the processes of investigation and remediation of the contaminated areas.

Because of the lack of financial resources and political agency in most communities suffering from environmental injustices, the help and support of legal clinics and legal advocates that operate from a social justice perspective have been invaluable in environmental justice litigation. The National Lawyers Guild/Maurice and Jane Sugar Law Center for Economic and Social Justice

(Guild Law Center) in Michigan, for example, has been at the forefront of environmental justice litigation in that state since 1994. Aside from their direct advocacy and representation, they have provided technical assistance and trainings to communities affected by environmental injustices, so that they may speak for themselves more effectively. Over the years, the Center has been involved in environmental justice cases ranging from the lack of green space in communities of color in New York City (*New York City Environmental Justice Alliance v. Giuliani*) to the siting of an elementary school on a former industrial site that is heavily contaminated in a predominantly Latino community in Detroit (*Lucero v. Detroit Public Schools*). In fact, it was a 1992 study by the *National Law Journal* that found that of all environmental lawsuits conducted in the U.S. within a seven-year period, the EPA imposed penalties that were 46% higher in white communities than in communities of color, that the EPA took 20% longer to list waste sites in minority communities in the National Priorities List, and that polluters paid 54% less in fines when penalized for wrongful activities in minority communities than when penalized for wrongful activities in white communities.

So today, I look back, not in anger, for what has not been accomplished, but in awe of the Great Expectations declared by 400 ragtag and amazing grassroots activists, who in 1991, in D.C., gathered together, to begin to build a national and international grassroots movement of people of color to achieve healthy communities, sustain the Earth, and to achieve environmental justice for all.

I think about how our local riskscapes have been defended by advocates like Sheila Foster and Eileen Guana, and Grover Hankins and Luke Cole of the Center for Race, Poverty and the Environment in Oakland. Luke and Grover are no longer with us but the work of these pioneers has forged the foundational concepts that we address here today. All of us have much to celebrate.

**Peggy Shepard is the executive director and co-founder of WE ACT, a nationally recognized organization working to improve environmental policy, public health and quality of life in communities of color. Ms. Shepard has served as the first female chair of the National Environmental Justice Advisory Council to the U.S. Environmental Protection Agency, and is an active member of a number of environmental organizations.**

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# Greening the New York Legal Profession— Encouraging a More Sustainable Practice

By Megan R. Brillault and Kristen Kelley Wilson

Today “Going Green” is one concept that unites many companies, groups, industries and various levels of government. More and more professions and industries are realizing that “Going Green” is not only better for the environment because it creates less waste, but it is also more cost-effective for most businesses. In early 2007, the American Bar Association (the “ABA”) first introduced the concept of its Climate Challenge program.<sup>1</sup> The Climate Challenge program was designed to encourage law offices to commit to certain actions that reduce waste and conserve energy and resources.

A law firm and/or specific office location can sign up for four different tracks of the Climate Challenge program. Specifically, law offices may:

1. Adopt best practices for office paper management by reducing paper usage, increasing recycled content in paper purchased, or increasing recycling.
2. Participate in EPA’s WasteWise program, which encourages organizations to save energy by reducing waste, and adopt best practices for office paper management (described above).
3. Participate in EPA’s Green Power Partnership (Green Power) program by purchasing energy from renewable sources to cover at least a portion of electricity usage.
4. Participate in EPA’s ENERGY STAR program, which encourages law offices to reduce energy use by at least 10% through, among other things, the purchase of ENERGY STAR-designated equipment and implementation of better energy management practices. This program has features that recognize the issues associated with tenant law offices.

Currently, there are around 50 law firms and/or organizations within New York that are enrolled in at least one of the four programs.<sup>2</sup> Of the firms that are enrolled in all four programs of the Climate Challenge, there are four with offices in New York.<sup>3</sup>

The Environmental Law Section (“ELS”), with the assistance of the Pollution Prevention Committee, has made an effort to promote the Climate Challenge program and set a goal of having 100 enrollees in at least one of the programs by the 2011 ELS fall meeting. Any firm/organization that has enrolled in all four programs will be highlighted at the fall and/or Annual Meeting(s). Applications for these programs can be found on the ABA website.<sup>4</sup>

In addition, the ELS has followed the ABA’s lead and has adopted “Green Guidelines” in order to reduce the use of paper, decrease the amount of energy use and to promote awareness of the Climate Challenge program

within the New York State Bar Association. Below is a brief overview of many of the Green Guidelines adopted to minimize the environmental impact of Section activities:

1. **Announcements.** To the extent feasible, publicity for Section events or other announcements should be circulated by email. Only one hard copy should be mailed for events.
2. **Journals.** In 2011, Section members will be able to opt out of hard copy delivery of the Section *Journal* and request to receive an electronic copy only.
3. **Meetings.** Whenever feasible, participants should be offered the opportunity to participate in meetings by telephone, webcast or video link. All agendas and other materials should only be circulated by email or web link (or other electronic form) unless a special request is made.
4. **CLE and Other Presentations.** Whenever feasible, participants should be offered the opportunity to participate by telephone, webinar or webcast. Materials in paper form should be minimized with the bulk of the materials presented in a CD form. As a general practice, statutes, regulations, and cases will not be reprinted if they can be obtained electronically.
5. **Section Web Site.** Use the section web site to circulate documentation including By-Laws, Minutes, Agendas, and Policies.

If you have any questions about any of the programs or how to enroll, please contact Megan Brillault at [mbrillault@bdlaw.com](mailto:mbrillault@bdlaw.com) and Kristen Wilson at [kwilson@harrisbeach.com](mailto:kwilson@harrisbeach.com).

## Endnotes

1. <http://www.abanet.org/environ/climatechallenge/overview.shtml>.
2. <http://www.abanet.org/environ/climatechallenge/ClimateChallengeEnrollees.pdf>.
3. *Id.*
4. See <http://www.abanet.org/environ/climatechallenge/home.shtml>.

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# Offshore Wind: Navigating the Complex Regulatory Landscape

By Kevin P. Walsh and James P. Rigano

The development of the open ocean has always been controversial. Images of the ongoing BP oil spill in the Gulf of Mexico tell only part of the tale. The ocean, as a communal resource, does not lend itself to individual ownership and development. However, this may be changing as our need for renewable energy solutions runs up against the limited open space in the United States' most populated regions.

For population centers, like the New York metropolitan area, the open ocean is one of the only viable locations for locally sourced, utility scale renewable energy generation. As a result, New York is one of several states proposing the development of an offshore wind farm. In order to construct an offshore wind facility, a potential developer will need to work with Federal and State agencies, navigate a new regulatory scheme, and satisfactorily address the concerns of a plethora of stakeholders while effectively managing costs to ensure a profitable project.

This article will provide a brief overview of the legal challenges facing an offshore wind farm in the waters offshore of New York to provide an understanding of what it takes to meet those challenges, get turbines in the water, and kick-start our region's renewable energy economy.

## The Promise of Offshore Wind

The northeast United States has some of the highest electricity rates in the United States.<sup>1</sup> Additionally, the cost of developing new power plants is significantly higher than the rest of the nation due to limited land availability and substantial community opposition. Moreover, the demand for energy continues to grow.<sup>2</sup> Therefore, New York State has committed to increasing its renewable energy generation in the short-term.<sup>3</sup>

The combination of factors listed above inevitably leads to the consideration of offshore wind. Offshore wind power in the northeast has the advantage of close proximity to power demand, significant wind resources, a developed energy infrastructure, and the relatively low cost of offshore land to onshore alternatives.

## Who Owns the Oceans?

The first question is, who owns the ocean bottom and how does a developer obtain the necessary approvals to build on that underwater land? From the beach to three (3) miles offshore, New York State has jurisdiction over the bottomlands.<sup>4</sup> It has been said that this seemingly arbitrary distance is derived from the distance that a cannon

ball could travel.<sup>5</sup> Regardless of its origins, the three-mile jurisdictional limit of states is well established.

From 3 through 200 miles, the federal government controls the bottomlands.<sup>6</sup> These lands, much like other lands under federal control, are the responsibility of the Department of the Interior, and, until recently, the Mineral Management Service (MMS), a bureau of the Department. As part of the fallout from the Deepwater Horizon spill in the Gulf of Mexico, the Secretary of the Interior, Ken Salazar, issued an Order eliminating the MMS and creating the Bureau of Ocean Energy Management ("BOEM"). The BOEM has been given authority over "the conventional [i.e., oil and gas] and renewable energy-related management function of the [MMS]."<sup>7</sup>

The wind farm that is currently proposed by the Long Island/New York City Offshore Wind Collaborative ("Collaborative") is to be situated thirteen miles from shore. An electrical transmission cable would run from an electrical substation to the shore. New York State will have the principal authority to review activities within the first three (3) miles of the transmission cable, as well as any onshore facilities, and the remaining portion of the project will be reviewed primarily within the context of federal regulations.

## Federal Authorizations<sup>8</sup>

### A. The Bureau of Ocean Energy Management<sup>9</sup>

The Energy Policy Act of 2005 empowered the MMS to promulgate regulations governing the development of energy generation facilities located on the continental shelf. Pursuant to Secretary Salazar's Order, the functions formerly performed by the MMS with regards to regulating the use of offshore land for renewable energy development will now be performed by the BOEM. Because the bottomlands between 3 and 200 miles are owned by the Federal government, the use of these lands will be governed by a lease.

BOEM has inherited a regulatory structure from the MMS that sets forth a very specific procedure for choosing the party that will end up with the lease. Pursuant to the Energy Policy Act, this is to be a competitive leasing process. Therefore, BOEM will publish a "Request for Interest." If numerous parties come forward expressing interest on a particular offshore area, BOEM will enter into one of several competitive processes. These all essentially amount to auctions, with variations in form. In the early stages of this offshore development, the auction will be a one-time, up-front payment to the government for the lease rights. In later stages, after several offshore facilities

have been developed and there is a greater understanding of the expected returns, it is possible that BOEM will also allow would-be developers to outbid each other on the basis of a contribution percentage over the course of the project life.

The regulations also require that a party seeking a lease have the technical and financial capabilities to construct, operate, maintain, and decommission the renewable energy installation. Under the final regulations, BOEM will not issue a commercial lease unless the prospective lessee provides a lease-specific \$100,000 bond or alternative financial assurance acceptable to BOEM. In essence, BOEM's selection process contains two distinct components: (1) the bid to purchase the rights to the lease; and (2) BOEM's analysis of the likelihood that the bidder will be able to successfully complete and operate the project. Both components must be met in order to obtain the offshore lease.

The apparent mandate for a competitive bidding process raises some potential concerns for projects such as the one proposed. However, the regulations indicate a willingness to work with local governments and power purchasers in this regard, so it will be very important for the Collaborative to work with BOEM to ensure that its project is ultimately constructed. The Collaborative appears to recognize this concern and has taken an initial step towards addressing it by having the New York Power Authority ("NYPA") submit an application to the BOEM seeking to lease the offshore site.<sup>10</sup> This will likely provide some incentive for the BOEM to issue a non-competitive lease. The regulations specifically provide that any such lease is assignable with BOEM consent, but NYPA will need to work closely with the wind developer in order to obtain the lease by convincing BOEM that it has both the technical and financial wherewithal to complete and successfully operate the project.

Once a lease is awarded, the winning party must begin rent payments. Initial rent payments, from the award of the lease through the commencement of commercial operations, will be \$3 an acre. The regulations anticipate that this will be approximately five years.

Once commercial operations are commenced, meaning that the facility is generating electricity, the rent payments are terminated and BOEM will be paid an "operating fee." This "operating fee" is calculated on the following formula:

$$F \text{ (annual operating fee)} = M \text{ (nameplate capacity)} * H \text{ (hours per year)} * c \text{ (capacity factor)} * P \text{ (power price per unit of production)} * r \text{ (operating fee rate).}^{11}$$

There are a couple of interesting things to note about this formula: (1) that it is calculated using the expected and not the actual power generation, and (2) that it uses the wholesale price of power for the state that is using the power generated offshore, and not the actual sale price.

According to the regulations, both of these measures are designed to simplify the calculation of the operating fee and reduce the need for audits, but it may result in the government's collection of revenues that are not in accordance with the actual revenue generated by the facility and potential developers must be aware of this variability. This payment will be made until the end of the lease.

In the initial stages of offshore development, the operating fee rate will be set at 2%.<sup>12</sup> As the development of offshore renewable energy facilities becomes more commonplace and the revenues generated can be predicted with greater accuracy, the regulations indicate that the operating fee rate may be a component of the bidding process in the future.

The regulations call for a 27% sharing of revenue with all states within 15 miles of the geographical center of the project.<sup>13</sup> Depending on the exact siting of this project, it is likely that New York will receive the entirety of this 27%, which will provide a benefit to State taxpayers.

Within six months of the issuance of the lease, the lessee must submit a Site Assessment Plan ("SAP") for BOEM review.<sup>14</sup> The SAP examines the activities leading up to the development of the site, such as the installation of a monitoring station, bottom surveying, avian monitoring, etc. The regulations anticipate that the preliminary, site assessment phase of development will take approximately five years. The SAP will trigger NEPA review as well.

The National Environmental Policy Act ("NEPA") requires the federal government to analyze the environmental effects of all approvals given. It is important to understand that the regulatory scheme being discussed here expressly calls for NEPA analysis at the issuance of the lease/SAP and an entirely separate NEPA analysis for the next stage, which is the submission of the Construction and Operation Plan ("COP").

The COP details virtually every aspect of the project, from site preparation through operation and eventual decommissioning. Again, as the regulations currently stand, the COP will undergo an entirely separate NEPA analysis, requiring additional and more detailed studies.<sup>15</sup>

After approval of the COP, the developer must prepare and submit two additional reports before commencing construction: (1) the Facility Design Report and (2) the Fabrication and Installation Report.

These reports will contain specifications of the structures to be installed and the precise procedures that will be followed in their installation. Once both of these reports are submitted to BOEM and there are no comments to the reports, construction can commence. The regulations contemplate a 30-day period for comments on these reports.<sup>16</sup>

As mentioned above, once the turbines are operating and generating electricity, the rent payments to the Department of the Interior terminate and the developer must pay the operating fee, which will work out to approximately 2% of gross revenues annually.

During the course of operation, BOEM will continue to monitor the installation with both scheduled and unscheduled inspections. Additionally, the developer will have ongoing record-keeping and reporting obligations that it must satisfy or risk BOEM's termination of the lease.

## B. The Army Corps of Engineers

Simultaneous with the BOEM process, the Army Corps of Engineers will have a role in reviewing the off-shore wind project under both Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbor Act, which will require the issuance of a permit for dredge and fill material. Both of the principal components of the off-shore wind farm, the installations of the turbines and the burying of the power cable will result in disturbance of the benthic environment.

When determining whether or not to issue permits for dredge and fill, an applicant must demonstrate that the action will not significantly degrade the water resource and that there are no practicable alternatives that are less damaging than the proposed action.<sup>17</sup> Applicants should describe the steps taken to minimize the impact on water bodies and provide appropriate mitigation measures.<sup>18</sup>

While there will be impacts to the bottomlands that will temporarily displace sediment and increase local turbidity, studies of offshore wind farms indicate that these effects are short lived and will not significantly degrade the water resource.<sup>19</sup>

## New York State's Role

The project proposed by the Collaborative is to be situated approximately thirteen (13) miles off the coast of the Rockaways. Thus, the bulk of the physical construction will occur in waters and on ocean bottom that are controlled by the federal government. Even if the Collaborative's project does not ultimately go forward as proposed, it is very likely that any offshore wind farm in the New York area would be situated more than three miles offshore in order to mitigate potential aesthetic concerns of local residents. New York State's jurisdiction to oversee such a project would therefore be limited to the scope of activities occurring within three miles of shore. These would include the siting and installation of a marine transmission line and the onshore connection to the existing electrical grid.

## The Public Service Commission

Pursuant to Article VII of the New York State Public Service Law, when anyone seeks to install a significant new electrical transmission line, the Public Service Commission must review the project and issue a Certificate for Construction before the party can proceed. The PSC's decision examines (1) the need for the transmission line; (2) the probable environmental impacts; and (3) the conformance to applicable State and local requirements.<sup>20</sup> In exchange for this rather robust scope of review, the PSC's decision preempts other state and municipal approvals that may ordinarily be required.

The application for a Certificate of Construction must be served on all municipal bodies where the facility is located, as well as the New York State Department of Environmental Conservation, Department of Commerce, Department of Parks, Recreation and Historic Preservation, Department of Agriculture and Markets and the New York Secretary of State. The PSC then holds an evidentiary hearing. Parties to the hearing include all of the State authorities and municipal bodies that received the application.

The exclusive jurisdiction of the Public Service Commission over the siting of transmission facilities allows for the PSC to issue approvals that would ordinarily fall under other state or municipal agencies. For example, when issuing a Certificate of Construction, the PSC may determine that any local requirement does not apply to the facility if it is found to be unreasonably restrictive.

The PSC will also oversee the issuance of a Water Quality Certification pursuant to Section 401 of the Clean Water Act for all activities requiring a federal permit that occur within three (3) miles from the shore. Finally, the PSC will be responsible for the determination that the installation of a power line will be consistent with the State and Federal Coastal Zone Management Act. Because all of these approvals, which would ordinarily involve discrete applications, are now issued under the auspices of the PSC, it will be extremely important for a would-be developer to tailor an application to address the concerns of the PSC.

## The Path Forward

The youth of the offshore wind industry in the United States, combined with the legal, financial, and technological hurdles that must be overcome to actually develop an offshore wind farm, can be daunting to examine. Because of these factors, offshore wind energy is very sensitive to cost and it is extremely important to navigate the regulatory hurdles as efficiently as possible. The key to the rapid development of a renewable energy economy with a significant offshore wind component will be to understand the applicable regulatory structure and anticipate and address agency and public concerns before they become large enough to derail the project.

## Endnotes

1. See comparison of state energy prices prepared by the U.S. Energy Information Administration at [http://www.eia.doe.gov/electricity/epm/table5\\_6\\_b.html](http://www.eia.doe.gov/electricity/epm/table5_6_b.html).
2. Projections for future energy usage in both OECD and non-OECD countries is expected to continue to grow: <http://www.eia.doe.gov/oiaf/ieo/highlights.html>.
3. [http://www.state.ny.us/governor/press/factsheet\\_0107092.html](http://www.state.ny.us/governor/press/factsheet_0107092.html).
4. Submerged Lands Act, 43 U.S.C. §§ 1301 *et seq.*
5. See Kent, H.S.K., *The Historical Origins of the Three-Mile Limit*, American Journal of International Law (1954).
6. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261 (entered into force Nov. 16, 1994).
7. Department of the Interior Order No. 3299.
8. It should be noted that, due to the novelty of developing renewable energy in the ocean, any developer of renewable energy must be prepared for uncertainty throughout the permitting process. It is very likely that numerous state and federal agencies not mentioned in this article will consult on a project of this size and the successful project sponsor will need to continually reassess and manage the governmental authorizations needed when pursuing offshore wind facilities.
9. The regulations that are discussed in this section are 30 CFR Parts 250, 285 and 290, available at <http://www.mms.gov/offshore/RenewableEnergy/PDF/FinalRenewableEnergyRule.pdf>.
10. See NYPA press release, dated June 30, 2010, available at <http://www.nypa.gov/press/2010/100630a.html>.
11. 30 CFR § 285.506(b).
12. 30 CFR § 285.506(c)(1).
13. 30 CFR § 285.540(a).
14. 30 CFR § 285.601(a).
15. It is likely that the NEPA reviews will be consolidated for both the SAP and COP phases, but, as the regulations are currently written, two distinct NEPA processes are required.
16. 30 CFR § 285.637.
17. *Overview of EPA Authorities for Natural Resource Managers Developing Aquatic Invasive Species Rapid Response and Management Plans: CWA Section 404-Permits to Discharge Dredged or Fill Material*, available at [www.epa.gov/owow/invasive\\_species/invasives\\_management/cwa404.html](http://www.epa.gov/owow/invasive_species/invasives_management/cwa404.html).
18. *Id.*
19. *Investigation of the Impacts of Offshore Wind Turbines on the Marine Environment (StUK3)*, Bundesamt Fur Seeschifffahrt Und Hydrographie (February 2007).
20. See *The Certification Review Process for Major Electric and Fuel Gas Transmission Facilities*, prepared by the New York State Public Service Commission and available at [www.dps.state.ny.us/Article\\_VII\\_Process\\_Guide.pdf](http://www.dps.state.ny.us/Article_VII_Process_Guide.pdf).

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The screenshot shows the New York State Bar Association website. At the top, it says "NEW YORK STATE BAR ASSOCIATION". Below that, there's a navigation menu with links like Home, My NYSBA, Blogs, CLE, Events, For Attorneys, For the Community, and Forums / Listservs. The main content area is titled "The New York Environmental Lawyer" and "About this publication". It describes the publication as a benefit for members of the Environmental Law Section, featuring peer-written substantive articles on various topics like climate change, brownfields, pollution, air quality, wetlands, and superfunds. It lists the Editor-in-Chief, Justin M. Bizon, Esq., and other editors. There are also links for "Recent Permission", "Article Submission", and "Citation Enhanced Version from Listserve (Section members only)".

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# An Overview of the Draft Model Green Buildings Ordinance

By Brian Sahn

The green movement continues to grow throughout all phases of the real estate industry as commercial, government, and residential building owners continue to implement a growing array of sustainable elements to create a more responsible and cost effective environment. Motivation for such undertakings may be driven by a desire for social responsibility, cost savings, and tax or other government-induced incentives. The benefits are enjoyed by building owners who can better control costs associated with consumption of energy and water, as well as building inhabitants, tenants and occupants who benefit from cleaner indoor air and a healthier environment. Across multiple sectors, public and private, commercial, residential, industrial and educational, the green building market is ramping up and is expected to account for five to ten percent of all new construction starts in the year 2010.<sup>1</sup>

In 2009, the residential and commercial building sector accounted for more than 50 percent of the total annual U.S. energy consumption, 74 percent of total U.S. electricity consumption, and 39 percent of the total U.S. greenhouse gas emissions.<sup>2</sup> As staggering as these statistics are, green buildings generally consume, or are attributable for the use of less water, energy and material than conventional buildings and use design, construction, and siting features to reduce the negative impact of buildings on the environment.<sup>3</sup> Efficiency gains in the building and building management industry are critical in mitigating the impact of climate change, and the implementation of green building protocols will allow us all to adapt to the unavoidable impacts of climate change.<sup>4</sup>

The movement to become more energy responsible and efficient has recently taken a new twist, one that may have been overlooked previously, but one for which the need is clearly evident. The focus in this regard has been to evaluate the multitude of disparate legislative efforts across numerous municipalities at various levels of government, and to create a nationally consistent framework of legislation for the benefit of the legislators. Since the advent of the green revolution, a quilt of widely varying laws has taken root across the nation. The design, content, and coverage of these ordinances have varied greatly, confusing the work of architects, engineers and lawyers who must try to conform their clients' projects to local requirements.<sup>5</sup> The inefficiency of this patchwork system is all too evident, leading to missed opportunities to improve the energy and water efficiency of buildings.<sup>6</sup> Think for a moment about the desire of a national chain to design a "cookie cutter" type building who then develops a design that strives for sustainability and efficiency, only to encounter an array of inconsistent building ordinances

that wreak havoc on the intended efficiency of creating a uniform design in the first place. Thus, it has come to be recognized that the laws and ordinances that govern greenness and promote design and energy efficiency themselves need to be made more efficient.

Likely, no modern urban activity has a greater impact on human health and the environment than those things we use and need every day, i.e., construction of buildings and the use of such buildings once constructed. Significant quantities of resources are used during building construction, renovation and operation, and the production of these resources has substantial environmental impacts and consequences. First is the consumption of raw materials to make building products, including the amount of electricity, water, and other resources consumed to make those products, then deliver them to a specific building site. Couple that with the greenhouse gas emissions, use of potable water, and disposal of millions of tons of construction and demolition wastes annually. Then add in the indoor air issues associated with everyday living, where many of the products we use in our homes and offices emit hazardous toxins impairing indoor air quality and reducing occupant health and productivity.<sup>7</sup> Technology and knowledge have all added to our understanding that our buildings themselves have impacts on our health and on the health of the environment.

Regulators, those in the building and construction industry and public interest groups have become more aware of the consequences and impacts of development on the environment. To start addressing these problems, many look to industry, government, and environmental advocacy groups to harmonize the agendas and strategies to make our world more sustainable. There are many approaches to green building, which need to be evaluated. Some take a very holistic approach and others a very micro-level approach. With regard to the former, goals of improved environmental quality can be achieved through improved environmental quality. For example, we could benefit from a concerted effort by regulators, government, and the building industry to engage in smart growth techniques on a comprehensive and inclusive scale, such as using cluster zoning, comprehensive environmental planning, water conservation and aquifer protection, emphasizing limited future development on open space and habitat set-asides, infrastructure planning, etc.<sup>8</sup> The other approach, as will be discussed in detail below regarding Columbia University's model ordinance, is to focus on the construction industry and the way we use our buildings, both new and old, by reaching green building goals through implementing a regime of green building codes similar in nature to typical building codes.

Recently, the Columbia Law School's Center for Climate Change Law ("CCCL") attempted to create a model ordinance, a uniform model code that would be the starting point for municipalities across the country to use as a framework for creating their own green building code or making their code more consistent with those of other municipalities.

In our age of national real estate companies, owners and operators, as well as lenders, users, etc., the benefit of having a uniform approach to tackle our sustainability problems makes eminent sense. The challenge for the authors of the code was to take into account the institutional challenges of imposing and obtaining acceptance of imposition on the regulator and regulated alike a set of rules that could be viewed as being merely additional burdens and liabilities to both the municipality that would have to enact and process building applications under the ordinance and, of course, to the regulated parties that would have to incur additional costs associated with compliance of the ordinance.

In creating the model ordinance, CCCL's first step was to analyze 163 ordinances from around the country to determine their respective best features.<sup>9</sup> The model ordinance, detailed commentaries on its features, explanations behind its features, associated legal issues, and optional "add-ons" are posted on CCCL's website.<sup>10</sup>

"The model municipal green building ordinance is the product of an empirical analysis of common practices in existing municipal green building regulation and research on possible legal impediments."<sup>11</sup> The model ordinance is designed to promote efficiency and to assist municipalities in reaching feasible goals, while offering flexibility in the form of optional "add-ons" so that individual municipalities may choose to customize the standard ordinance with enhanced environmental benefits.<sup>12</sup>

In looking to create an adoptable national standard, CCCL based the model ordinance on the latest standard for new construction and major modifications developed in the Leadership in Energy and Environmental Design for New Construction and Major Renovations (LEED-NC) version 3.0 standard and other residential construction standards known as the Energy Star Homes standard.<sup>13</sup> CCCL designated the "silver" level, which is the most often adopted level.<sup>14</sup>

LEED is an internationally recognized green building certification system aimed at improving performance across all metrics in the building and construction industry, which focuses on energy savings, water efficiency and CO<sub>2</sub> emissions reduction, improved indoor environmental quality, and stewardship of resources and sensitivity to their impacts (12 LEED web page). LEED is a voluntary program administered by the United States Green Building Council.

Energy Star is a joint program of the U.S. Environmental Protection Agency and the U.S. Department of Energy whose goal is to enable homeowners to save money and protect the environment through the use of energy efficient products and practices.<sup>15</sup>

LEED silver certification is usually thought of in the context of significant construction projects, such as commercial and municipal buildings and high-rise multifamily residential buildings in excess of 5,000 square feet. It also is applied to major modifications of such buildings.<sup>16</sup> LEED, though, is not well tailored for the smaller type of construction such as 1- and 2-family residences, and low-rise multi-residential buildings. The CCCL ordinance is thus balanced by integrating some components from Energy Star Homes Rating System.<sup>17</sup>

## Ordinance Structure and Purpose

Those familiar with the basic structure of a typical zoning ordinance will see similarities with the structure of the CCCL ordinance. The model ordinance commences with a statement of purpose and intent, whereby the broad policy goals are outlined, specifically to enhance the public welfare by creating a more sustainable community and incorporating green building measures into the design, construction and maintenance of buildings that will minimize negative impacts on the environment. The ordinance thus promotes resource conservation, waste reduction, reduction in energy consumption, energy efficiency and reduction of greenhouse gas emissions to mitigate the impacts of climate change. A byproduct of achieving these goals will be economic benefits in energy and water savings, and health benefits of better indoor air quality.<sup>18</sup>

## Applicability

The model ordinance is intended to apply to all applications for building permits for (i) all new construction or major modifications of municipal buildings in excess of 5,000 square feet of conditioned space,<sup>19</sup> (ii) all new construction or major modifications of commercial and high-rise multi-family residential buildings greater than 5,000 square feet of conditioned space, and (iii) all new construction of 1 and 2-family dwellings and low-rise multi-family residential buildings regardless of size. Of note, though, is that schools are not regulated by this ordinance.<sup>20</sup> In New York State, most public school districts are special purpose units of government and are excluded from regulation under the ordinance. But schools in the five most populous cities in New York State are not special purpose units of government and are intended to be regulated under the ordinance as commercial buildings.<sup>21</sup>

The ordinance determines applicability based on conditioned space that is artificially heated or cooled by fixed equipment, and not based on gross floor area. A

municipality may decide to modify the size threshold to meet its objectives. With regard to residential dwellings, the emphasis is on new construction rather than burdening an owner of an existing home with having to comply with the ordinance, although a homeowner in that case may still be required to comply with otherwise applicable building and energy conservation codes. However, a municipality could impose the ordinance on major modifications of existing homes.

An interesting element of the ordinance is the concept that although the ordinance incorporates the U.S. Green Building Council's point system to establish a building's compliance with the ordinance, the municipality, not third-party organizations like the USGBC, remains in control of permitting and certification. In other words, the ordinance does not force a relinquishment of local authority to a third party or non-governmental organization. It adopts some standards from the USGBC and the Energy Star program, but in the end the municipality retains control over revisions to and enforcement of these standards.<sup>22</sup> A positive feature of the ordinance, though, is to adopt an existing recognized evaluation system, which undoubtedly makes it much easier for a municipality to incorporate into its local laws.<sup>23</sup>

Another interesting feature of the ordinance is the identity of the party in the municipality that will administer the ordinance. The ordinance contemplates the appointment of a "Green Building Compliance Official." This could be newly created or an existing building inspector. At the municipality's option, it can require that the person so designated be a LEED Accredited Professional (AP). Undoubtedly requiring such an official to be trained and tested to become LEED accredited should be preferable.<sup>24</sup>

## Green Building Rating Systems

As stated above, at the core the rating system tracks the USGBC's LEED for New Construction Rating System, Version 3.0, as well as the EPA Energy Star Rating System in effect on the date of adoption of the ordinance. There are provisions to accommodate updating the systems as those two systems are updated and modified, using methods such as notice and comment procedures by which the Green Building Compliance Official may update the standards to incorporate new developments in green building codes.<sup>25</sup> Alternatively, the municipal governing body may retain the power to adopt new rating systems.<sup>26</sup>

## Standards for Compliance

The ordinance dictates that all new construction of, and major renovations to, covered municipal and commercial and high-rise multi-family residential buildings must comply with LEED Silver certification standards, while 1- and 2-family dwellings and low-rise residential

buildings are to comply with Energy Star rating system. LEED-NC Silver is the most commonly required standard in existing ordinances. Under the USGBC, to become LEED Silver certifiable a project must attain 50 points on the LEED-NC checklist. A municipality may elect to make its ordinance more or less stringent, or could require a different level of the LEED-NC rating system. Likewise, municipalities could modify or set different Energy Star standards to be more or less stringent.<sup>27</sup>

An interesting option that a municipality could adopt is to impose a requirement on existing buildings to meet certain energy efficiency, particularly in regard to consumption of energy and water.<sup>28</sup>

Not long ago, Mayor Bloomberg attempted to impose a law to mandate retrofits to inefficient buildings in New York City, but that effort failed.<sup>29</sup>

## Compliance Process

Essentially the ordinance requires an applicant filing for a building permit for new construction of or major modification to a covered building to submit to the Green Building Compliance Official a completed LEED checklist showing the LEED points that the building is designed to obtain, an explanation of how the building will obtain the LEED points or the Energy Star rating score.

The drafters of the ordinance identified concern as to whether aspects of a municipal green building code may be preempted by, or otherwise in conflict with the New York State building code or federal Energy Policy and Conservation Act. The ordinance is designed to give the Green Building Compliance Official the ability to deem a LEED point to have been attained so long as the building meets the standard required by the state building code and any other applicable requirements.<sup>30</sup>

## Enforcement

The ordinance places in the hands of the Green Building Compliance Official the ability to determine whether the specifications for which a building application was issued have been implemented by conducting inspections during construction and prior to issuance of a certificate of occupancy similar to administration of a building permit under ordinary circumstances. The ordinance also provides such official with the ability to halt construction. Stop work orders, though, can be problematic so the ordinance permits the official to accept the implementation of some other LEED point or Energy Star feature in lieu of one that was originally called for but was not implemented.<sup>31</sup>

## Exemptions

Recognizing the need to be adaptable as well as creating a flexible compliance process, the model ordinance

provides for exemption from regulations for a host of reasons, assuming an applicant is able to successfully demonstrate a hardship and reason that compliance is not feasible. This is not an all or nothing measure. Rather, elements of the regulations may be determined to create a hardship for which the Green Building Compliance Official may agree that compliance in certain respects is not feasible. For example, if a building owner demonstrates why it cannot meet the LEED certification level of 50 points but can achieve 40 points, then the official can require a 40-point total in lieu of the normal 50 points.

The ordinance contains an add-on that would permit partial exemption for historic buildings, subject to the municipality declaring a building of historical value. Buildings that are of historic value determined by proper authorities must still follow the procedure for requesting an exemption, although they will be presumed to be entitled to a presumptive justification for an exemption.

Another add-on for exemption permits a municipality to exempt buildings whose cost would dramatically increase due to compliance with the ordinance.

## Exclusions

The ordinance permits a municipality to fully exempt certain classes of building from the ordinance. State and federal buildings are exempt since a local municipality will not have the power to enforce green building regulations from such higher authorities. Special purpose classes of buildings such as school districts may be exempted. Other concerns exist, such as a municipality's ability to regulate buildings that are under the dominion and control of other governmental units but within the jurisdictional borders of a certain municipality. The legal hierarchy of applicability and challenges is something the ordinance deals with, but ultimately it may be up to courts to settle such issues as cases develop.

Houses of worship and healthcare facilities may be other elements exempted. Ordinarily, a house of worship is not exempt from building code regulations, whether, for example, plumbing and electric codes or fire codes. However, under the model ordinance, a municipality may exempt a house of worship from the green building ordinance.

Regarding schools, in New York State, all school districts are considered special purpose units of government in which case a municipality may not enforce the model ordinance against such buildings. The exception to this rule is for the five largest school districts in New York State, being that those districts are run by the city and are part of municipal government.<sup>32</sup>

## Appeals

The ordinance sets forth a mechanism for appeal, such as using the already established board of zoning appeals (BZA) to hear such cases. In such case, the BZA would review the decision of the Green Building Compliance Official similar to what currently typically transpires with regard to a denial of a building permit application by the local building superintendent official. BZAs, though, would have to be trained to understand the applicability and operation of the green building code to properly administer a request for an appeal. Thereafter, New York's Article 78 process and procedure would presumably be available for further appeal to the courts by a party that is aggrieved of a municipality's determination.

## Severability

The ordinance contains a severability provision, such that if any part of the ordinance is declared unconstitutional or invalid, such determination does not automatically void the entire statute.

## Other Applicable Regulations

Finally, the ordinance sets forth a section that states that a party subject to this ordinance still must comply with other applicable ordinances, such as fire, safety and electric codes. Thus the ordinance was designed to integrate and work with existing codes structures, and not to be an island unto itself.

## Prescriptive Standards

Modern building codes are typically performance based or prescriptive in nature.<sup>33</sup> They have dictated certain methods of design and engineering, use of materials, etc. For example, dictating a certain standard might require a specific dimension to a doorway frame.<sup>34</sup> Some regulations are promoted by the building industry, some by engineers and architects, others by contribution of the insurance industry to minimize or manage risks. Still others come from government and non-government interest groups. The acceptance of green building codes by the construction industry and owners and managers of properties will be necessary for the success of such endeavors. The real estate industry may reject such efforts to impose a green building ordinance, citing the numerous codes and ordinances that already are in effect, locally (e.g., zoning codes), regionally (e.g., groundwater and aquifer protection regulations), statewide (e.g., fire and building codes), and nationally (e.g., American with Disabilities Act regulations). Yet it is the real estate industry working in concert with government and environmental action groups that will have to lead the way to promoting such green building ordinances.

Consumers can help in the effort to bring about green building regulations. Homeowners of both new and renovated homes may insist on green building techniques in order to realize energy savings, to promote better indoor health, or to be environmentally conscious. Utility and water companies may entice builders and consumers by offering rebates and other benefits that assist them in achieving green goals and reducing the burdens on their existing utility grids. Government can also contribute to such incentives by offering tax rebates and other incentives. For example, New York State extends tax credits to both new construction and renovations for energy efficiency.<sup>35</sup> Other techniques include grants and loans for implementing green building techniques, offering density bonuses to developers allowing them to over intensify a site if green techniques are implemented.

## Legal Challenges

Several potential legal issues associated with the model ordinance and green building ordinances have been identified, including:

### Federal preemption

The Federal Energy Policy and Conservation Act preempts state and local ordinances that are covered by federal efficiency standards.

### State preemption

The New York State Energy Conservation Construction Code sets forth energy efficiency standards that are to be enforced by municipalities, but allows municipalities to create stricter standards. The New York State Uniform Fire Prevention and Building Code establishes a superior set of ordinances on such matters involving fire safety, fuel gas and plumbing.

### Nondelegation of authority

The model ordinance adopts the point structure of LEED NC but does not delegate authority or application of the rating system to a non-governmental entity such as the USGBC. Rather the municipality retains command and authority over its respective application of that standard and the Energy Star rating system to the immediate building application before its green building compliance administrator.

### Ban against incorporation by reference

The New York State Constitution does not permit incorporation by reference of outside laws. The model ordinance incorporates standards created by third parties, namely the USGBC for LEED NC and the Department of Energy for the Energy Star Home Rating System.

### Antitrust laws

Two possible situations have been identified. The first is the appointment of parties with specific qualifications

to administer the act, which would disadvantage those without such qualifications. Second, LEED points are awarded for the use of wood that has been certified by the Forest Stewardship Council, which may disqualify certain uncertified wood producers.

### New home construction warranty

Another possible challenge created by the green building code would be the impact on developers who after the fact would be challenged by consumers of their products claiming that they did not meet their contractual obligations in delivering a green product to a certain specification. For example, the New York State New Home Warranty statute mandates that a builder of a new home warrant certain elements of construction for up to six years.<sup>36</sup> The impact of a home that is found not to be energy or sustainability compliant notwithstanding a builder's compliance with the municipality's green building code would have to be assessed. While the ordinance does not create additional warranty obligations on the builder, the failure of a home to achieve certain energy saving criteria as may have been represented in a construction contract or a building permit application may give rise to claims in contract or tort that a builder failed to meet an obligation or representation, or in building the home, did so negligently despite being certified by the local green building compliance official.

### The Lending Community

Another unknown and point of analysis should be the view and evaluation of the lending community of the green building ordinance. Imposition of additional building requirements by the municipality may be viewed in the same context as building code obligations. However, if a lender ever had to enforce its security interest in a particular project and step into the shoes of a developer or owner, it would now have the additional burden of having to comply with a set of new and perhaps unfamiliar regulations. Such additional burdens may result in lenders taking additional escrows or reserves to cover such uncertainties, especially in today's tight financial markets.

### Conclusion

We really are at the dawn of looking at the whole picture when it comes to understanding our environment and the depth of human impact. As has been discussed above, the myriad concerns and issues we confront in natural resource consumption, energy demands, greenhouse gas emissions, indoor air quality, etc., are all things that should and do weigh on the minds of the real estate and construction industry as well as those that regulate such construction efforts. They also weigh on the utility providers without whom our modern lives would come to a halt. Developing a comprehensive, uniform-based green building ordinance that seeks to achieve certain recog-

nized standards and goals as embodied in LEED and the Energy Star rating system are worthy efforts. The CCCL model ordinance may only be the beginning of a revolution to integrate the existing building regulatory environment with the knowledge and modern perspective about green building standards. Government officials, industry, and consumers may object to such efforts because of cost implications, or because of the already existing burdensome regulatory environment. However, those reasons are not sufficient to avoid the inevitability of having to address the significant impact to our environment by the houses and buildings we occupy and use for habitat, commerce, health care, education, and government functions.

## Endnotes

1. See KEITH H. HIROKAWA, *At Home With Nature: Early Reflections on Green Building Laws and the Transformation of the Built Environment*, 39 ENVTL. L. 507, 509 (2009).
2. See Michael B. Gerrard, *Model Green Building Ordinance for Municipalities Open for Comment*, 243 N.Y.L.J. 3 (col. 1).
3. See Model Municipal Green Building Ordinance, introductory cmt. (Draft June 7, 2010) available at <http://www.law.columbia.edu/centers/climatechange/resources/municipal> [hereinafter Model Ordinance].
4. See *id.*
5. See Gerrard, *supra* note 2, at 3.
6. See *id.*
7. See HIROKAWA, *supra* note 1, at 511.
8. See *id.* at 514.
9. See Gerrard, *supra* note 2, at 3.
10. See Model Ordinance, *supra* note 3, introductory cmt.
11. *Id.*
12. See *id.*
13. See *id.*
14. See Gerrard, *supra* note 2, at 3.
15. See Model Ordinance, *supra* note 3, cmt. § 3 (stating homes that are Energy Star rated are typically at least 15% more energy efficient than homes built to the 2006 International Residential Code, thus making Energy Star homes some 20 to 30% more efficient than standard homes).
16. See Gerrard, *supra* note 2, at 3.
17. See *id.*
18. See Model Ordinance, *supra* note 3, § 1(C).
19. See Model Ordinance, *supra* note 3, cmt. § 3 (commenting that the emphasis on conditioned space rather than gross floor area avoids regulating buildings that use little energy, such as an unenclosed parking garage or sports field with outdoor bleachers).
20. Buildings used for residential purposes but are more structurally similar to commercial buildings, such as hotels, are exempt from the definition of “Buildings.”
21. See Model Ordinance, *supra* note 3, cmt. § 3.
22. See Gerrard, *supra* note 2, at 3.
23. See Model Ordinance, *supra* note 3, cmt. § 3.
24. See *id.*
25. See Model Ordinance, *supra* note 3, cmt. § 4(B).
26. See *id.*
27. See Model Ordinance, *supra* note 3, cmt. § 5(A).
28. See Model Ordinance, *supra* note 3, cmt. § 5(E).
29. See *id.*
30. See Model Ordinance, *supra* note 3, cmt. § 6(A).
31. See Model Ordinance, *supra* note 3, cmt. § 7(B).
32. USGBC has developed LEED for schools and health care facilities. Thus the decision to not regulate these facilities may need to be reconsidered, assuming all other legal issues are resolved.
33. See HIROKAWA, *supra* note 1, at 520.
34. See *id.*
35. See *id.* at 531.
36. General Business Law § 777a(1)(c).

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# Ethical Considerations for the Clean Air Act Attorney

By Daniel Riesel and Victoria Shiah

The increased scrutiny of the regulated community under the Clean Air Act (“CAA”),<sup>1</sup> combined with the widespread adoption of the American Bar Association’s Model Rules of Professional Conduct,<sup>2</sup> raise several important issues relating to the representation of clients that have airborne emissions, in the context of both enforcement and reporting. Although a lawyer’s ethical obligations should harmonize with vigorous representation of the client, the Clean Air Act lawyer practices in an ethical minefield due to the competing demands posed, on the one hand, by confidentiality and the need to vigorously represent a client whose actions may inadvertently trench on the punitive provisions of the Clean Air Act and, on the other hand, by the public interest in a healthy environment. This article focuses on Clean Air Act practice, but insofar as the command-and-control paradigm established by the Clean Air Act is mirrored in other major environmental statutes, such as the Clean Water Act and the Resource Conservation and Recovery Act, the broad principles discussed here may be applicable to other environmental practices.

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*“[A] lawyer who knowingly submits an inaccurate response to an EPA information request pursuant to Section 114 of the Clean Air Act exposes himself to penal sanctions.”*

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## (1) Environmental Lawyers Are Regulated Under Multiple Regimes

Environmental lawyers, like other litigating attorneys, are regulated under various regimes, including rules governing litigation, rules of professional conduct, general penal codes, and environmental statutes which can impose civil and criminal penalties for attorney misconduct. First, various rules of civil and criminal procedure, applicable to all lawyers, empower courts to sanction counsel for such offenses as failure to comply with discovery requirements and the commencement of a frivolous lawsuit.<sup>3</sup> Sanctions under such rules include dismissal of the underlying action, disbarment and monetary sanctions.<sup>4</sup> Second, in the administrative context, lawyers are similarly subject to agency rules delineating attorney conduct and imposing penalties—including disbarment from practice before the agency—for violations thereof.

Third, the Model Rules of Professional Conduct (“Model Rules”) created by the American Bar Association (“ABA”), prescribe baseline standards of legal ethics

and professional responsibility for lawyers in the United States. The rules are merely recommendations, or models, and are not themselves binding. However, they have been adopted, in some form, and to some extent, as the professional standards of conduct by the judiciaries or integrated bar associations of all of the United States except California.<sup>5</sup> Rules adopted in a particular state (that may be based upon the Model Rules) are legally enforceable against the lawyers of that state as well as any lawyer practicing there temporarily. Moreover, the Model Rules often provide the basis for sanctions imposed as part of an ongoing litigation.<sup>6</sup> As will be discussed further below, the lawyer’s duties of confidentiality to the client and of candor to the court and other entities, both of which are imposed by the Model Rules, have the potential to conflict in practice.

Fourth, to the extent that lawyers become involved in clients’ actions, they face punishment for acts of dishonesty under state and federal penal codes. For example, a lawyer who knowingly submits an inaccurate response to an EPA information request pursuant to Section 114 of the Clean Air Act exposes himself to penal sanctions.<sup>7</sup>

Compliance with Clean Air Act regulations often involves a complex mixture of lawyering and making technical evaluations; it frequently involves the lawyer’s guidance in fashioning submissions and responses to regulatory agencies. The lawyer’s involvement in such submissions and responses can raise significant issues relating to the lawyer’s ethical obligations of confidentiality, candor, and, unfortunately, the lawyer’s personal exposure to sanctions.

## (2) The CAA’s Civil and Criminal Enforcement Mechanisms

The CAA’s enforcement provisions are found in Section 113 of the Act.<sup>8</sup> This section contains all of the familiar civil enforcement mechanisms of the “command and control” environmental statutes enacted since 1970; it empowers the EPA, for the purposes of enforcing the statutory scheme, to issue orders demanding compliance, to issue penalty orders, and to bring civil actions for injunctive relief and penalties.<sup>9</sup> Civil enforcement under the CAA has evolved significantly since the early years of its enactment, when the U.S. Environmental Protection Agency (“EPA”) appeared to be primarily concerned with the accuracy of its opacity readers. During the Bush administration, and continuing today in the Obama administration, enforcement has focused on a source’s compliance with the Prevention of Significant Deterioration and New Source Review rules promulgated pursuant to Title I of the CAA.

In addition to its civil enforcement provisions, the Clean Air Act also has the standard panoply of provisions that criminalize certain knowing or intentional conduct. Section 113(c) criminalizes actions by “[a]ny person who knowingly violates any requirement or prohibition of an applicable implementation plan” or who knowingly violates various other provisions of the CAA.<sup>10</sup> The Clean Air Act’s enforcement mechanism, like the other “command and control” enactments, is highly dependent on self-reporting and the maintenance of records,<sup>11</sup> and it is a crime under the Clean Air Act to subvert this system by “knowingly mak[ing] a false statement,” “omit[ting] material information,” or “knowingly alter[ing], conceal[ing] or fail[ing] to file or maintain any notice, application, record, report, plan or other document” required to be filed or maintained under the CAA.”<sup>12</sup> For example, insofar as a Title V permit<sup>13</sup> inevitably requires the permittee to report excursions beyond the permitted emission limits, the knowing failure to submit such a report is a violation of the permit and theoretically a crime under § 113(c).

Lately, enforcement efforts under CAA § 113 have focused on responses to information requests issued by the EPA pursuant to CAA § 114. Section 114 authorizes the EPA to demand written responses to information requests, which often come in the form of burdensome, broadly drafted interrogatories and document demands.<sup>14</sup> Although the typical target of enforcement efforts under § 114 is the recipient of the information request or the unfortunate individual who signed the responsive document, the role of the lawyer in counseling responses that are knowingly false or misleading raises significant liability issues.

### (3) The Model Rules in CAA Practice—An Introduction

A number of the Model Rules of Professional Responsibility may apply to the lawyer for a client subject to reporting requirements under the Clean Air Act. These rules are best explained against the backdrop of a hypothetical scenario, one that attorneys currently face. Consider the following: an attorney’s client is a corporation whose emission of pollutants is subject to a permit under Title V of the Clean Air Act. The client’s representative has informed the attorney that the corporation last month exceeded the limit, set by the permit, on the concentration of a certain pollutant released into the air. Instead of capping emissions at  $x$  parts per billion, as required by the permit, the client has emitted  $x+5$  parts per billion. The client’s representative indicates that the corporation intends to continue its present excursions (i.e., emissions exceeding the permit limits), taking the position that the significant cost of upgrading its facility is not worth the negligible human health or well-being benefits it believes would result from an upgrade. The client does not intend to report its past, present or future excursions to the EPA, despite requirements under its Title V permit that it do so. The attorney recognizes that the client’s continued excursions

would be a knowing violation of its permit, which is a violation of CAA § 113(c) that could be prosecuted as a felony. Under the Model Rules or any other law, is the attorney required to report this violation to the EPA or other government authorities?

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*“The confidentiality rule applies not only to matters communicated in confidence by the client but also to all information relating to the representation of the client,” whatever its source.*”

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### (4) The Confidentiality Rule and Its Internal Limits

The starting point in this discussion is Model Rule 1.6, which requires lawyers to maintain client confidentiality.<sup>15</sup> The principle of lawyer-client confidentiality is one of the fundamental rules of professional conduct. It is based on the assumption that confidentiality encourages clients to tell their lawyers the truth, which is necessary for effective representation. As enunciated by the ABA:

Client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality, [articulated in Model Rule 1.6], applies in situations other than those where evidence is sought from the lawyer through compulsion of law.<sup>16</sup>

The confidentiality rule applies not only to matters communicated in confidence by the client but also to all information “relating to the representation of the client,” whatever its source.<sup>17</sup> During the course of their representation, environmental lawyers receive information subject to the confidentiality rule in a number of different ways. Information is not only conveyed by the client, but also by consultants hired by the client or the lawyer. In addition, lawyers often “unearth” data and information on their own through their own investigation or the careful examination of data provided by others. Finally, routine activities such as internal audits often turn up material that the lawyer obtains from participating in or reading documentation of such processes. Model Rule 1.6 prohibits the lawyer from revealing any of this information without the informed consent of the client, except as expressly permitted by Rule 1.6 or as required by the Rules of Professional Conduct or other law.<sup>18</sup>

Notably, Model Rule 1.6(b) lists a number of circumstances under which a lawyer is permitted to reveal information relating to client representation without the client's informed consent:

A lawyer may reveal information relating to the representation of a client to the extent the lawyer *reasonably believes necessary*:

(1) to prevent *reasonably certain* death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is *reasonably certain* to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud and in furtherance of which the client has used the lawyer's services; [or]

\* \* \*

(6) to comply with other law or a court order.<sup>19</sup>

Model Rule 1.6(b) creates a permissive standard, allowing, but not compelling, an attorney to reveal client information if any of the listed factors apply. The Rule creates a subjective test, as the key factor governing permissive disclosure is the lawyer's reasonable belief in the necessity of disclosure.

Although Title V permits typically require disclosure of permittees' emissions, Rule 1.6(b)(6) does not directly apply to the attorney in the hypothetical CAA permit violation scenario because the reporting duty under Title V permits falls on the permittee itself, rather than on any person with knowledge of the permittee's emissions. That is, any legal responsibilities connected to reporting emissions under a permit are borne by the client directly, and it is the client, not the lawyer, who is required under the Clean Air Act to submit accurate reports pursuant to the permit. Therefore, a client's duty to make disclosures to the EPA does not necessarily extend to the attorney or authorize the attorney to disclose client information under Rule 1.6(b)(6).<sup>20</sup> By contrast, Rule 1.6(b)(6) always applies when a law imposes reporting duties on an attorney specifically, or on any person with knowledge of a certain condition. For example, laws requiring certain members of the public to report child abuse may compel a lawyer to reveal relevant client information, and this duty is recognized by Rule 1.6(b)(6).<sup>21</sup>

Subsections (b)(1), (b)(2), and (b)(3) of Rule 1.6 require the environmental lawyer to evaluate the impact of the client's excursion. An environmental lawyer's general abhorrence for violations of environmental law does not alone justify disclosure of a client's violation. Under Model Rule 1.6(b)(1), the environmental lawyer is permitted to reveal client information only if he or she "reasonably believes" that the disclosure of the excursion is "necessary" to prevent "reasonably certain death or substantial bodily harm." The lawyer should know that reporting violations and minor emissions excursions usually do not create the risk of death or substantial bodily harm that must be present before disclosure is allowed under 1.6(b)(1). Furthermore, even when such a risk exists, an attorney is not allowed to disclose the violation if the attorney cannot "reasonably believe" that disclosure is "necessary" to minimize the risk.<sup>22</sup> For example, "[w]here practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure."<sup>23</sup>

In the hypothetical CAA Title V permit violation scenario, Model Rule 1.6(b) requires the attorney to make a reasonable judgment on the harm that will result from the client's permit violation. Ambiguous situations in which such judgment is difficult include, for example, cases where an excursion exists but the emission limit has been set by default rather than by a risk assessment, and cases where an excursion exists but the emission limit has been set by a risk assessment based on the assumption that a person would be exposed to the relevant pollutant at the prohibited level for 70 years. In contrast, a situation in which this judgment would be relatively easy might arise where a lawyer knew that the client was about to commence the demolition of a building without regard to substantial amounts of asbestos in the building. Here, if the lawyer may assume that the release will violate the Clean Air Act's National Emissions Standards for Hazardous Air Pollutants ("NESHAP"),<sup>24</sup> the lawyer will likely determine that the scenario poses a significant threat to human health, and that either correction of the problem or disclosure of the problem (which may be necessary to impel the correction) is necessary to address this threat.<sup>25</sup>

When injury to financial interests or property, rather than bodily injury, is at stake, subsections (b)(2) and (b)(3) of Model Rule 1.6 impose an additional limitation on an attorney's ability to reveal client information. As in Rule 1.6(b)(1), in order to properly disclose client information under Rule 1.6(b)(2), the lawyer must believe that the harm is "reasonably certain" and must "reasonably believe" that disclosure is "necessary" to prevent the harm. In addition, the lawyer must have participated in the transaction that gives rise to the "substantial injury to the financial interests or property of another";<sup>26</sup> examples of such participation include the provision of advice condoning the client's unlawful behavior or the submission, on the client's behalf, of false reports to government authorities. Model Rule 1.6(b)(2) posits that a client

who seeks such complicity from his attorney engages in “[s]uch a serious abuse of the client-lawyer relationship” that the client “forfeits the protection” of Rule 1.6.<sup>27</sup>

It should be noted that, as with many of the Model Rules, there are significant variations of Model Rule 1.6(b)(2) among the states. According to the ABA, “[o]nly a few jurisdictions have adopted the ABA version of Rule 1.6(b)(2) verbatim.”<sup>28</sup> The ABA observes that some states “permit disclosure to prevent a crime or fraud regardless of the type of consequences likely to result, some permit disclosure whether or not the lawyer’s services are involved, some permit disclosure to prevent a criminal but not a fraudulent act, some permit disclosure to prevent anyone from committing a crime or a fraud, and some require disclosure.”<sup>29</sup> In New York, for example, disclosure is allowed to prevent the client from committing a crime; there is no allowance for the prevention of fraud, and there is no requirement of injury to another or of the client’s use of the lawyer’s services.<sup>30</sup> In California, which has not adopted the Model Rules, a lawyer may not invoke the prevention of financial or property harm to another in order to justify the disclosure of confidential client information without the client’s consent.<sup>31</sup> California only allows disclosure of confidential information without the client’s consent if it is necessary to prevent a criminal act that a lawyer “reasonably believes is likely to result in [the] death of, or substantial bodily harm to, an individual.”<sup>32</sup>

Model Rule 1.6(b)(3) also gives rise to state variations. The ABA notes that “[m]any jurisdictions have [provisions similar to Rule 1.6(b)(3)] permitting disclosure to rectify the consequences of a client’s criminal or fraudulent activities in furtherance of which the lawyer’s services have been used.”<sup>33</sup> For example, in New York, use of confidential information is permitted to the extent a lawyer believes necessary to

withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or a fraud[.]<sup>34</sup>

The New York rule is broader than the analogous Model Rule in that it does not condition disclosure on the reasonable certainty of substantial financial or property injury to another. On the other hand, it is narrower than the Model Rule in that it limits disclosure to occasions when it is needed to withdraw prior representations or opinions of a lawyer. In contrast to New York, Illinois has adopted Model Rule 1.6(b)(3) verbatim.<sup>35</sup>

In the hypothetical CAA Title V permit violation scenario, the client’s continued excursions would have the elements of a crime. However, the client has not asked the attorney to assist him in this behavior. Although an attorney is not permitted to aid a client in committing a crime or fraud,<sup>36</sup> disclosure of the client’s intentions is not warranted under the Model Rules unless the other two elements of (1) reasonably certain substantial injury and (2) reasonably certain necessity of disclosure are satisfied. For example, in situations where the expected injury is minor, disclosure is not warranted. However, as will be discussed further below, even when disclosure of client information is not allowed, attorneys must always consider their duty under Model Rule 1.2 not to aid any fraudulent or criminal act of a client. Under certain conditions, this duty may require an attorney to withdraw from representation.

Attorney involvement under Model Rule 1.6(b)(3) is present when the attorney assists a client in committing a crime or fraud and “the lawyer does not learn of the client’s crime or fraud until after it has been consummated.”<sup>37</sup> In the context of the CAA permit violation scenario, an attorney may confront Rule 1.6(b)(3) when the attorney has represented to the EPA, on behalf of the client, that no excursions have occurred, and then later learns that the client had not been truthful and that the representations were therefore false. As under Model Rule 1.6(b)(2), disclosure under Model Rule 1.6(b)(3) is not allowed unless the other elements of reasonably certain substantial injury and reasonably certain necessity of disclosure are satisfied. Again, the attorney must form a judgment on the harm caused or made possible by the client’s permit violation. The attorney must determine whether disclosure—whether to affected party, the government, or someone else—is *necessary* to prevent or mitigate the harm.

In sum, it seems clear that Model Rule 1.6, taken in isolation, is ambiguous with respect to whether an attorney may disclose the client’s information in the Title V violation scenario discussed above. The answer under the other relevant provisions of Model Rule 1.6 depends largely on the attorney’s fact-bound assessment of the seriousness of injury caused or to be caused by the violation, and of the necessity of disclosure to prevent or mitigate harm. Examination of other Model Rules and their relationship to Model Rule 1.6 provides additional guidance. On the one hand, some of the Model Rules, such as Rules 1.2(d) (prohibiting assistance to a client’s criminal or fraudulent conduct), 4.1(b) (requiring truthfulness in statements to others), and 1.16 (allowing a “noisy withdrawal”) require or allow disclosure of client information under certain circumstances, but only if such disclosure would be permitted by Rule 1.6.<sup>38</sup> On the other hand, other Rules, such as Rule 3.3 (requiring candor before a tribunal), 3.9 (requiring candor before a legislative body or an agency in a nonadjudicative proceeding), and 1.13(c)

(allowing disclosure of misconduct in a corporation), create situations outside of the 1.6(b) list in which disclosure of client information is required or permitted. These Rules are discussed further below.

**(5) Limits to a Lawyer's Discretion: Avoiding Complicity in a Client's Wrongdoing While Adhering to Rule 1.6**

Model Rule 1.2(d) provides that "a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." In the hypothetical CAA Title V permit violation scenario, the client's knowing and continued emission of pollutants beyond its permit limits may be a crime under CAA § 113(c). Under Model Rule 1.2, the attorney may not advise the client to continue the excursions and may not assist the client in doing so:

Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.<sup>39</sup>

The comment above makes a distinction between, on the one hand, an attorney's provision of legal advice that a client independently uses to advance a criminal or fraudulent goal and, on the other hand, the attorney's actual complicity in a client's wrongdoing. This distinction, already fine, becomes even more nuanced in the context of potential uncertainty concerning the scope of the client's crime. A key question is whether the client's failure to report an excursion as required by the Title V permit represents a continuing crime,<sup>40</sup> an issue which is beyond the scope of this article. In any event, when a client fails to report a past excursion, continues to emit in excess of its permit, or both, the ABA commentators have recognized that an environmental lawyer's "responsibility is especially delicate":

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate.

The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.<sup>41</sup>

One clear message to take from the comments above is that the lawyer cannot in any way counsel the client on how to continue the excursions without getting caught, or on how to take evasive actions to avoid discovery. To the contrary, a lawyer may be required to "remonstrate with former clients" to be candid with the authorities themselves.<sup>42</sup>

Another clear message to be taken from the comments is that the attorney may not, on the client's behalf, knowingly make false representations to the government to the effect that no excursion has occurred. Clean Air Act lawyers frequently make representations to environmental agencies in the context of resolving allegations of permit violations. In the Title V hypothetical, the lawyer may face a difficult situation if the lawyer previously represented that the excursion did not happen, that it was an isolated result of a by-pass or upset, or perhaps that it was the result of sampling error. To the extent that the lawyer has made those contentions as fact, and should have known that the contentions did not have a factual basis, the lawyer is dangerously close to sanctionable conduct.<sup>43</sup> As discussed previously, if the lawyer had no reason to know, at the time of his or her representations, that such contentions were false, and later learns this to be the case, the lawyer should withdraw so as to avoid continued assistance of a crime, and should undertake an analysis under Rule 1.6(3) to determine whether disclosure is necessary to mitigate any injury.

**(6) The Duty of Candor—Lawyers Don't Lie**

In some situations, as when the lawyer is before a tribunal or a nonadjudicative government hearing, Model Rule 1.2, in conjunction with Rules 3.3 and 3.9, imposes on the lawyer a duty of candor to the factfinders, which duty overrides Rule 1.6's protections of client information.<sup>44</sup> The duty of candor to the tribunal under Rule 3.3 requires the attorney, if he "knows that [his client] intends to engage, is engaging, or has engaged in criminal or fraudulent conduct relating to the proceeding," to "take

reasonable remedial measures, including, if necessary, disclosure to the tribunal.”<sup>45</sup> Candor to the tribunal is necessary to ensure its proper functioning, since a major role of a tribunal is to assess facts presented to it. According to the annotations to Rule 3.3, this rule “applies to all statements regardless of materiality, and can even require a lawyer to disclose information protected by Rule 1.6, Confidentiality of Information.”<sup>46</sup> Thus, when Rule 3.3 or 3.9 applies, the ABA has opined that “[e]ven passive assistance, such as withholding information from a court or the government, may violate Rule 1.2.”<sup>47</sup> For example, in *People v. Casey*, the Colorado Supreme Court upheld the lower court’s finding that an attorney violated the Colorado equivalent of Model Rule 1.2 when he failed to inform the court in a criminal matter that his client, who was before the court, was in fact impersonating the true defendant in the case.<sup>48</sup>

A tribunal is defined as “a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity.”<sup>49</sup> A body is said to “ac[t] in an adjudicative capacity when a neutral official, after the presentment of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interest in a particular manner.”<sup>50</sup> Rule 3.9 extends the essential elements of Rule 3.3’s duty of candor to a tribunal to “a legislative body or administrative agency in a nonadjudicative proceeding.”<sup>51</sup> Rule 3.9 “does not apply to representation of a client in a negotiation or other bilateral transaction with a government agency” or to “the client’s compliance with generally-applicable reporting requirements, such as the filing of income tax returns.”<sup>52</sup> For example, the ABA’s Ethics Committee has found that a routine banking examination is not subject to Rule 3.9.<sup>53</sup>

Under the Model Rules, a key question in determining whether all the protections of Rule 1.6 remain intact is whether the lawyer is representing the client before some sort of “proceeding.” If so, Rule 3.3 or 3.9 applies, and the duty of candor supersedes the duty of confidentiality when the two conflict. If not, the less demanding Rule 4.1 applies, and Rule 1.6’s confidentiality protections remain intact.<sup>54</sup>

An examination of one state’s ethics rules—New York’s—reveals a variation on the above analysis. Rule 3.3 of the New York Rules of Professional Conduct includes a duty of candor that adopts nearly verbatim Model Rule 3.3.<sup>55</sup> However, unlike its counterpart in the Model Rules, New York Rule 3.9 does not extend the lawyer’s duty of candor to non-adjudicative proceedings.<sup>56</sup> Hence, with respect to the hypothetical CAA Title V permit violation scenario, an attorney subject to the New York Rules should not have a duty of candor to a “tribunal” because the client’s reporting of its emissions does not involve an adjudicatory proceeding, and therefore does not involve a tribunal.

Similarly, under the Model Rules, in the present CAA permit violation scenario, it seems likely that a client’s emissions report would not be characterized as either an adjudicative or non-adjudicative proceeding subject to the duty of candor. Rather, the emission’s report should be viewed as an exchange of information covered by Rule 4.1, similar to the bank examination discussed above.<sup>57</sup> It follows, however, that if the attorney commenced representation when the client was already embroiled in an adjudicative or nonadjudicative proceeding, Rule 3.3 or 3.9 might apply. If we assume that the client in the CAA permit violation scenario did not become involved in an adjudicative or nonadjudicative proceeding prior to retaining the attorney, and that Rule 4.1 applies rather than Rule 3.3 or 3.9, the duty of confidentiality constrains the attorney’s ability to disclose client information. Viewed from a different angle, when the client is not before a tribunal or other proceeding, the attorney has no affirmative duty under Rules 3.3, 3.9, or 1.2 to disclose the client’s violation. The overriding concern is that lawyers should not lie; the client’s best protection is to have a lawyer whose integrity is not suspect and whose representation can be relied on.

#### (7) Disclosure in the Context of Withdrawal

Under Model Rule 1.16, an attorney is required to withdraw from representation where “the representation will result in a violation of the Rules of Professional Conduct or other law,” and an attorney may withdraw from representation if the client “persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent” or “has used the lawyer’s services to perpetrate a crime or fraud.”<sup>58</sup> As applied to the hypothetical CAA permit violation scenario, the application of the mandatory withdrawal provision seems clear; it would apply, for example, if the client knowingly insisted that the lawyer submit false reports on his behalf, a violation of Rule 1.2. The permissive withdrawal provision excuses a lawyer from being associated with a client’s criminal or fraudulent conduct, “even if the lawyer does not further” this conduct.<sup>59</sup> Permissive withdrawal would apply where disclosure of client information is justified by Rule 1.6(b)(2) or 1.6(b)(3), as well as to the broader set of situations where the client has committed or intends to commit a crime or fraud using the attorney’s services, but disclosure is not necessary to prevent or mitigate substantial injury.<sup>60</sup>

The mandatory withdrawal provision of Model Rule 1.16 raises an interesting question with respect to the CAA Title V permit violation scenario. The environmental attorney in this scenario may be engaged in numerous other aspects of the client’s environmental compliance that are unrelated to the excursion. In this context, if the client’s behavior pertaining to its permit violation forces the attorney to withdraw (e.g., if the client insists on the lawyer’s submission of false reports), must the attorney

withdraw from the other unrelated matters in which he or she represents the client? Arguably, it may be permissible to withdraw from representing a client in one matter while maintaining representation in other matters. As indicated above, the answer may depend on the specific adaptation of the Model Rules used by a particular state.

Unless disclosure is required (e.g., under Model Rule 3.3 or 3.9), “the lawyer’s statement that professional considerations require termination of the representation should be accepted as sufficient” by the court hearing from an attorney seeking termination of representation.<sup>61</sup> However, a lawyer’s knowledge that the client intends to perpetuate the crime or fraud may make withdrawal meaningless unless the lawyer makes “noise” to disassociate himself or herself from the client’s past, ongoing, or planned crime or fraud.<sup>62</sup> This “noisy withdrawal” is effected by “disaffirm[ing] documents prepared in the course of the representation that are being, or will be, used in furtherance of the fraud.”<sup>63</sup> The rationale for this sort of noisy withdrawal lies in the relationship between Rule 1.16 and Rule 1.2(d): if a client who has engaged in crime or fraud using a lawyer’s services intends to continue using the lawyer’s work product to perpetuate its misconduct, the lawyer’s mere withdrawal is not enough to prevent his or her services from being further used in service of the client’s crime or fraud. Only by repudiating the applicable work product may the attorney fully effectuate a withdrawal under Rule 1.16.<sup>64</sup> The principles behind noisy withdrawal are affirmed in Model Rule 4.1, which provides that a lawyer

shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.<sup>65</sup>

In explaining Model Rule 4.1, the ABA expressly contemplates noisy withdrawal, and adds that the noisy withdrawal is subject to the duty of confidentiality imposed by Rule 1.6.<sup>66</sup>

The Model Rules suggest one more possible avenue by which the Clean Air Act attorney could disclose the client’s misconduct, if the client is an organization: Model Rule 1.13. The language of Model Rule 1.13(c) allows the attorney for an organization to “report out” (i.e., to a government agency) wrongdoing within the corporation if prior attempts to make reports up the organization’s chain of command have not resulted in the cessation of unlawful activity, and if the attorney believes that doing so is necessary to prevent substantial injury to the organization:

If (1) despite the lawyer’s efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.<sup>67</sup>

In the ABA’s view, Rule 1.13(c) does not conflict with Rule 1.6, but rather “supplements Rule 1.6 by providing an additional basis upon which the lawyer may reveal information relating to the representation, [without] modify[ing], restrict[ing], or limit[ing] the provisions of Rule 1.6(b)(1)-(6).”<sup>68</sup> However, although Rule 1.13(c) makes “reporting out” an option for attorneys, the ABA posits that it should be avoided if possible: “[a]ny measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization.”<sup>69</sup>

Not all states have adopted a “reporting out” provision that could be seen as trenching on the protections of Model Rule 1.6. For example, New York Rule 1.13(c) only allows “reporting out” to the extent that it is permitted by New York Rule 1.6.<sup>70</sup> If confidentiality constraints pursuant to New York Rule 1.6 prevent such reporting, the attorney is advised to withdraw from representation.<sup>71</sup>

An attorney who does “report out” under Model Rule 1.13 is likely to do so concurrently with withdrawal from representation. The combination of the withdrawal and the “reporting out” results in another form of noisy withdrawal, one that is permitted outside of the limits set by Rule 1.6 on its face. This sort of noisy withdrawal can be an effective option for a lawyer who has discovered illegal mismanagement in a corporation that is detrimental to the shareholders and the corporation as whole.<sup>72</sup> However, it is probably not an option for the attorney in the Clean Air Act permit violation scenario, who is unlikely to believe that the disclosure of a minor permit violation, which can potentially incur disproportionate enforcement measures from the government, will prevent substantial injury to the organization; to the contrary, the attorney may reasonably believe that risking such a government reaction would injure the organization.

In sum, when faced with the specific scenario contemplated in this article, if an environmental attorney may assume that the excursion does not pose the risk of serious physical or financial harm to others, he or she is not obligated, and in fact not allowed, to disclose to government authorities any information relating to the representation of the client, including that which reveals the client's illegal behavior. Although some of the Model Rules, such as 3.3, 3.9, and 1.13, leave space for such a disclosure, the specific facts of the scenario presented do not allow an attorney to take advantage of these options.

#### (8) Government Attempts to Intrude Upon Client-Lawyer Confidentiality

The lawyer's role in representing institutions that either are accused of violating the Clean Air Act or, although not accused, institute their own investigations into potential CAA violations, often involves the acquisition of confidential information. Indeed, the cornerstone of an effective investigation of suspected corporate wrongdoing is the elicitation of truthful information from corporate officers and other employees. In turn, a lawyer's success in obtaining truthful statements often involves the informant's belief that his or her statements will be cloaked with the investigating lawyer's obligation of confidentiality. Nevertheless, prosecutors and government investigators have attempted in the past, and may continue to attempt, to trench on a lawyer's duty of confidentiality by demanding disclosure of confidential information as the "price" of lenient treatment.

In recent years, the ABA has expressed concern over what it considered to be an erosion of the attorney-client privilege, the work product doctrine, and other protections of client-lawyer confidentiality in the corporate setting. The ABA has contended that by adopting certain corporate charging policies that pressure corporations into waiving the attorney-client privilege, federal agencies, including the Department of Justice, have weakened the protections available to a corporation during investigations.<sup>73</sup> For the ABA, the most alarming manifestation of this policy occurred in the early years of the Bush Administration. Over time, the Justice Department's position with respect to this issue has drifted toward the ABA's position. To begin, in January of 2003, Larry Thompson, then Deputy Attorney General of the United States, issued a memorandum directing federal prosecutors to consider a corporation's "cooperation," as measured by its degree of voluntary disclosure of wrongdoing, in deciding whether to charge the corporation.<sup>74</sup> Most controversially, the Thompson memo recommended that prosecutors seek privilege waivers from the organizations under scrutiny:

One factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including, if necessary,

a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors and employees and counsel. Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements. In addition, they are often critical in enabling the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation.<sup>75</sup>

The ABA's concern is that a policy like Thompson's forces corporations to choose between, on the one hand, waiving the attorney-client privilege and jeopardizing frank discussion with legal counsel and, on the other hand, being labeled "uncooperative" and falling into disfavor with prosecutors.

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*"The ABA has contended that by adopting certain corporate charging policies that pressure corporations into waiving the attorney-client privilege, federal agencies, including the Department of Justice, have weakened the protections available to a corporation during investigations."*

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In response to strong criticism such as that issued by the ABA, in December of 2006, then-U.S. Deputy Attorney General Paul McNulty issued a memorandum that provided guidance for when prosecutors may seek corporate waiver of the attorney-client privilege.<sup>76</sup> The McNulty memo, which superseded the Thompson memo, states that prosecutors may only request waiver of attorney-client privilege when there is a legitimate need for the privileged information. This need can be established by considering the likelihood the privileged information will benefit the investigation, the availability of alternatives to waiver, the completeness of any voluntary disclosures already made, and any potential collateral consequences of waiver.<sup>77</sup> The "catch" is that the evaluation factors rest within the discretion of the prosecutor, the same person, probably, who made the demand for waiver in the first place. Two years later, Deputy Attorney General Mark Filip placed further limits on federal prosecutors' ability to consider or request privilege waivers.<sup>78</sup> Under Filip's policy, a corporation receives credit for volunteering facts, not for waiving privileges.<sup>79</sup>

Changes in waiver-request policy are being made in the ABA's favor outside of the Department of Justice, too. In February, 2009, the Attorney-Client Privilege Protec-

tion Act of 2009 was introduced in the Senate.<sup>80</sup> The bill's purpose is to

protect the sanctity of the attorney-client relationship by statutorily prohibiting Federal prosecutors and investigators across the executive branch from requesting waiver of attorney-client privilege and attorney work product protections in corporate investigations. The bill would similarly prohibit the government from conditioning charging decisions or any adverse treatment on an organization's payment of employee legal fees, invocation of the attorney-client privilege, or agreement to a joint defense agreement.<sup>81</sup>

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*"[E]nvironmental lawyers often face a problem not commonly found in other practice areas: they must help clients come into compliance while at the same time protecting them from unjustified sanctions."*

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The bill has been referred to the Senate Committee on the Judiciary, where it presently remains.<sup>82</sup> In addition, the U.S. Sentencing Commission amended its guidelines, effective November 1, 2006, to omit commentary suggesting that waiver of the attorney-client privilege is in some instances a prerequisite for credit at sentencing.<sup>83</sup>

## (9) Conclusion

Environmental lawyers are best able to protect both the environment and their clients' interests if the clients believe, so long as their current ongoing actions comply with the law, that their confidences will be protected. Truth is promoted by such confidential relationships. However, environmental lawyers often face a problem not commonly found in other practice areas: they must help clients come into compliance while at the same time protecting them from unjustified sanctions. Aligning this task with the applicable ethical rules is a challenging but essential component of effective representation under the Clean Air Act and other similar environmental statutes.

## Endnotes

1. 42 U.S.C. §§ 7401, *et seq.*
2. Model Rules of Professional Conduct (1995). In February 2002, the ABA Commission On Evaluation of the Rules of Professional Conduct, also known as the "Ethics 2000 Commission," issued various comprehensive amendments to the Model Rules. Shortly after this revision, in August 2003, the ABA again amended Model Rules 1.6 and 1.13, in response to the enactment of the Sarbanes-Oxley Act, 15 U.S.C. § 7245.
3. See Fed. R. Civ. P. 11(b)-(c), 26(g), and 37.
4. See, e.g., *Ibarra v. Baker*, 2009 WL 2244659 (5th Cir. July 28, 2009).
5. See American Bar Association, Dates of Adoption of Model Rules of Professional Conduct, [http://www.abanet.org/cpr/mrpc/chron\\_states.html](http://www.abanet.org/cpr/mrpc/chron_states.html) (last visited Nov 4, 2010). California's unique professional responsibility rules differ significantly from the ABA rules in both structure and content, reflecting practical considerations as well as differences in public policy. Notwithstanding the near-universal adoption of the Model Rules, it should be noted that eight states have refrained from adopting the ABA's Comments to the Model Rules, which provide interpretive guidance to the rules. See American Bar Association, State Adoption of Comments to the Model Rules of Professional Conduct as of November 2009, <http://www.abanet.org/cpr/pic/comments.pdf>.
6. *Cf. Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001).
7. 18 U.S.C. § 1001 punishes a person who, in a matter within the jurisdiction of the federal government, "falsifies, conceals, or covers up by any trick, scheme, or device a material fact"; "make[s] any materially false, fictitious, or fraudulent statement or representation"; or "makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry." State laws similarly impose penalties on persons who present material misrepresentation to the government or to others.
8. See 42 U.S.C. § 7413(a); see generally Daniel Riesel, ENVIRONMENTAL ENFORCEMENT, CIVIL AND CRIMINAL §§ 10.01—10.07 (1999).
9. Fines imposed under this section can run as high as \$32,500 per day, per violation.
10. CAA § 113(c)(1), 42 U.S.C. § 7413(c)(1). "Knowingly violates" is a general as opposed to a specific intent element; it requires knowledge of facts and circumstances that violate the statute but not knowledge that the conduct under scrutiny violates the statute. *U.S. v. Weintraub*, 273 F.3d 139 (2d Cir. 2001); *U.S. v. Rubenstein*, 403 F.3d 93 (2d Cir. 2005), *cert. denied*, 126 S.Ct. 388, 546 U.S. 876 (2005). The provisions referenced in § 113(c)(1), the knowing violation of which is a crime, are CAA §§ 111, 112, 113(a), 114, 129, 175(a), 177, 303, 502(a), and 503(c).
11. CAA § 113(c)(2), 42 U.S.C. § 7413(c)(2).
12. CAA § 113(c)(2)(A), 42 U.S.C. § 7413(c)(2)(A).
13. Title V of the CAA requires operating permits for major stationary sources. See CAA §§ 502–507, 42 U.S.C. §§ 7661–7661f.
14. See CAA § 114(a)(1), 42 U.S.C. § 7414(a)(1). Section 114 authorizes the EPA to require "any person who owns or operates any emission source" to make reports and provide "other information" if the agency believes such information is necessary for the enforcement or implementation of certain CAA provisions. The failure to answer a Section 114 information request exposes the recipient of the request to harsh civil penalties and possible felony punishments.
15. See Model Rule 1.6.
16. Model Rule 1.6 cmt 3.
17. Model Rule 1.6(a).
18. See Model Rule 1.6 (a)-(b).
19. Model Rule 1.6(b) (emphasis added).
20. If the attorney undertakes to submit emissions reports to EPA on behalf of her client, the duty will extend to her.
21. See Model Rule 1.6 annot.; see also Assoc. of the Bar of the City of New York, Comm. on Prof'l. & Judicial Ethics, Formal Op. 1997-2 (1997) (holding that an attorney working for a social services agency may be obligated to report suspected child abuse under § 413 of the Social Services Law), available at <http://www.nycbar.org/Ethics/eth1997-2.htm>.
22. *Cf. In re Bryan*, 61 P.3d 641 (Kan. 2003) (discussing necessity of disclosure, holding that lawyer's disclosure of adverse information

- about client, including disclosure to client's supervisor that client had a history of making false claims, was not *necessary* to establish a claim to defend against client's claim that lawyer was stalking her. Rule 1.6(b)(5) allows disclosure by a lawyer to establish a claim or defense, or to respond to allegations, when a controversy exists between lawyer and client).
23. Model Rule 1.6 cmt. 14.
  24. See 40 C.F.R. Part 61, Subpart M (establishing NESHAP standards for asbestos).
  25. See also Model Rule 1.6 cmt 6 (discussing another scenario where the lawyer's decision to disclose may be a straightforward one: where the client has "accidentally discharged toxic waste into a town's water supply system." Here, the lawyer "may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.").
  26. Model Rule 1.6(b)-(c).
  27. Model Rule 1.6 cmt. 7.
  28. Model Rule 1.6 annot. Illinois is one state that has essentially adopted Model Rule 1.6(b)(2) verbatim. The analogous Illinois Rule allows a lawyer to "reveal information relating to the representation of a client" to the extent he "reasonably believes necessary" to "prevent the client from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services." ILLINOIS RULES OF PROFESSIONAL CONDUCT OF 2010, Rule 1.6(b)(2). The only difference between the Illinois rule and the analogous Model Rule is that the text of the Illinois rule only explicitly discusses disclosure to prevent fraud and does not mention disclosure to prevent crime.
  29. Model Rule 1.6 annot.
  30. See NEW YORK STATE BAR ASSOCIATION, NEW YORK RULES OF PROFESSIONAL CONDUCT, Rule 1.6(b)(2) (2009, revised 2010) (hereinafter "New York Rules") (a lawyer is allowed to "reveal or use confidential information" to the extent that he "reasonably believes necessary" to "prevent the client from committing a crime.").
  31. See STATE BAR OF CALIFORNIA, CALIFORNIA RULES OF PROFESSIONAL CONDUCT, Rule 3-100 (2004).
  32. STATE BAR OF CALIFORNIA, CALIFORNIA RULES OF PROFESSIONAL CONDUCT, Rule 3-100(B) (2004).
  33. Model Rule 1.6 annot.
  34. New York Rule 1.6(b)(3).
  35. See ILLINOIS RULES OF PROFESSIONAL CONDUCT OF 2010, Rule 1.6(b)(3).
  36. See Model Rule 1.2.
  37. Model Rule 1.6 cmt. 8.
  38. See, e.g., Model Rule 1.6 cmt. 15.
  39. Model Rule 1.2 cmt. 9.
  40. The intentional violation of a permit violation is cognizable under § 113(c). Whether the failure to report is a continuing crime is a question that may be addressed by analogy to questions raised in many common law crime scenarios. Such issues include the determination of when the theft of goods changes from a past crime to the possession of stolen property, and whether the possession then becomes a continuing crime that would warrant disclosure under some state codes. See Assoc. of the Bar of the City of New York, Comm. On Prof'l & Judicial Ethics, Formal Op. 2002-1 (2002).
  41. Model Rule 2.1 cmt 10.
  42. Model Rule 1.2 annot. (citing Md. Ethics Op. 2004-05 (2004)).
  43. Lawyers are not immune from penal sanctions for making knowing false statements to a federal agency. 18 U.S.C. § 1001. Of course, the institution of such charges would have to be reserved for an extreme instance; otherwise, the penal code could be used to stifle forceful advocacy.
  44. See Model Rules 3.3, 3.9 (discussing the lawyer's duty of candor to tribunals and to administrative bodies in nonjudicative hearings, which overrides the duty of confidentiality under Rule 1.6).
  45. Model Rule 3.3.
  46. Model Rule 3.3 annot.
  47. Model Rule 1.2(d) annot.
  48. 948 P.2d 1014 (Colo. 1997).
  49. Model Rule 1.0(m).
  50. *Id.*
  51. Model Rule 3.9.
  52. Model Rule 3.9 cmt. 3.
  53. *Id.* See also Lawrence G. Baxter, *Reforming Legal Ethics in a Regulated Environment*, 8 GEO. J. LEGAL ETHICS 181, 205-06 (1994) (lamenting the inaptness of the categories delineated by the terms "tribunal" and "nonadjudicative proceeding").
  54. Model Rule 4.1 prohibits a lawyer from knowingly failing "to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."
  55. Rule 3.3 of the New York Rules, set forth below in its entirety, adopts nearly verbatim subsections (a)-(d) of Model Rule 3.3., and also adds sections (e) and (f), which do not appear in the Model Rule:
    - Conduct Before a Tribunal
    - (a) A lawyer shall not knowingly:
      - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
      - (2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
      - (3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
    - (b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
    - (c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
    - (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

(f) In appearing as a lawyer before a tribunal, a lawyer shall not:

(1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply;

(2) engage in undignified or discourteous conduct;

(3) intentionally or habitually violate any established rule of procedure or of evidence; or

(4) engage in conduct intended to disrupt the tribunal.

New York Rule 3.3.

56. New York Rule 3.9.

57. See ABA Comm. on Ethics and Prof. Resp., Formal Op. 93-375 (1993).

58. Model Rule 1.16(a)(1), (b)(2).

59. Model rule 1.16 cmt 7.

60. Model Rule 1.16 provides for permissive withdrawal when “the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent” or “when the client has used the lawyer’s services to perpetrate a crime or fraud.” Model Rule 1.16(b)(2)-(3).

61. Model Rule 1.16 cmt 3.

62. See Model Rule 1.2 cmt 10; Model Rule 4.1 cmt. 3; Irma S. Russel, ISSUES OF LEGAL ETHICS IN THE PRACTICE OF ENVIRONMENTAL LAW, American Bar Association (2003) at p. 428.

63. ABA Comm. on Ethics and Prof. Resp., Formal Ethics Op. 92-366 (1992); see Pamela Esterman, *Ethical Considerations of the Environmental Lawyer*, in ALI-ABA, ENVIRONMENTAL LAW COURSE OF STUDY, 295, 305 (Feb. 2009) (cautioning that “it is questionable whether the ‘noisy withdrawal’ option should be greatly relied upon, because it is only mentioned in a footnote to the rules and the ABA’s opinion and the Rules do not make it mandatory”).

64. See ABA Ethics Op. 92-366.

65. Model Rule 4.1.

66. See Model Rule 4.1 cmt. 3.

67. Model Rule 1.13(c). It should be noted that Model Rule 1.13(d) bars the application of Rule 1.13(c) to lawyers hired by an organization “to investigate an alleged violation of law or to defend the organization or an officer, employee, or other constituent associated with the organization against a claim arising out of an alleged violation of law.”

68. Model Rule 1.13 cmt. 6.

69. Model Rule 1.13 cmt. 4.

70. See New York Rule 1.13(c).

71. *Id.*

72. See generally, Ryan Morrison, Note, *Turn up the Volume: The Need for “Noisy Withdrawal” in a Post Enron Society*, 92 Ky. L.J 279, 307-08 (2003). This article discusses a proposed SEC regulation, drawn up

after the passage of the Sarbanes-Oxley Act of 2002, which would require corporate counsel who become aware of evidence of a material violation of the securities laws to report such evidence up the corporate chain of command and, if this action is to no avail, to report to the board of directors. This portion of the proposed regulation was codified at 17 CFR 205.3(b) (2003). The proposed regulation would have also imposed mandatory withdrawal on an attorney who, having made such reports, does not receive an appropriate response from the corporation. The withdrawing attorney would have been required to disaffirm, in writing to the SEC, any work he did which he now believes to be materially false or misleading. This portion of the proposed regulation, imposing a “mandatory noisy withdrawal,” faced criticism on several grounds, including concerns raised by the ABA about the breach of the duty of confidentiality. Morrison 299. Ultimately, the “mandatory noisy withdrawal” provision did not find its way into the final regulation.

73. See, e.g., Statement of Karen J. Mathis, President of the American Bar Association before the Committee on the Judiciary of the United States Senate, concerning “The Thompson Memorandum’s Effect on the Right to Counsel in Corporate Investigations” (Sept. 12, 2006), *prepared statement available at* [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/files/clientprivissueabatestimonytosenjudcommkarenmathissept122006.pdf](http://lawprofessors.typepad.com/whitecollarcrime_blog/files/clientprivissueabatestimonytosenjudcommkarenmathissept122006.pdf).

74. Memorandum from Larry D. Thompson, U.S. Deputy Attorney General, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), *available at* [http://www.justice.gov/dag/cftf/corporate\\_guidelines.htm](http://www.justice.gov/dag/cftf/corporate_guidelines.htm).

75. *Id.*

76. Memorandum from Paul McNulty, Deputy U.S. Attorney, Principles of Federal Prosecution of Business Organizations (Dec. 2006), *available at* [http://www.justice.gov/dag/speeches/2006/mcnulty\\_memo.pdf](http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf).

77. *Id.*

78. Memorandum from Mark Filip, Deputy U.S. Attorney, Principles of Federal Prosecution of Business Organizations (Aug 28, 2008), *available at* <http://www.justice.gov/opa/documents/corpccharging-guidelines.pdf>.

79. *Id.*

80. See S. 445, 11th Cong. (2009).

81. Remarks of Senator Specter, 154 CONG. REC. S-2331-2332 (2009) (Feb. 13, 2009), *available at* <http://federalevidence.com/pdf/2009/Misc/S.445.CR1.pdf>.

82. See Library of Congress, S. 445, Record of All Congressional Actions, *available at* <http://thomas.loc.gov> (last visited Nov. 4, 2010).

83. See Carter, *Privilege Waiver Policy Dumped*, ABA JOURNAL E-REPORT (April 14, 2006).

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# Eco Anti-Terrorism: EPA's Role in Securing Our Nation's Chemical Plants

By Jonathan Kalmuss-Katz

## Introduction

The terrorist attacks of September 11, 2001 transformed our nation's laws, administrative structures, and regulatory requirements relating to homeland security. Sweeping anti-terrorism legislation passed in a matter of months, a vast bureaucracy emerged to coordinate homeland protection efforts, and the public adjusted to a world of color-coded threat alerts and longer airport lines. As we settle into a post-9/11 era, however, one of our largest pre-9/11 vulnerabilities remains surprisingly unchecked—the over 10,000 U.S. facilities that produce, use, or store hazardous amounts of chemicals.

According to chemical industry data submitted to the Environmental Protection Agency (EPA), at least 100 of those chemical plants could harm a million or more people following a terrorist attack or other worst-case release, and almost 7,400 could harm at least 1,000 nearby residents and workers.<sup>1</sup> Yet these recognized terrorist targets remain subject to only limited security standards, and some of the most vulnerable facilities lie beyond the Department of Homeland Security's (DHS) regulatory authority. DHS issued temporary standards pursuant to a 2006 budget rider,<sup>2</sup> intended to give Congress three years to debate and enact more comprehensive chemical security legislation. That period has now passed with only temporary extensions of this stopgap solution.<sup>3</sup>

With lawmakers deadlocked over chemical security, it is time to re-examine the possibility of moving forward under alternate statutory authority. Shortly after the September 11 terrorist attacks, EPA began visiting at-risk chemical facilities and preparing site security standards under the Accidental Release Prevention provisions of Clean Air Act (CAA) § 112(r).<sup>4</sup> The agency had regulated chemical plants' accident preparedness under that section since the mid-1990s, and it believed that it could use the same authority to establish anti-terrorism standards for those facilities. When others within the Bush Administration objected, however, EPA abandoned its plans to exercise that power, citing "significant litigation risk."<sup>5</sup> Richard Falkenrath, then a policy director for the Office of Homeland Security (a predecessor to DHS), went further, explaining: "There was an absolute unanimity around the table that we'd be sued and that we'd lose those suits."<sup>6</sup>

This article challenges that assessment, analyzing EPA's authority over catastrophic, terrorism-related chemical releases. Part I documents the vulnerability of domestic chemical facilities and surveys recent legislative debates and regulatory developments related to chemi-

cal security. Part II describes existing EPA safeguards against catastrophic releases, focusing largely on the 1990 enactment of CAA § 112(r) and EPA's enforcement of its Accidental Release Prevention authority. Part III analyzes the potential use of these provisions to protect chemical plants against terrorism, filling the holes in existing regulations. The conclusion defends EPA's role in protecting our chemical plants, either under the CAA or new chemical security legislation.

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## I. The Legislative Debate Over Our Nation's Chemical Security

### A. The Threat Posed by Vulnerable Chemical Plants

Industrial chemicals are an ever-present and necessary part of modern society.<sup>7</sup> They purify our water, refine our fuel, protect our food supply, and create many of the products we use every day. The American Chemistry Council (ACC), a leading chemical industry trade group, has even used this ubiquity as a marketing tool, highlighting the diverse and vital uses of chemicals in its "Essential<sub>2</sub>" ad campaign.<sup>8</sup>

Without due care or in the wrong hands, however, chemicals are also incredibly dangerous. In 1984, for example, an accidental release of methyl isocyanate from a Union Carbide pesticide plant in Bhopal, India claimed more than 2,000 lives overnight and left thousands of others blind, sterile, and suffering from other permanent injuries.<sup>9</sup> A year later, a chemical leak from a Union Carbide facility in Institute, West Virginia harmed over 100 nearby residents and sent dozens to the hospital—an incident that could have been considerably worse.<sup>10</sup> Some of the same substances used in industrial processes today have been employed as nerve agents in chemical warfare—from World War I through the recent conflict in Iraq.<sup>11</sup>

In the United States, roughly 14,000 facilities exceed threshold quantities of potentially hazardous chemicals,<sup>12</sup> and many of these plants are recognized terrorist targets.<sup>13</sup> This vulnerability has troubled national security experts,<sup>14</sup> lawmakers,<sup>15</sup> and government regulators<sup>16</sup> for years; in 2006, then-Senator Barack Obama said of the chemical sector, "There may be no greater failure of our

government than the fact that we have done almost nothing to secure one of America's most vulnerable targets."<sup>17</sup> Until recently, most chemical plants were not subject to any federal security standards, governed instead by a patchwork state or local laws and voluntary industry codes.<sup>18</sup>

The leading industry initiative—the ACC's Responsible Care program—covers less than 10 percent of the nation's chemical facilities, and few state and local governments have passed their own chemical security legislation.<sup>19</sup> While increased security would seem to be in a chemical plant owner's self-interest, the free market is poorly suited to encourage individual facilities to sufficiently invest in preventing or mitigating an unlikely terrorist attack, the costs of which would be largely externalized to the surrounding community.<sup>20</sup>

## B. Proposed Chemical Security Reforms

The 1990s brought periodic calls for reform, with environmental groups often leading these efforts.<sup>21</sup> As part of their larger campaign to strengthen chemical regulation, these organizations focused primarily on replacing hazardous chemicals with "inherently safer technology" (IST), simultaneously reducing the threat to surrounding communities and eliminating toxic substances.<sup>22</sup> Individual facilities have been using various forms of IST for years,<sup>23</sup> but the federal government has thus far declined to require its adoption as a security or safety measure.<sup>24</sup> Most facilities are not even required to assess the benefits and costs of potentially safer technologies, precluding reliable estimates of the impacts of IST mandates or the number of facilities that could be required to make such a switch.<sup>25</sup>

Within the chemical industry, IST arises out of the work of safety engineers like Trevor Kletz, whose 1978 article "What You Don't Have, Can't Leak" emphasized process and design changes that can preemptively reduce the risk posed by a chemical plant accident.<sup>26</sup> In the environmental movement, the concept reflects the early 1990s focus on "Pollution Prevention" strategies that address potential environmental threats at their source, eliminating the need for more expensive cleanup or remediation measures later on.<sup>27</sup> IST does not refer to a specific technology or process change, but rather a broader approach to minimizing risk and addressing chemical plant security. In one prominent application of IST, in 2002 the Blue Plains Wastewater Treatment Plant in Washington, D.C. reduced the threat posed by a terrorist attack by replacing its inventory of chlorine gas with sodium hypochlorite, a less hazardous alternative.<sup>28</sup>

The first federal chemical security bills emerged in the late 1990s, proposing amendments to CAA § 112(r) that would have required chemical facilities to prepare vulnerability assessments, implement on-site security improvements and adopt IST "to the maximum extent

practicable."<sup>29</sup> But the debate languished until the series of coordinated terrorist attacks on September 11, 2001 forced the nation to confront its vulnerabilities. Shortly thereafter, the *Washington Post* reported that Mohammed Atta, an organizer of the September 11 attacks, had previously scoped out a Tennessee chemical plant,<sup>30</sup> and copies of chemical industry trade publications were found in an Osama Bin Laden hideout.<sup>31</sup>

In October 2001, Sen. John Corzine introduced new legislation that would have required EPA to set chemical security standards and mandated the use of "practicable" IST at the most hazardous facilities.<sup>32</sup> The bill passed unanimously out of the Environment and Public Works Committee the following July, but the chemical industry mounted a campaign against it during the August recess.<sup>33</sup> That fall, seven senators who voted for the bill in committee signed a letter to their Senate colleagues withdrawing their support.<sup>34</sup> The bill never came up for a floor vote.

Despite periodic reminders of chemical plants' vulnerabilities,<sup>35</sup> legislative reforms stalled in Congress, with environmentalists backing subsequent versions of the Corzine bill and industry supporting alternate legislation that took jurisdiction away from EPA and contained no IST provisions.<sup>36</sup> In light of this inaction, New Jersey—home to 12 chemical plants that could harm over 100,000 people—enacted its own chemical security standards in 2005.<sup>37</sup> The following year, the House Homeland Security Committee reported bipartisan chemical security legislation, the most substantial committee action on the subject since 2002.<sup>38</sup>

## C. The Current Regulatory Regime

Instead of enacting this proposal for comprehensive reform, Congress capitalized on a single-page amendment to a Senate appropriations bill that gave DHS authority to set temporary security standards for the "chemical facilities that, in the discretion of the Secretary, present high levels of security risk."<sup>39</sup> Largely overlooked in the Senate and absent completely from the House bill, the Conference Committee turned this vague provision into the foundation for DHS' current chemical security regime. In the process of doing so, however, lawmakers added several limitations on DHS authority.<sup>40</sup> For instance, the final rider prohibits DHS from regulating "Public Water Systems;...[Wastewater] Treatment Works...[or] any facility owned or operated by the Department of Defense or the Department of Energy,"<sup>41</sup> even though water treatment plants often use large amounts of hazardous chemicals and have been recognized as "particularly vulnerable" to terrorist attacks since the 1940s.<sup>42</sup> In reviewing site security plans, DHS is also powerless to require the use of any particular compliance measure, which it has interpreted to foreclose IST mandates.<sup>43</sup>

Per its statutory deadline, DHS finalized its Chemical Facility Anti-Terrorism Standards (CFATS) in April 2007,<sup>44</sup>

listing approximately 300 “chemicals of interest” and requiring vulnerability assessments or site security plans from 7,010 chemical facilities.<sup>45</sup> The standards divide facilities into four tiers based upon risk, with 140 Tier 1 facilities subject to the most stringent requirements.<sup>46</sup> DHS recently began inspecting these Tier 1 facilities, and violations could trigger fines or possible facility closure.

DHS chemical security authority was scheduled to sunset in October 2009, as even proponents of the 2006 rider described it as a temporary measure that would give Congress enough time to enact broader chemical security reforms.<sup>47</sup> Comprehensive legislation remains mired in legislative gridlock, however, and—with President Obama’s support—Congress recently extended the stopgap solution.<sup>48</sup> The DHS authorization was scheduled to expire on October 4, 2010, but has been extended in limited increments through continuing budget resolutions.<sup>49</sup>

## II. Statutory Provisions Governing Catastrophic Chemical Releases

Congress’ failure to enact comprehensive chemical security legislation does not leave chemical plants’ safety and potentially hazardous releases unregulated. In terms of their day-to-day operations and emissions, chemical facilities are bound by a wide array of environmental, public health, and worker safety laws, most of which are beyond the scope of this article. Instead, this section focuses on the prevention, detection, and reaction to unplanned, catastrophic chemical releases—similar to those that would be caused by a terrorist attack.

As enacted in the 1970s, the CAA and Clean Water Act primarily regulated intentional emissions from stationary and mobile sources, while the Toxic Substances Control Act of 1976 regulated the production, testing, and marketing of chemicals, but not their storage or post-sale use.<sup>50</sup> Congress did not turn its attention to large-scale chemical accidents until the 1984 disaster in Bhopal, India and 1985 scare in Institute, West Virginia. The following year, lawmakers passed the Emergency Planning and Community Right-to-Know Act (EPCRA), which created a system of State Emergency Response Commissions (SERCs) and Local Emergency Planning Committees (LEPCs) to help prepare for large-scale chemical accidents.<sup>51</sup>

Under EPCRA, SERCs divide each state into emergency planning districts, often along county lines or other political and geographic subdivisions.<sup>52</sup> The SERC selects a LEPC for each district, consisting of local and state elected officials, first responders, chemical facility operators, community group representatives, and other stakeholders.<sup>53</sup> LEPCs must provide their SERC with an “emergency plan” for responding to chemical releases, which, among other requirements, specifies evacuation routes; lists emergency equipment and emergency response facilities; and coordinates response strategies

among the police, fire department, and medical personnel.<sup>54</sup> To better inform this process, any facility that possesses an “extremely hazardous substance” above EPCRA threshold levels<sup>55</sup> must notify the SERC, LEPC, and local fire department, and designate representatives to work with the LEPC in developing and implementing the emergency plan.<sup>56</sup> EPA provides guidance to assist SERCs and LEPCs in carrying out their CERCLA responsibilities, and also determines chemical reporting thresholds.

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In the case of a release of an extremely hazardous substance, the facility owner or operator must notify the LEPC and keep the committee informed of any actions taken to respond to or contain the release.<sup>57</sup> Recent EPA guidance encourages LEPCs to consider potential acts of terrorism in developing their emergency plans<sup>58</sup> and as of 2008 more than 77 percent of LEPCs had done so—almost double the amount from a 1999 survey.<sup>59</sup>

EPCRA’s planning provisions do not require individual facilities to prevent or mitigate the harms posed by a chemical release, however, aside from this mandatory cooperation with the LEPC.<sup>60</sup> Without such a mandate, many chemical facilities continued to overlook accident prevention and mitigation even after the passage of EPCRA. A 1988 EPA report to Congress revealed that only 10 percent of chemical facilities had trained their employees in accident prevention, and an even smaller percent used perimeter monitoring to determine when an accidental release escaped facility boundaries.<sup>61</sup>

Responding to that report and other warnings from EPA, the 1990 CAA amendments created new accidental release prevention requirements for chemical facilities. CAA § 112(r)(7) requires facilities that exceed threshold levels of listed chemicals to prepare and submit Risk Management Plans (RMPs) to EPA.<sup>62</sup> These plans assess the potential effects of an accidental chemical release, describe the facility’s program for preventing such releases, and set forth a response program for responding to them.<sup>63</sup> EPA reviews and approves RMPs, which are revised as circumstances warrant and generally made available to the public, with limited security-related exceptions.<sup>64</sup>

EPA issued regulations implementing these RMP requirements in 1996, and the program took effect three years later.<sup>65</sup> The RMP rule divides facilities into three programs, with regulatory requirements increasing based upon the level of risk posed by the facility’s chemical processes.<sup>66</sup> Over 15,000 facilities have submitted RMPs

to EPA since that rule took effect, and these plans must be updated every five years as long as the facility exceeds the rule's chemical thresholds.<sup>67</sup>

In addition to RMP compliance, § 112(r)(1) also imposes a "general duty" requiring any facilities that produce, process, handle or store extremely hazardous substances "to identify hazards which may result from [accidental] releases...to design and maintain a safe facility taking such steps as are necessary to prevent releases, and to minimize the consequences of accidental releases which do occur."<sup>68</sup> This general duty clause applies to both RMP and non-RMP facilities, making facility owners and operators directly liable for their failure to prevent or mitigate accidental releases of extremely hazardous chemicals.<sup>69</sup> Rather than mandating compliance with specific performance standards, the most common enforcement tool in other parts of the Clean Air Act,<sup>70</sup> the general duty clause requires facilities to develop and implement their own site-specific measures, informed by industry protocol, EPA guidance, and general standards of care. EPA may audit facilities or perform site inspections to ensure compliance, and bring enforcement actions with civil penalties if facilities neglect this general duty.<sup>71</sup>

Finally, the 1990 CAA amendments also required the Occupational Safety and Health Administration (OSHA) to promulgate "process safety management" (PSM) standards designed to prevent accidental releases of chemicals that could present a threat to employees.<sup>72</sup> The PSM standard, which took effect in 1992, requires chemical facilities that exceed threshold levels of "highly hazardous chemicals" to comply with a detailed, 14-element workplace safety program, though like the RMP program it does not explicitly safeguard against possible terrorist attacks.<sup>73</sup>

In 2000, EPA issued a "Chemical Safety Alert" warning chemical facility owners to anticipate and prepare for potential criminal attacks.<sup>74</sup> The agency's turned its focus to terrorism again after the September 11, 2001 attacks, when EPA officials visited approximately 30 high-risk chemical facilities and began developing chemical security standards under its CAA § 112(r) authority.<sup>75</sup> Working alongside the Office of Homeland Security, OSHA, and other agencies, EPA even drafted press materials for the rollout of a new security program, with talking points that referred to the CAA as "the quickest path to improving chemical facility security."<sup>76</sup> At the last minute, however, EPA backed off those plans, citing "litigation risks."<sup>77</sup> Instead of mandating security measures, EPA Administrator Christine Whitman announced that the agency would wait for more specific authorization from Congress.<sup>78</sup>

During the ensuing congressional debate, Administrator Whitman grew so frustrated with the politics surrounding chemical security that she asked the White

House to relieve the agency of its lead responsibility for chemical facility protection,<sup>79</sup> a request granted in a presidential directive giving the newly formed DHS primary jurisdiction over critical infrastructure protection.<sup>80</sup> EPA has not seriously considered setting chemical security standards since then, and, despite its temporary and limited authority, DHS is currently the lead agency on chemical security.

### III. Potential Chemical Security Regulation Under the Clean Air Act

During 2001 and 2002, the debate over whether to use the CAA as a source of chemical security standards occurred primarily in private, interagency meetings and calls.<sup>81</sup> The contents of those discussions have never been made public, and while EPA officials invoked vague litigation risks to justify their decision not to pursue chemical security standards,<sup>82</sup> they did not explain their specific legal concerns. Two subsequent government reports have analyzed the scope and limits of EPA's authority by focusing primarily on two parts of CAA § 112(r).<sup>83</sup> First, that section governs only the prevention and mitigation of "accidental releases," raising questions as to whether that term covers emissions caused by deliberate acts of terrorism.<sup>84</sup> Second, § 112(r)(1)'s general duty to minimize the consequences of accidental releases applies "in the same manner and to the same extent" as a similar clause in the Occupational Health and Safety Act (OSH Act), which the Department of Labor has not extended to workplace hazards posed by acts of terrorism.<sup>85</sup> As described in the following section, however, neither of these concerns should preclude EPA from regulating chemical security under the CAA.

#### A. The Meaning of Accidental Release Under CAA § 112(r)

Using the CAA to safeguard against terrorist attacks on chemical plants would require EPA to broaden its previous interpretation of "accidental release." If these new rules were challenged, however, the agency's interpretation should receive deference under *Chevron v. Natural Resources Defense Council*.<sup>86</sup> CAA § 112(r) expressly delegates EPA authority to promulgate regulations implementing its RMP requirements.<sup>87</sup> Implicit in this delegation is the authority to define terms left ambiguous in that section of the statute, including accidental release.<sup>88</sup> Assuming the agency issued its chemical security rules within this delegated authority, which it was planning to do until 2002,<sup>89</sup> its interpretation would be upheld unless foreclosed by the plain meaning of the statute or found to be unreasonable.<sup>90</sup> *Chevron* deference applies even when the statute governs the scope of an agency's jurisdiction,<sup>91</sup> and where, as here, the asserted authority overlaps with another agency's regulatory program.<sup>92</sup> The first question for a reviewing court, therefore, would be whether § 112(r) precludes an interpretation of "accidental release" that covers acts of terrorism.

## 1. The Statutory Definition of “Accidental Release”

Most of the provisions within CAA § 112(r), including the general duty clause of § 112(r)(1) and the RMP requirements of § 112(r)(7), are triggered by the prospect or occurrence of an accidental chemical release.<sup>93</sup> The statute defines accidental release as “an unanticipated emission of a regulated substance or other extremely hazardous substance into the ambient air from a stationary source,”<sup>94</sup> but in the context of terrorism the word “unanticipated” is just as ambiguous as “accidental.” From the perspective of the regulated party (the chemical facility owner), a release caused by an act of terrorism at a chemical plant is generally unanticipated.<sup>95</sup> From the terrorist actor’s perspective, the release is not only anticipated but intentional.

While EPA has not provided a more specific definition of accidental, the authorization for OSHA’s PSM rule under the 1990 CAA Amendments uses similar phrasing.<sup>96</sup> In issuing that rule, OSHA equates the terms “accidental releases,” “major accident,” and “catastrophic release,” the latter of which it defines as “a major uncontrolled emission, fire, or explosion, involving one or more highly hazardous chemicals, that presents serious danger to employees in the workplace.”<sup>97</sup> The PSM rule has not been applied to acts of terrorism, but its broad definition of accidental releases leaves open the possibility of such regulation. Since EPA and OSHA authority stems from similar language in the same statute, EPA could reasonably use OSHA’s definition of accidental release to authorize anti-terrorism safeguards under § 112(r).<sup>98</sup>

## 2. Other Uses of “Accidental Release” In Environmental Contexts

When a statute fails to clearly define a term, courts will often look for its most common usage or trade-specific meaning, if it has one.<sup>99</sup> Some dictionary definitions of “accidental” appear to preclude releases caused by terrorist attacks,<sup>100</sup> others appear to cover such releases,<sup>101</sup> and most are open to multiple interpretations.<sup>102</sup> If nothing else, this reflects an ambiguity that could support *Chevron* deference towards EPA’s revised interpretation.

Moreover, the term “accidental release” often carries a broad definition in the environmental context, which could cover terrorist-caused emissions. For instance, many companies’ general insurance policies cover only environmental liabilities that result from “sudden and accidental” releases, as opposed to intentional discharges or long-term disposal.<sup>103</sup> EPA regulations governing liability insurance requirements define “accidental occurrences” as those that “result[] in bodily injury or property damage neither expected nor intended *from the standpoint of the insured.*”<sup>104</sup> CAA § 112(r) also defines accidental as unexpected, and if relevant expectations are also those of the facility owner, then terrorist-caused releases could reasonably be considered accidental for the purposes of that section.

The term “accidental release” also arises in judicial decisions under the National Environmental Policy Act (NEPA), a statute requiring federal agencies to prepare environmental impact statements (EIS) for major actions with significant environmental consequences.<sup>105</sup> The U.S. District Court for the Northern District of California recently upheld the EIS for a new research lab focused on bioterrorism, in part because the Department of Energy had analyzed a catastrophic release scenario that “takes into account any accidental release, *even a terrorist attack.*”<sup>106</sup> While other federal courts do not require the analysis of terrorism-related releases under NEPA, this split is not due to differing definitions of accidental release but rather varying conceptions of proximate causation.<sup>107</sup> For instance, in holding that the Oyster Creek nuclear power plant did not have to analyze terrorist-caused releases in the EIS for its relicensing application, the Third Circuit Court of Appeals relied upon the fact that the Nuclear Regulatory Commission (NRC) had previously considered “severe *accidents* initiated by external phenomena, such as...sabotage” and concluded that such threats were typically not common enough to merit separate analysis.<sup>108</sup> Sabotage, like terrorism, involves the knowing intervention of a third-party, yet Oyster Creek’s EIS left open the possibility that sabotage-related accidents would have to be analyzed if site-specific information indicated a greater risk than that found by the NRC.<sup>109</sup>

## 3. The Legislative History of CAA § 112(r)

Critics of EPA’s chemical security plans have argued that Congress did not intend for CAA § 112(r) to cover terrorist-caused releases.<sup>110</sup> The debate leading up to the enactment of § 112(r) focused primarily on technical errors and process failures like the one in Bhopal,<sup>111</sup> and the absence of any discussion of terrorism in hearings or floor debates could be interpreted as a sign that Congress did not consider those risks to be covered by the new provisions.<sup>112</sup> On the other hand, lawmakers often draft broad statutes with applications beyond those expressly mentioned or even considered at the time of enactment.<sup>113</sup> Moreover, a discussion of congressional intent would be incomplete without looking to the legislative history of § 112(r), as courts are more likely to discover Congress’ objectives in what lawmakers said and wrote than in trying to interpret their silence.<sup>114</sup>

In its report on the 1990 CAA amendments, the Senate Environment and Public Works Committee defined accidental release as “any event which introduces an extremely hazardous substance into the air whether directly or indirectly,” excluding only those releases authorized by a permit, intentionally vented in order prevent a catastrophic event, or resulting in long-term—as opposed to sudden—health effects.<sup>115</sup> The Committee’s use of a broad definition that is narrowed by discrete exceptions suggests that releases resulting from terrorist attacks, which do not fall under the enumerated exclusions, may

be regulated under the Act.<sup>116</sup> The floor debate supports this interpretation, as lawmakers repeatedly described accidental releases as “sudden” and “catastrophic”<sup>117</sup> and an EPA fact-sheet cited by a bill sponsor divided chemical releases into two categories: “routine releases, such as emissions for industrial smokestacks” and “sudden, irregular accidental releases.”<sup>118</sup> Releases caused by terrorist attacks are far more likely to be characterized as sudden, catastrophic, or irregular than as routine, so they could reasonably be considered “accidental” in light of this legislative history.

Supporters of a narrower reading of “accidental” also point to the events preceding the enactment of CAA § 112(r) to bolster their interpretation. As described above, the accidental release provisions of the 1990 CAA amendments were largely a response to the 1984 Bhopal disaster and subsequent chemical accidents that held no clear connection to terrorism.<sup>119</sup> Beyond any single event, however, Congress was most concerned about the sheer amount of chemical accidents that had occurred on U.S. soil, evidence of the breadth of the nation’s vulnerability. The House Energy and Commerce Committee, Senate Environment and Public Works Committee, and individual lawmakers all cited an EPA study that identified over 11,000 chemical accidents on U.S. soil between 1980 and 1987, 17 of which could have been as harmful as the release in Bhopal.<sup>120</sup> This Acute Hazardous Events Database drew upon accident reports from newspapers, state governments, and regional EPA offices, coding each one for its primary cause.<sup>121</sup> One of the listed codes in the database was for arson and vandalism.<sup>122</sup> If deliberate criminal activities were among the accidents that motivated the passage of CAA § 112(r), it is difficult to define “accidental” so narrowly as to exclude terrorist-caused releases today.

#### 4. Post-Enactment Legislative Developments on Chemical Security

Even if the original text and history of the 1990 CAA amendments authorized EPA to classify terrorist-caused releases as “accidental” and subject to regulation under § 112(r), subsequent regulatory and legislative developments may narrow that authority.<sup>123</sup> Here, two such events merit further analysis: Congress’ rejection of a bill that would have required EPA regulation of chemical security legislation and the passage of legislation giving such authority, at least temporarily, to DHS.

In 2000, 2002, and 2003, Congress considered chemical security legislation that would have given EPA regulatory authority over terrorist-caused releases under § 112(r) and mandated anti-terrorism safeguards at chemical plants.<sup>124</sup> The introduction of these bills does not indicate their sponsors’ belief that EPA lacked chemical security authority under the CAA as written. Lawmakers often introduce legislation to clarify vague regulatory authority, or, more likely in this case, compel action where

an agency has not exercised its full regulatory discretion. Likewise, the failure of those bills does not reflect Congress’ intent to deny EPA jurisdiction over chemical security. Every Congress, hundreds of bills are introduced but never proceed to a floor vote.<sup>125</sup> There are countless explanations for this phenomenon, and courts do not imply any specific legislative intent from such inaction.<sup>126</sup>

To regulate chemical security under § 112(r), EPA must overcome not only legislative inaction but also the budget rider authorizing DHS to set temporary chemical security standards. In the rule challenged in *FDA v. Brown & Williamson Tobacco Corp.*, the Food and Drug Administration (FDA) reversed its longstanding position that it lacked the authority to regulate tobacco under the Food, Drug, and Cosmetic Act (FDCA) and attempted to control the marketing and sale of tobacco products to minors.<sup>127</sup> Prior to FDA’s reversal, however, Congress had enacted a series of statutes governing the sale and use tobacco products, several of which assigned authority to other executive agencies.<sup>128</sup> Reading this subsequent legislation “against the backdrop of the FDA’s consistent and repeated statements that it lacked authority,” the Supreme Court held that “Congress’ tobacco-specific statutes have effectively ratified the FDA’s [previous] position,” barring the FDA’s new interpretation.<sup>129</sup>

This tobacco legislation is distinguishable from the chemical security rider, however. The former involved six stand-alone bills enacted over the course of 35 years, creating a “distinct regulatory scheme to address the problem of tobacco and health.”<sup>130</sup> Moreover, given the high profile of the issue, these bills attracted substantial Congressional attention; the court found it “hardly conceivable that...any Member of Congress was not abundantly aware of what was going on.”<sup>131</sup> In contrast, the chemical security rider was drafted and inserted behind the closed doors of a conference committee, occupying less than two pages of a 109-page military spending bill which passed almost unanimously following a single day’s debate on the conference report.<sup>132</sup> Even if most lawmakers were aware of its addition, a generous assumption, the rider does not reflect a clear intent to foreclose EPA regulation. Instead, it was widely described as a stopgap measure, granting DHS authority for only three years and containing a savings clause expressly preserving other sources of statutory authority over the manufacture, distribution, and use of hazardous chemicals.<sup>133</sup>

Moreover, prior to its challenged regulation the FDA had consistently denied its own authority to control tobacco under the FDCA, creating a presumption of incapacity that Congress “effectively ratified” with its subsequent legislation. On the other hand, there is no indication that EPA ever considered expanding CAA § 112(r) to cover terrorist attacks before September 11, 2001. After analyzing its authority and visiting a series of chemical plants, EPA concluded that it could classify ter-

rorist-caused releases as “accidental” but litigation risks and policy concerns cautioned against such regulation.<sup>134</sup> While the agency has since deferred to Congress and DHS on chemical security, it has never indicated that its initial assessment of its authority has changed. This resembles the EPA’s position on greenhouse gas (GHG) regulation in *Massachusetts v. EPA*,<sup>135</sup> where the agency had previously determined that it had the authority to control GHG emissions under the Clean Air Act but had never chosen to exercise that power.<sup>136</sup> Thus, despite separate legislation aimed specifically at addressing global warming, the Supreme Court distinguished *Brown & Williamson* and held that EPA retained the authority to regulate GHGs under the CAA as well.<sup>137</sup>

Nor would the EPA’s chemical security rules necessarily conflict with the DHS rider. In *Brown & Williamson*, the majority held that if the FDA were to regulate tobacco under the FDCA it would be required to ban all tobacco products, a drastic remedy that contravenes the “collective premise of [pre-existing tobacco] statutes... that cigarettes and smokeless tobacco will continue to be sold in the United States.”<sup>138</sup> The EPA is neither required nor authorized to ban groups of chemicals under CAA § 112(r); instead, it can merely require advanced planning and site-specific security measures. At best, this approach could fill the gaps in DHS regulations; at worst, EPA rules would be redundant with—but not contradictory to—existing chemical security standards.

It might seem counterintuitive to allow EPA to exercise largely the same regulatory authority that Congress recently gave, more explicitly, to another agency.<sup>139</sup> These concerns may guide EPA in deciding whether and how to regulate, but the potential for redundancy does not foreclose the agency’s statutory authority. In fact, agencies’ jurisdictional boundaries often overlap; Executive Order 12146 envisions this possibility and creates a formal mechanism for resolving such inter-agency disputes.<sup>140</sup> In affirming EPA’s authority to regulate vehicle GHG emissions, the Supreme Court acknowledged that such standards would inevitably have effects similar to fuel economy regulations statutorily assigned to the National Highway Traffic and Safety Administration (NHTSA). Rather than interpreting EPA’s authority narrowly to avoid a potential conflict, the Court expressed its faith that “the two agencies can[] both administer their obligations and yet avoid inconsistency.”<sup>141</sup> While this quote was *dicta* in the Supreme Court’s decision, two lower courts reached a similar holding in separate challenges to EPA’s authority, a result made even more striking because the federal fuel economy law expressly preempts the actions of other agencies “related to fuel economy standards.”<sup>142</sup> In contrast, the chemical security rider giving contained a savings clause preserving EPA’s potentially overlapping jurisdiction.

## B. The Clean Air Act’s Cross-Reference to the OSH Act’s General Duty Clause

As described in Section II, the general duty clause of CAA § 112(r)(1) creates an affirmative obligation for chemical facility owners to: (a) identify hazards that may result from accidental releases, (b) design and maintain a safe facility by acting to prevent such releases, and (c) minimize the consequences of releases that do occur.<sup>143</sup> EPA does not issue specific regulations defining the bounds of this duty; instead, the agency uses informal guidance and individual enforcement actions to ensure compliance.<sup>144</sup> This general duty, however, applies only “in the same manner and to the same extent” as a similar clause in the Occupational Safety and Health Act (OSH Act).<sup>145</sup> Thus, to the extent that EPA relies on the general duty clause in its chemical security program, this cross-reference may limit the agency’s regulatory authority.

The OSH Act general duty clause requires employers to “furnish...employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.”<sup>146</sup> While this obligation extends beyond compliance with specific safety standards, the Department of Labor (DOL)—which contains the Occupational Safety and Health Administration (OSHA)—has interpreted it not to cover hazards caused by acts of terrorism.<sup>147</sup>

DOL’s position does not bar EPA from interpreting its general duty clause more broadly, however. First, while DOL’s interpretations of the OSH Act general duty clause may be entitled to deference in some cases, its views are not dispositive.<sup>148</sup> DOL’s interpretations of the general duty clause are reviewed for their consistency with the OSH Act, and courts have not yet ruled on the clause’s application to terrorism. Moreover, the general duty clauses in the CAA and OSH Act serve different purposes. The former imposes an obligation to prevent and mitigate accidental releases involving extremely hazardous substances; the latter requires all employers to minimize the impacts of workplace hazards. While Congress may have wanted to place some limits on EPA’s discretion under the CAA general duty clause, it would make little sense to delegate full interpretive authority over that distinct statutory provision to OSHA, however.

The legislative history of CAA § 112(r) further suggests that EPA’s interpretation of its general duty clause may differ from OSHA’s. In defining the scope of chemical facility owners’ duties, the Senate Environment and Public Works Committee cited a 1984 Occupational Safety and Health Review Commission (OSHRC) decision, *Secretary of Labor v. Duriron Company*,<sup>149</sup> which set a four-part standard for the OSH Act general duty clause.

In order to establish a...violation, the Secretary must prove: (1) the employer failed to render its workplace free of a hazard,

(2) the hazard was recognized either by the cited employer or generally within the employer's industry, (3) the hazard was causing or was likely to cause death or serious harm, and (4) there was a feasible means by which the employer could have eliminated or materially reduced the hazard.<sup>150</sup>

The reference to *Duriron* reveals that, in some cases at least, Congress intended OSH Act precedent to guide the CAA's general duty requirements. But while adopting the OSH Act's standard for general duty violations, Congress expressly tasked EPA with applying this test, opening the door to CAA enforcement that goes beyond OSHA's interpretation.<sup>151</sup>

### 1. Failure To Render a Facility Free of a Hazard

The first prong of the *Duriron* test requires EPA to establish a facility's failure to render itself free of hazards posed by accidental chemical releases.<sup>152</sup> This criterion does not significantly limit the application of the general duty clause; in fact, it no longer serves a clear purpose in the general duty analysis. Prior to *Duriron*, when courts often used a three-part test for OSH Act general duty clause violations, this first prong was often interpreted to require a showing that the employer could feasibly reduce or eliminate the hazard.<sup>153</sup> But *Duriron* separated out feasibility into a separate inquiry, depriving the first criterion of much of its meaning. As a result, it is often untested,<sup>154</sup> and since chemical releases following terrorist attacks present a clear hazard to the surrounding community, this prong should not prevent EPA from bringing general duty clause claims against chemical facilities.

### 2. Recognition of the Hazard

The most contentious aspect of the general duty clause is often whether the employer (or facility owner, in the case of the CAA) "recognized" the hazard at issue. Actual recognition is sufficient but not necessary, as constructive recognition also exists when conditions are known to be hazardous within an industry in general.<sup>155</sup> The goal of this prong is to separate speculative or theoretical threats from those that the typical employer would take steps to prevent.<sup>156</sup>

The threat posed by violence in the workplace is generally not considered a recognized hazard under the OSH Act's general duty clause.<sup>157</sup> In a 1995 dispute involving an employer's failure to protect apartment building workers from violent residents, the Occupational Safety and Health Review Commission (OSHRC) found no violation of the general duty clause, reasoning that criminal acts of violence are so impulsive and unpredictable that "a high standard of proof must be met to show that the employer itself recognized the hazard of workplace violence."<sup>158</sup> In so holding, the OSHRC distinguished "hazards that arise from some condition inherent in the environment

or the processes of the employer's workplace," which are the primary focus of the OSH Act, from hazards that arise from "demented, suicidal, or willfully reckless" conduct, which are generally regulated through the criminal justice system.<sup>159</sup> More recently, the 10th Circuit Court of Appeals held that an employer's acceptance of guns on work premises did not violate the OSH Act's general duty clause.<sup>160</sup> Chemical facility owners could argue that if workplace violence is too unpredictable to be a recognized hazard under the OSH Act then even less common acts of terrorism should not be recognized under the CAA's general duty clause.

While general acts of workplace violence are not a recognized hazard, the more specific threat of a terrorist attack may still be recognized within the chemical industry. While raising OSHA's burden of proof, the OSHRC has acknowledged that certain instances of criminal activity could fall under the OSH Act's general duty clause, a fact-specific determination that depends in part upon "[p]ublicized studies, enactment of legislation, industry publications, or similarly disseminated information known to an applicable industry."<sup>161</sup> The terrorist threat to chemical plants has been well documented and publicized, by sources ranging from the Department of Justice to the Army Surgeon General.<sup>162</sup> Congress enacted legislation aimed at addressing this very subject,<sup>163</sup> and the ACC has made its own site security code binding upon its members.<sup>164</sup> A 2000 EPA site security alert described chemical facilities as potential terrorist targets.<sup>165</sup> And Frederick Weber, president of the ACC, said two months after the September 11, 2001 terrorist attacks: "No one needed to convince us that we could be—and indeed would be—a target at some future date."<sup>166</sup> Given the specificity of these warnings, there is a stronger case for inferring the recognition required to regulate chemical plant security under the CAA's general duty clause than for regulating general acts of workplace violence under the OSH Act's.

### 3. Likelihood of Death or Serious Harm

Under the third prong of *Duriron*, the general duty clause only applies where death or serious harm is a likely result of the hazard. The hazard itself need not be likely to occur; instead, this criterion focuses on the probability of adverse consequences in the event of a workplace incident (or, for the purposes of the CAA, an accidental release).<sup>167</sup> Chlorine gas, a toxic substance found in large quantities at many chemical plants, has been used as a lethal nerve agent since World War I,<sup>168</sup> and 33 people died in non-terrorist related chemical accidents between 1994 and 1999.<sup>169</sup> A chlorine release from a major chemical facility could kill 17,500 people,<sup>170</sup> impacts far greater than other cases where courts have recognized a likelihood of death or serious harm under the OSH Act's general duty clause.<sup>171</sup>

#### 4. Feasibility of Reducing the Hazard

Finally, neither the CAA nor the OSH Act's general duty clause requires the elimination of all risk at any cost. Instead, EPA and OSHA have the burden of showing specific, feasible measures that the facility owner or employer should have taken to materially reduce the likelihood of harm.<sup>172</sup> Such measures need not be cost-effective, but they cannot threaten the economic viability of the regulated party.<sup>173</sup> They cannot shift risk from one phase of the production process to another; instead, they must yield a net safety benefit.<sup>174</sup>

This feasibility prong does not restrict EPA's general authority to regulate terrorist-caused releases under the Clean Air Act. Rather, it limits the specific remedies the agency can require in a given case. The chemical industry acknowledges that there is a range of feasible steps that could reduce the threat posed by terrorism, though it has argued that these protective measures are site-specific and resisted what it views as "one size fits all" mandates in federal chemical security proposals.<sup>175</sup> Because the CAA requires EPA to make specific findings about the feasibility of safety improvements at a given facility, the general duty clause is well positioned to meet this critique.

Thus, contrary to EPA's stated concerns and Richard Falkenrath's dour assessment,<sup>176</sup> nothing in the text of CAA § 112(r) would preclude EPA from issuing chemical security safeguards, especially given the courts' deference to agency interpretations of ambiguous statutes. Were EPA to pursue the course described above, the threat of added regulation would likely galvanize the chemical industry and prompt Congressional action on chemical security. If this led to comprehensive and robust security standards, the EPA standards would achieve their primary goal without ever taking effect. Even if an EPA proposal simply to a statutory amendment that preempted the agency's efforts, our chemical plants would be no less secure than they are today, and the vote could help build momentum behind a comprehensive legislative solution.

#### Conclusion

The Clean Air Act was not drafted with national security in mind, and EPA's primary area of expertise is not infrastructure protection. At this point, however, that statute and agency provide the best option for filling the gaps in our existing chemical security standards and resolving a longstanding area of vulnerability. For that reason alone, EPA should consider regulating under its existing statutory authority, picking up where it abruptly left off in 2002.

Before such rules are finalized, Congress may still render the debate over EPA's statutory authority moot. The House of Representatives passed comprehensive chemical security legislation for the first time in November 2009,<sup>177</sup> and while the Senate did not take up the bill the issue is expected to resurface in the 112th Congress.

New legislation can eliminate the litigation risks that disrupted EPA's initial attempt at regulation, and capitalize on the chemical security expertise that DHS has developed under the temporary CFATS program.

Forthcoming chemical security legislation, however, should also retain a core regulatory role for EPA. Some lawmakers have attempted to remove EPA from the chemical security debate,<sup>178</sup> and the latest House bill limits EPA authority to water treatment plants.<sup>179</sup> In doing so, it sacrifices much of the relevant expertise that EPA has developed under CERCLA, the CAA's RMP program, and other regulatory initiatives.

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*"New legislation can eliminate the litigation risks that disrupted EPA's initial attempt at regulation, and capitalize on the chemical security expertise that DHS has developed under the temporary CFATS program."*

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Securing the nation's chemical facilities and reducing the risk to surrounding communities is a daunting task, requiring not only enhanced physical safeguards and intelligence gathering but also risk analysis of hazardous chemicals and their possible alternatives. While DHS will clearly play a central role in organizing these efforts, Congress must be careful not to overlook the expertise that EPA developed decades before the Department of Homeland Security was created in 2003. If lawmakers do not require such interagency collaboration, and DHS does not voluntarily pursue it, then EPA can draw upon its existing statutory authority as needed to fully address our homeland security vulnerabilities.<sup>180</sup>

#### Endnotes

1. Memorandum from Dana A. Shea, Resources, Science, and Industry Division, Congressional Research Serv., to Rep. Edward Markey 4-6, tbl.1 (March 4, 2008) (compiling data from the worst-case scenario in chemical plants' Risk Management Plans), available at <http://www.hsdl.org/?view&doc=89662&coll=public>. Under the Clean Air Act, stationary sources that exceed a threshold quantity of a regulated substance must submit Risk Management Plans (RMPs), including a worst-case release projection, to EPA. 40 C.F.R. §§ 68.150-68.195 (2008). The RMP program is described in greater detail in Part II, *infra*.
2. Department of Homeland Security Appropriations Act of 2007, Pub. L. No. 109-295, § 550, 120 Stat. 1335, 1388 [hereinafter DHS Appropriations Rider].
3. See, e.g., Department of Homeland Security Appropriations Act of 2010, Pub. L. No. 111-83, § 550, 123 Stat. 2142, 2177.
4. See Clean Air Act § 112(r), 42 U.S.C. § 7412(r) (2000); Eric Pianin, *Chemical Plants Face Oversight*, WASH. POST, Aug. 5, 2002, at A13 (describing EPA plans).
5. U.S. GEN. ACCOUNTING OFFICE, HOMELAND SECURITY: VOLUNTARY INITIATIVES ARE UNDER WAY AT CHEMICAL FACILITIES, BUT THE EXTENT OF SECURITY PREPAREDNESS IS UNKNOWN 12 (2003).

6. Art Levine, *Dick Cheney's Dangerous Son-in-Law: Philip Perry and the Politics of Chemical Security*, WASH. MONTHLY, Mar. 2007, at 38, 40–41, available at <http://www.washingtonmonthly.com/features/2007/0703.levine.html>.
7. See Kelly Rain, *Establishing Sound Chemicals Management: A Prerequisite for Achieving the Millennium Development Goals*, 6 SUSTAINABLE DEV. L. & POL'Y 27 (2005) ("Virtually every manmade good involves the use of intentionally produced chemicals."); Noah Sachs, *Blocked Pathways: Potential Legal Responses to Endocrine Disrupting Chemicals*, 24 COLUM. J. ENVTL. L. 289, 330 (1999) ("United States production of synthetic chemicals was over 435 billion pounds in 1992, or 1,600 pounds per capita.").
8. American Chemistry Council, Essential<sub>2</sub> Public Education Campaign, [http://www.americanchemistry.com/s\\_acc/index.asp?noflash=1](http://www.americanchemistry.com/s_acc/index.asp?noflash=1) (last visited May 9, 2010). The ACC campaign features billboards, posters, and other advertisements declaring chemicals "Essential<sub>2</sub>" workplace safety, clean air, energy production, and more. See *id.* for examples.
9. See Env'tl. Protection Agency, Methyl Isocyanate: Health Hazard Information, <http://www.epa.gov/ttn/uatw/hlthef/methylis.html> (last visited May 9, 2010). For more information on the Bhopal disaster, see Edward Broughton, *The Bhopal Disaster and Its Aftermath: A Review*, ENVTL. HEALTH (May 2005), available at <http://www.ehjournals.net/content/4/1/6>.
10. See Ben A. Franklin, *Toxic Cloud Leaks at Carbide Plant in West Virginia*, N.Y. TIMES, Aug. 12, 1985, at A1. Among the several chemicals released in the leak, the chemical of concern, aldricarb oxime, has been called a "mild irritant," but the plant also used large amounts of methyl isocyanate, the gas that leaked in Bhopal. *Id.*
11. See Charlie Savage, *Despite Safety Concerns, Chlorine Gas Tanks Remain in Use*, BOSTON GLOBE, May 29, 2005, at A26 ("Water-treatment plants in dozens of cities continue to use tanks of concentrated chlorine gas, the same substance used as a deadly weapon on World War I battlefields...."); *Chlorine Gas Attacks Hint At New Enemy Strategy*, ASSOCIATED PRESS, Feb. 22, 2007, available at <http://www.msnbc.msn.com/id/17254507/>.
12. Chemical thresholds are established in the EPA's RMP regulations. 40 C.F.R. § 68.130 and tbls.1–4 (2008). At the end of 2008, EPA had approximately 14,000 RMPs on file. See ENVTL. PROTECTION AGENCY, EPA, CLEAN AIR ACT SECTION 112(R): ACCIDENTAL RELEASE PREVENTION/RISK MANAGEMENT PLAN RULE (2009), available at [http://www.epa.gov/oem/docs/chem/caa112\\_rmp\\_factsheet.pdf](http://www.epa.gov/oem/docs/chem/caa112_rmp_factsheet.pdf).
13. See, e.g., Eric Pianin, *Study Assesses Risk of Attack on Chemical Plant*, WASH. POST., Mar. 12, 2002, at A8 (describing Army surgeon general study that "ranked the threat of attacks against chemical plants second only to the widespread use of biological weapons"); Press Release, Department of Homeland Security, Statement by the Department of Homeland Security on Continued Al-Qaeda Threats (Nov. 21, 2003), available at [http://www.dhs.gov/xnews/releases/press\\_release\\_0300.shtm](http://www.dhs.gov/xnews/releases/press_release_0300.shtm).
14. See, e.g., *Chemical Attack on America: How Vulnerable are We?: Hearing before the S. Comm. on Homeland Security and Gov't Affairs*, 109th Cong. (2005) (statement of Stephen E. Flynn, Senior Fellow in National Security Studies, Council on Foreign Relations) [hereinafter "Flynn Testimony"]; *id.* (statement of Richard A. Falkenrath, Deputy Commissioner for Counter Terrorism, New York City Police Department) [hereinafter "Falkenrath Testimony"].
15. See, e.g., *The 9/11 Commission and the Course Ahead, Hearing before the H. Select Comm. on Homeland Sec.*, 108th Cong. (2004) (statement of Rep. Thompson) (describing chemical plants as "pre-positioned weapons of mass destruction"); Press Release, Sen. John Corzine, Sen. Corzine Lauds New Chemical Plant Security Bill (Dec. 20, 2005) (same).
16. See, e.g., Michael Chertoff, Homeland Security Secretary, Remarks at the National Chemical Security Forum (Mar. 21, 2006), available at [http://www.dhs.gov/xnews/speeches/speech\\_0276.shtm](http://www.dhs.gov/xnews/speeches/speech_0276.shtm); DHS Dir. Tom Ridge and EPA Adm'r Christine Whitman, Letter to the Editor, *A Security Requirement*, WASH. POST, Oct. 6, 2002, at B6.
17. Press Release, Sen. Frank Lautenberg, Senators Lautenberg, Obama and Menendez Introduce Sweeping Bill to Tighten Security at Chemical Plants (Mar. 30, 2006), available at <http://lautenberg.senate.gov/newsroom/record.cfm?id=253919>.
18. See STEPHEN E. FLYNN, AMERICA THE VULNERABLE 119 (2004) ("There are no federal laws that establish minimum security standards at chemical facilities."); DEP'T OF HOMELAND SECURITY, THE PHYSICAL PROTECTION OF CRITICAL INFRASTRUCTURE AND KEY ASSETS 65 (2003) ("However, there is currently no clear, unambiguous legal or regulatory authority at the federal level to help ensure comprehensive, uniform security standards for chemical facilities.").
19. GAO, *supra* note 5, at 15–16, 27.
20. See Philip Auerswald et al., *Where Private Efficiency Meets Public Vulnerability: The Critical Infrastructure Challenge*, in SEEDS OF DISASTER, ROOTS OF RESPONSE: HOW PRIVATE ACTION CAN REDUCE PUBLIC VULNERABILITY 9–10 (Philip Auerswald et al. eds., 2006) (describing "security externalities"); Peter Orzag, Statement before the National Commission on Terrorist Attacks Upon the United States, Nov. 19, 2003, available at [http://govinfo.library.unt.edu/911/hearings/hearing5/witness\\_orzag.htm](http://govinfo.library.unt.edu/911/hearings/hearing5/witness_orzag.htm) ("Individuals or firms deciding how best to protect themselves against terrorism are unlikely to take the external costs of an attack fully into account... Without government involvement, private markets will thus typically under-invest in anti-terrorism measures.").
21. See generally, e.g., U.S. PIRG, TOO CLOSE TO HOME: A REPORT ON CHEMICAL ACCIDENT RISKS IN THE UNITED STATES (1998) (emphasizing risks of chemical accidents). Greenpeace also mounted a "Chlorine Free by '93" campaign to phase out the use of lethal chlorine gas in pulp and paper production. While not directly addressing the threats posed by terrorists, these efforts were precursors to later chemical security debates involving many of the same advocates. See Chuck McCutcheon, *Alternatives to Chlorine Gain Steam Nationwide*, NEWARK STAR-LEDGER, Jan. 14, 2005, at A5.
22. See, e.g., U.S. PIRG, *supra* note 21, at 18–20 ("Both Inherent Safety and pollution prevention share a similar goal: changes in technologies, products, and raw materials to reduce toxics-related hazards at the source."); McCutcheon, *supra* note 21.
23. See generally Paul Orum, Ctr. for Am. Progress, *Chemical Security 101: What You Don't Have Can't Leak, or Be Blown Up By Terrorists* (2008) (listing examples of chemical facilities that have voluntarily adopted safer technologies or process).
24. See Accidental Release Prevention Requirements: Risk Management Programs Under Clean Air Act Section 112(r)(7), 61 Fed. Reg. 31,667, 31,674 (June 20, 1996) (explaining absence of IST requirements in EPA's RMP rule). Some state and local governments, on the other hand, have begun requiring the consideration—and, in some cases, the adoption—of IST by vulnerable chemical facilities. See, e.g., Contra Costa County, Cal., Code ch. 450-8.016(d)(3) (requiring chemical facilities to "select and implement inherently safer systems to the greatest extent feasible").
25. A 2008 report by the Center for American Progress identified over 300 high-risk facilities where specific chemical or process changes could substantially reduce the risk to surrounding communities. See generally Orum, *supra* note 23. Ultimately, however, information from the facilities themselves could provide a more complete and accurate assessment of the potential for IST.
26. See Trevor A. Kletz, *What You Don't Have, Can't Leak*, 6 CHEMISTRY & INDUS. 278 (1978).

27. See Statement of Carol Browner, EPA Administrator, on Pollution Prevention: The New Environmental Ethic (June 15, 1993), available at <http://www.epa.gov/p2/pubs/p2policy/policy.htm> (“The Pollution Prevention Act establishes a bold national objective for environmental protection: ‘[T]hat pollution should be prevented or reduced at the source whenever feasible’”). The Pollution Prevention Act, passed as an amendment to a 1990 budget bill, defines “source reduction” as “any practice which...reduces the hazards to public health and the environment associated with the release of [hazardous] substances, pollutants, or contaminants,” including “substitution of raw materials.” 42 U.S.C. 13102(5)(a) (2006).
28. See Carl D. Leonnig & Spencer S. Hsu, *Fearing Attack, Blue Plains Ceases Toxic Chemical Use*, WASH. POST, Nov. 10, 2001, at A1.
29. Chemical Security Act of 1999, S. 1470, 106th Cong. § 3(b) (1999).
30. See James V. Grimaldi & Guy Gugliotta, *Chemical Plants Are Feared as Targets: Views Differ on Ways to Avert Catastrophe*, WASH. POST, Dec. 16, 2001, at A1 (reporting that Atta asked, “What kind of chemicals are in those massive storage tanks?” as he flew over them in a small aircraft).
31. *Id.*
32. Chemical Security Act of 2001, S. 1602, 107th Cong. § 3(7) (2001).
33. See John B. Judis, *Poison: The GOP Caves to the Chemical Lobby*, NEW REPUBLIC, Jan 27, 2003, at 12–13, available at <http://www.tnr.com/article/poison> (describing the ACC’s August recess lobbying efforts); COMMON CAUSE, CHEMICAL REACTION 3–5 (2003) (quoting congressional staff describing the ACC and American Petroleum Institute as “ringleaders” of the August 2002 lobbying efforts).
34. Letter from Sens. Jim Inhofe, Bob Smith, Arlen Specter, George Voinovich, Pete Domenici, Mike Crapo and Kit Bond to colleagues (Sept. 10, 2002), available at [http://news21project.org/mars/media/2/application/EPW\\_Rs\\_letter\\_9-02.pdf](http://news21project.org/mars/media/2/application/EPW_Rs_letter_9-02.pdf) (voicing concerns that the Corzine bill “severely misses the mark”).
35. See, e.g., Rebecca Leung, *60 Minutes, U.S. Plants: Open to Terrorists*, CBS NEWS, June 13, 2004, available at <http://www.cbsnews.com/stories/2003/11/13/60minutes/main583528.shtml> (“[I]n the center of Houston, where a terrorist attack might affect three million people, it looked as if an intruder could simply walk right in.”); Carl Prine, *Chemicals Pose Risks Nationwide*, PITTSBURGH TRIB.-REV., May 5, 2002 (documenting security lapses at chemical plants in Baltimore, Chicago, and Houston).
36. Compare Chemical Security Act, S. 157, 108th Cong. (2003) (environmentalist-supported bill sponsored by Sen. Corzine), with Chemical Facilities Security Act, S. 994, 108th Cong. (2003) (industry-supported bill sponsored by Sen. Inhofe).
37. See New Jersey Domestic Security Preparedness Task Force, *Best Practices Standards at TPCA/DPCC Chemical Security Facilities (2005)* (establishing statewide chemical security standards); NEW JERSEY DEP’T OF ENVTL. PROTECTION, GUIDANCE ON INHERENTLY SAFER TECHNOLOGY (2006); Congressional Research Service Memorandum, *supra* note 1, at 5.
38. See Chemical Facility Anti-Terrorism Act of 2006, H.R. 5695, 109th Cong. (2006).
39. DHS Appropriations Rider, *supra* note 2.
40. For a detailed account of the administration’s role in these conference negotiations, see Levine, *supra* note 6.
41. DHS Appropriations Rider, *supra* note 2.
42. CLAUDIA COPELAND, CONG. RESEARCH SERV., TERRORISM AND SECURITY ISSUES FACING THE WATER INFRASTRUCTURE SECTOR 1 (May 26, 2009) (quoting FBI Director J. Edgar Hoover), available at <http://fas.org/sgp/crs/terror/RL32189.pdf>. While many water treatment plants have voluntarily improved their security since the Sept. 11 terrorist attacks, and many drinking water facilities are required to prepare vulnerability assessments under the 2002 Bioterrorism Preparedness Act, EPA is not authorized to require specific site security plans or to promulgate security-related performance standards pursuant to that law. *Id.* at 5–6, 14.
43. Chemical Facility Anti-Terrorism Standards: Interim Final Rule, 72 Fed. Reg. 17688, 17718 (Apr. 9, 2007) (“[The chemical security rider] prohibits the Department from disapproving a site security plan ‘based on the presence or absence of a particular security measure,’ including inherently safer technologies.”).
44. *Id.*
45. DANA A. SHEA, CONG. RESEARCH SERV., CHEMICAL FACILITY SECURITY: REAUTHORIZATION, POLICY ISSUES, AND OPTIONS FOR CONGRESS 3, 5 (2010), available at <http://www.fas.org/sgp/crs/homesecc/R40695.pdf>.
46. *Id.*
47. See Ben Geman, *Security Provision Makes the Cut Into DHS Conference Report*, ENV’T & ENERGY DAILY, Sept. 26, 2006 (quoting Sen. Gregg); Rep. Loretta Sanchez, Op-Ed., *Chemical Security Legislation Needed*, ROLL CALL, Sept. 25, 2006, available at: [http://www.rollcall.com/features/Homeland-Security\\_2006/homeland\\_security/15109-1.html](http://www.rollcall.com/features/Homeland-Security_2006/homeland_security/15109-1.html) (“Any language authorizing chemical plant security attached to an appropriations bill must be considered only a stopgap measure put in place to begin the work of securing chemical plants while work continues on passing a comprehensive chemical plant security bill.”).
48. See SHEA, *supra* note 45, at 11, 18–19. On Feb. 4, 2010, four senators introduced a bi-partisan bill that would further extend the temporary DHS chemical security program until 2015. Continuing Chemical Facilities Antiterrorism Security Act of 2010, S. 2996, 111th Cong. (2010).
49. See, e.g., Full-Year Continuing Appropriations Act, H.R. 3082 (as passed by the House of Representatives and the Senate, Sept. 21, 2010) (extended CFATS program until March 4, 2011).
50. See Michael B. Gerrard, *Disasters First: Rethinking Environmental Law After September 11*, 9 WIDENER L. SYMP. J. 223, 223–25 (2003). The Resource Conservation and Recovery Act (RCRA) requires facilities that store hazardous waste to control entry gates and conduct round-the-clock surveillance, but this statute covers only a fifth of our nation’s chemical plants. See Leticia M. Diaz, *Chemical Homeland Security, Fact or Fiction: Is the U.S. Ready for an Attack on Our Chemical Facilities?*, 56 CATH. U. L. REV. 1171, 1184–85 (2007).
51. Eric M. Falkenberg, Note, *The Emergency Planning and Community Right-to-Know Act: A Tool for Toxic Release Reduction in the 90s*, 3 BUFF. ENVTL. L.J. 1, 3–5 (1995). See also David W. Case, *Corporate Environmental Reporting As Informational Regulation: A Law and Economics Perspective*, 76 U. COLO. L. REV. 379, 385 (describing EPCRA as, in part, a response to the Bhopal and Institute releases).
52. 42 U.S.C. § 11001 (2006). In selecting the SEPC, the governor shall “to the extent practicable, appoint persons...who have technical expertise in the emergency response field.” *Id.*
53. *Id.*
54. 42 U.S.C. § 11003 (2006).
55. 40 C.F.R. § 370.20 (2008) (setting EPCRA thresholds for various chemicals and hazardous substances).
56. 42 U.S.C. § 11003(d) (2006).
57. 42 U.S.C. § 11004 (2006). These requirements apply regardless of the cause of the release. *Id.*
58. ENVTL. PROT. AGENCY, LEPCs AND DELIBERATE RELEASES: ADDRESSING TERRORIST ACTIVITIES IN THE LOCAL EMERGENCY PLAN (2001), available at <http://www.epa.gov/oem/docs/chem/lepcc.pdf>.
59. ENVTL. PROT. AGENCY, 2008 NATIONWIDE SURVEY OF LOCAL EMERGENCY PLANNING COMMITTEES 6 (2008), available at [http://www.epa.gov/OEM/docs/chem/2008\\_lepcsurv.pdf](http://www.epa.gov/OEM/docs/chem/2008_lepcsurv.pdf).
60. See James C. Belke and Deborah Y. Dietrich, *The Post-Bhopal and Post-9/11 Transformations in Chemical Emergency Prevention and Response Policy in the United States*, 18 J. OF LOSS PREVENTION IN

THE PROCESS INDUSTRIES 375, 376 (2005) (“EPCRA does not require facilities to take any actions to prevent chemical accidents from occurring.”).

61. See Rep. Henry Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1721, 1783 n.283 (citing ENVTL. PROT. AGENCY, REVIEW OF EMERGENCY SYSTEMS: REPORT TO CONGRESS (1988)). The report recommended that “[t]he federal government should act as a catalyst, identifying problems and providing guidance to state and local governments and to industry.” *Id.*
62. 42 U.S.C. § 7412(r)(7) (2006). Threshold levels for RMP reporting depend upon the chemical. See 40 C.F.R. §§ 68.115, 68.130 (2008) (listing thresholds and regulated chemicals).
63. 42 U.S.C. § 7412(r)(7).
64. *Id.* See generally ENVTL. PROT. AGENCY, RMP GUIDANCE: COMMUNICATION WITH THE PUBLIC (2004) (describing limits on public access to certain data from chemical plant RMPs).
65. Accidental Release Prevention Requirements: Risk Management Programs Under Clean Air Act Section 112(r)(7), 61 Fed. Reg. 31,667 (June 20, 1996).
66. See generally ENVTL. PROT. AGENCY, GENERAL RISK MANAGEMENT PROGRAM GUIDANCE: APPLICABILITY OF PROGRAM LEVELS (2004) (describing varying program levels and their corresponding regulatory requirements), available at <http://www.epa.gov/oem/docs/chem/Chap-02-final.pdf>.
67. JAMES K. BELKE, EPA, CHEMICAL ACCIDENT RISKS IN U.S. INDUSTRY—PRELIMINARY ANALYSIS OF ACCIDENT RISK DATA FROM U.S. HAZARDOUS CHEMICAL FACILITIES 1, 2.3 (2000). Since RMP reporting began, the number of chemical facilities exceeding reporting thresholds has fallen significantly, attributed in part to the voluntary adoption of IST. See THE WHARTON SCHOOL, UNIV. OF PENN. & ENVTL. PROT. AGENCY, OFFICE OF EMERGENCY MGMT., ACCIDENT EPIDEMIOLOGY AND THE RMP RULE: LEARNING FROM A DECADE OF ACCIDENT HISTORY DATA FOR THE U.S. CHEMICAL INDUSTRY 3–4 (2007).
68. 42 U.S.C. § 7412(r)(1) (2006).
69. See ENVTL. PROT. AGENCY, GUIDANCE FOR IMPLEMENTATION OF THE GENERAL DUTY CLAUSE CLEAN AIR ACT 112(r)(1) 2 (2000), available at <http://www.epa.gov/oem/docs/chem/gdcregionalguidance.pdf>.
70. See, e.g., 42 U.S.C. § 7411(b)(1) (2006) (establishing new source performance standards for stationary sources); 42 U.S.C. § 7412(d) (2006) (establishing performance standards for hazardous air pollutant emissions); 42 U.S.C. § 7512(a) (2006) (establishing performance standards for mobile sources).
71. See ENVTL. PROT. AGENCY, GUIDANCE FOR IMPLEMENTATION OF THE GENERAL DUTY CLAUSE CLEAN AIR ACT 112(r)(1), *supra* note 69, at 3–6.
72. See Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 304(a), 104 Stat. 2399, 2576 (1990).
73. See Process Safety Management of Highly Hazardous Chemicals, 29 C.F.R. § 1910.119 (2008).
74. See ENVTL. PROT. AGENCY, CHEMICAL ACCIDENT PREVENTION: SITE SECURITY 1 (2000).
75. GAO, *supra* note 5, at 19–20.
76. ENVTL. PROT. AGENCY, CHEMICAL SITE SECURITY: EPA’S STRATEGY FOR IMPROVING SECURITY AND PREVENTING RELEASES CAUSED BY CRIMINAL ATTACKS AT HAZARDOUS CHEMICAL FACILITIES (2002) (pre-decisional draft on file with author).
77. See Whitman Says Fear of Legal Challenge Killed Chemical Security Rules, INSIDE EPA, Oct. 14, 2002 (quoting Adm’r Whitman); GAO, *supra* note 5, at 16.
78. See EPA Drops Chemical Security Effort, WASH. POST, Oct. 3, 2002, at A17.
79. CHRISTINE TODD WHITMAN, IT’S MY PARTY TOO: THE BATTLE FOR THE HEART OF THE GOP AND THE FUTURE OF AMERICA 164–65 (2005). *But see* Kriz, *infra* note 81, at 2479 (claiming the White House “pull[ed] the EPA off the chemical security beat” in response to industry lobbying).
80. Homeland Security Presidential Directive 7: Directive on Critical Infrastructure Identification, Prioritization, and Protection 2 PUB. PAPERS 1739 (Dec. 17, 2003). EPA retains jurisdiction over drinking water and wastewater treatment facilities. *Id.*
81. Margaret Kriz, *Security Leak*, 35 NAT’L J. 2476, 2478 (2003) (describing meetings between EPA, the Office of Management and Budget (OMB) and “various federal agencies”); Carl Prine, *EPA’s Security Push Fails*, PITTSBURGH TRIB.-REV., July 14, 2002, at A1 (same).
82. See, e.g., GAO, *supra* note 5, at 16; EPA Drops Chemical Security Effort, *supra* note 78; Matthew Weinstock, *Easy Targets*, GOV’T EXECUTIVE, Feb. 1, 2003, available at <http://www.govexec.com/features/0203/0203s2.htm> (quoting EPA’s Robert Bostock).
83. GAO, *supra* note 5, at 16–17; LINDA-JO SCHIEROW, CONG. RESEARCH SERV., CHEMICAL FACILITY SECURITY (2006).
84. See SCHIEROW, *supra* note 83, at 29; GAO, *supra* note 5, at 17 (“[A] release due to a terrorist attack is not entirely unanticipated, as it is an intentional act.”).
85. GAO, *supra* note 5, at 17–18 (noting the Department of Labor’s concerns). *But see id.* at 18 n.18 (describing EPA’s narrower interpretation of the connection between the CAA and OSH Act general duty clauses).
86. 467 U.S. 837 (1984). To the extent the agency is obligated to provide a “reasoned analysis” of its changed interpretation under the Administrative Procedures Act’s arbitrary and capricious review, see *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 56–57 (1983), the changed circumstances and increased awareness of our vulnerabilities post-September 11 should be sufficient to justify the shift.
87. 42 U.S.C. § 7412(r)(7)(b)(i) (2006) (“[T]he Administrator shall promulgate reasonable regulations and appropriate guidance to provide, to the greatest extent practicable, for the prevention and detection of accidental releases of regulated substances....”).
88. While the statute actually defines “accidental release,” in this context the definition remains ambiguous. See notes 94–95 and accompanying text *infra*.
89. ENVTL. PROT. AGENCY, CHEMICAL SITE SECURITY, *supra* note 76: EPA’s Strategy for Improving Security and Preventing Releases Caused by Criminal Attacks at Hazardous Chemical Facilities (June 2002) (pre-decisional draft on file with author). This deference would not apply to interpretations advanced through individual enforcement actions brought under § 112(r)’s general duty clause, as there is no indication that Congress intended to delegate interpretative authority to EPA through the general duty clause. See *United States v. Mead Corp.*, 533 U.S. 218, 229–30 (2001).
90. See *Chevron*, 467 U.S. at 842–43, 843 n.11.
91. See *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 380–81 (1988) (Scalia, J., concurring) (collecting cases establishing *Chevron* deference to agency interpretations of jurisdictional statutes).
92. *Cf. Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458, 2469 (2009) (stating the *Chevron* deference could apply to EPA’s Clean Water Act regulations despite regulatory overlap with the Army Corps of Engineers); *Chicago Mercantile Exchange v. SEC*, 883 F.2d 537, 548 (7th Cir. 1989) (assuming, without deciding, that “in this jurisdictional dispute, each agency is entitled to leeway in applying its own statute”).
93. See 42 U.S.C. § 7412(r) (2006). Part of the general duty clause could be read to impose a responsibility to “design and maintain a safe facility taking such steps as are necessary to prevent releases,” without regard to their accidental nature. *Id.* Because that clause is contained within a section entitled “Prevention of Accidental Releases,” however, and is focused on accident prevention, I do not explore that interpretation in this paper.

94. *Id.* The statutory definitions of “regulated substance,” 42 U.S.C. § 7412(r)(2)(B), and “stationary source,” 42 U.S.C. § 7412(r)(2)(C), are broad enough to cover industrial chemicals and most chemical facilities, respectively.
95. Even if terrorism is a foreseeable threat at many chemical facilities, the specific act that causes the release will typically be unanticipated by the owner. Mechanical errors or process failures may also be foreseeable in the abstract and factored into the costs of operating of a facility, but no one disputes the application of § 112(r) to those types of accidental releases.
96. See Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 304(a), 104 Stat. 2399, 2576 (1990). (“The Secretary of Labor shall act under the Occupational Safety and Health Act of 1970 (29 U.S.C. 653) to prevent accidental releases of chemicals which could pose a threat to employees.”).
97. Process Safety Management of Highly Hazardous Chemicals; Explosives and Blasting Agents, 57 Fed. Reg. 6356, 6403 (Feb. 24, 1992).
98. *Cf. Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (referencing canon of interpretation that “identical words used in different parts of the same act are intended to have the same meaning”). While this presumption is rebuttable, see *Envtl. Defense v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007); it nonetheless supports EPA’s attempt to give the term “accidental” a consistent definition.
99. See, e.g., *Price v. Time, Inc.*, 416 F.3d 1327, 1339 (11th Cir. 2005) (comparing the dictionary definition of “newspaper” with its generally accepted usage in the journalism trade); *Vanderlande Indus. Nederland BV v. Int’l Trade Comm’n*, 366 F.3d 1311, 1321 (Fed. Cir. 2004).
100. See BLACK’S LAW DICTIONARY 16 (8th ed. 2004) (“Not having occurred as a result of anyone’s purposeful act.”).
101. See Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/accidental> (last visited May 11, 2010) (“Arising from extrinsic causes.”).
102. See, e.g., BALLENTINE’S LAW DICTIONARY (3d ed. 1969) (“[U]nexpected, unusual, and unforeseen.”).
103. See Nicholas J. Guiliano, *The Sudden and Accidental Exception to the Pollution Exclusion Solution*, 13 TEMP. ENVTL. L. & TECH. J. 261, 261–62 (1994).
104. 40 C.F.R. § 264.141(g) (2008) (emphasis added). See also *Benedictine Sisters of St. Mary’s Hosp. v. St. Paul Fire & Marine Ins. Co.*, 815 F.2d 1209, 1211 (8th Cir. 1987) (accident determination depends on “whether the [i]nsured expected or intended the harm at the time it occurred”); *Macklanburg-Duncan Co. v. Aetna Cas. & Sur. Co.*, 71 F.3d 1526, 1532 (10th Cir. 1995) (same).
105. 42 U.S.C. § 4332(2)(C) (2006).
106. *Tri-Valley Cares v. Dep’t of Energy*, No. C03-3926, 2007 U.S. Dist. LEXIS 29437, at \*25, 33–34 (N.D. Cal. Apr. 6, 2007) (emphasis added). See also *United States v. New York*, 463 F. Supp. 604, 613 (S.D.N.Y. 1978) (“The [Atomic Safety and Licensing Board] also examined the accident possibilities posed by ‘sabotage of the reactor’ and by ‘a burning aircraft crash.’”) *But see* DEP’T OF ENERGY, OFFICE OF NEPA POLICY AND COMPLIANCE, RECOMMENDATIONS FOR ANALYZING ACCIDENTS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 20 (2002), available at [http://gc.energy.gov/NEPA/nepa\\_documents/TOOLS/GUIDANCE/Volume2/2-8-accidents.pdf](http://gc.energy.gov/NEPA/nepa_documents/TOOLS/GUIDANCE/Volume2/2-8-accidents.pdf) (“Intentional destructive acts are not accidents.”).
107. Compare *New Jersey Dep’t of Env’tl. Prot. v. Nuclear Regulatory Comm’n*, 561 F.3d 132, 136 (3d Cir. 2009) (holding that terrorist-caused releases were too attenuated to require consideration in the EIS for a nuclear plant’s relicensing) with *Tri-Valley Cares*, 2007 U.S. Dist. LEXIS 29437, at \*25, 33–34 (requiring consideration of terrorist-caused releases in a biological research laboratory’s EIS).
108. NUCLEAR REGULATORY COMM’N, GENERIC ENVIRONMENTAL IMPACT STATEMENT FOR LICENSE RENEWAL OF NUCLEAR PLANTS: SUPPLEMENT 28 REGARDING OYSTER CREEK NUCLEAR GENERATION STATION 5-3 (2007), available at <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1437/supplement28/index.html> (emphasis added). See also *New Jersey Dep’t of Env’tl. Prot.*, 561 F.3d at 143–44.
109. See NUCLEAR REGULATORY COMM’N, *supra* note 108, at 5-4.
110. See Letter from House Energy and Commerce Committee leadership to Tom Ridge, Director, Office of Homeland Security, on Critical Infrastructure Protection (June 19, 2002), available at [http://republicans.energycommerce.house.gov/107/letters/06192002\\_613.htm](http://republicans.energycommerce.house.gov/107/letters/06192002_613.htm) (“[t]he Clean Air Act was not enacted with deliberate terrorist actions in mind.”).
111. For more information on the Bhopal disaster, see Broughton, *supra* note 9.
112. See, e.g., *Quern v. Jordan*, 440 U.S. 332, 343 (1979) (implying intent not to waive sovereign immunity from Congress’ failure to mention such objectives during the legislative debate); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 209 (1978) (Powell, J., dissenting) (“The absence of any such consideration by the Committees or in the floor debates indicates quite clearly that no one participating in the legislative process considered these consequences as within the intendment of the Act.”).
113. See *Massachusetts v. Env’tl. Prot. Agency*, 549 U.S. 497, 532 (2007) (holding that EPA may regulate greenhouse gasses as air pollutants under § 202 of the Clean Air Act, notwithstanding Congress’ failure to consider such gasses when enacting that section); *Pennsylvania Dep’t of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) (affirming that a statute “can be applied in situations not expressly anticipated by Congress”) (citation omitted).
114. See, e.g., *Burns v. United States*, 501 U.S. 129, 136 (1991) (“Not every silence is pregnant.”); *Zuber v. Allen*, 396 U.S. 168, 185 (1969) (“Legislative silence is a poor beacon to follow in discerning the proper statutory route.”).
115. S. REP. NO. 101-228, at 8550 (1989) [hereinafter EPW Report].
116. *Cf. Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980) (“Where Congress explicitly enumerates certain exceptions... additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.”).
117. See, e.g., 136 CONG. REC. S36,057 (1990) (statement of Sen. Durenberger) (“In addition to these routinely occurring emissions, another aspect of the toxic problem is the sudden and potentially catastrophic chemical accident.”).
118. 136 CONG. REC. H11, 331 (daily ed. May 21, 1990) (Clean Air Facts, Aug. 2, 1989, introduced into the record by Rep. Waxman).
119. See H.R. REP. NO. 101-490, at 3179 (1990) [hereinafter Energy and Commerce Report]; EPW Report, *supra* note 115, at 8474; 136 CONG. REC. H11, 911 (daily ed. May 21, 1990) (statement of Rep. Richardson).
120. See *supra* notes 9–10 and accompanying text.
121. James Cummings-Saxton et al., *Accidental Chemical Releases and Local Emergency Response: Analysis Using the Acute Hazardous Events Data Base*, 2 INDUS. CRISIS Q. 139, 144 (1988).
122. *Id.* at 167.
123. See *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (“At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings.”).
124. See *supra* notes 29, 32, 36 and accompanying text.
125. During the 110th Congress (2008–2009), almost 14,000 pieces of legislation were introduced, and only 3.3 percent of them were ultimately signed into law, and almost a third of those passed merely renamed federal buildings. See Paul Singer, *Members Offered Many Bills But Passed Few*, ROLL CALL, Dec. 1, 2008, available at [http://www.rollcall.com/issues/54\\_61/news/30466-1.html](http://www.rollcall.com/issues/54_61/news/30466-1.html).

126. See *United States v. Estate of Romani*, 523 U.S. 517, 535 (1998) (Scalia, J., concurring) (“The act of refusing to enact a law (if that can be called an act) has utterly no legal effect, and thus has utterly no place in a serious discussion of the law.”); *Brown & Williamson*, 529 U.S. at 155 (refusing to rely upon Congressional inaction on proposed amendments to the Food, Drug, and Cosmetics Act).
127. *Brown & Williamson*, 529 U.S. at 125.
128. See *id.* at 143–44 (discussing legislative enactments regulating tobacco).
129. *Id.* at 144.
130. *Id.*
131. *Id.* at 156 (citations omitted).
132. The conference report of the Homeland Security Appropriations Act passed by voice vote in the Senate and a vote of 412-6 in the House. The final floor debate included no mention of chemical security.
133. See DHS Appropriations Rider, *supra* note 2 (“Nothing in this section shall be construed to supersede, amend, alter, or affect any Federal law that regulates the manufacture, distribution in commerce, use, sale, other treatment, or disposal of chemical substances or mixtures.”) While EPA’s authority to issue chemical security standards is a separate question, if EPA had such authority prior to the enactment of this rider, as argued above, then its regulatory powers should be preserved by this provision.
134. See GAO, *supra* note 5, at 16–18; *EPA Drops Chemical Security Effort*, RISK POLICY REPORT, Oct. 14, 2002 (“While we believe we could have the regulatory authority, it would be pushing the envelope,” Whitman said....”).
135. 549 U.S. 497 (2007).
136. See, e.g., Memorandum from Jonathan Cannon, EPA General Counsel, to Carol Browner, EPA Adm’r, on EPA’s Authority to Regulate Pollutants Emitted by Electric Power Generation Sources (Apr. 10, 1998).
137. See *Massachusetts v. EPA*, 549 U.S. at 531 (distinguishing *Brown & Williamson* because “EPA had never disavowed the authority to regulate greenhouse gases, and in 1998 it in fact affirmed that it had such authority”) (emphasis in original). EPA had formally reversed its finding of authority prior to the *Massachusetts v. EPA* decision, but the Supreme Court still cited the Cannon Memorandum and distinguished *Brown & Williamson*, where the FDA had consistently disclaimed regulatory authority over a period of several decades. *Id.*
138. *Brown & Williamson*, 529 U.S. at 139.
139. EPA and DHS chemical security authority is not entirely co-extensive. There are classes of facilities and specific security measures that could be regulated under the CAA’s “accidental release” provisions but not DHS’s chemical security rider. See *supra* note 41 and accompanying text. Likewise, there are terrorist threats that could be addressed by DHS but would not result in chemical releases to the air covered by the CAA. See *Is the Federal Government Doing Enough to Secure Chemical Facilities and is More Authority Needed: Hearing before the S. Comm. on Homeland Security and Gov’t Affairs*, 109th Cong. 46 (2005) (statement of Thomas P. Dunne, Deputy Assistant Adm’r, Office of Solid Waste and Emergency Response, U.S. EPA) (“[A] CAA chemical security program could not reach releases to water, land or indoor air, or theft of chemicals from facilities for release elsewhere.”).
140. Exec. Order No. 12,146, § 1-401, 3 C.F.R. 409 (1979).
141. *Massachusetts v. EPA*, 549 U.S. at 532.
142. See *Green Mountain Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 302 (D. Vt. 2007); *Cent. Valley Chrysler-Jeep v. Goldstene*, 529 F. Supp. 2d 1151, 1157, 1163 (E.D. Cal. 2007).
143. 42 U.S.C. § 7412(r)(1) (2006).
144. See ENVTL. PROT. AGENCY, GUIDANCE FOR IMPLEMENTATION OF THE GENERAL DUTY CLAUSE CLEAN AIR ACT 112(r)(1), *supra* note 71.
145. 42 U.S.C. § 7412(r)(1). In a 1994 rulemaking, EPA appeared unsure precisely what to make of this requirement, noting, “The Agency is investigating the relationship between requirements under section 112(r) and OSHA’s general duty provisions.” See *List of Regulated Substances and Thresholds for Accidental Release Prevention*, 59 Fed. Reg. 4,478, 4,491 (Jan. 31, 1994).
146. 29 U.S.C. § 654(a) (2006).
147. GAO, *supra* note 5, at 17–18. See also OSHA, *Inspection Procedures for 29 C.F.R §§ 1910.120 and 1926.65*, Paragraph (q): Emergency Response to Hazardous Substance Releases, Directive No. 02-02-073, Aug. 27, 2007, available at [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_id=3671&p\\_table=DIRECTIVES](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_id=3671&p_table=DIRECTIVES) (“OSHA does not consider terrorist events to be foreseeable workplace emergencies for purposes of standards requiring employers to anticipate and prepare for such emergencies.”) But see *Safety, Security Experts Offer Advice on Chemical Plants’ Response to Terror*, BNA OCCUPATIONAL SAFETY & HEALTH DAILY, Aug. 13, 2002 (quoting OSHA Deputy Assistant Secretary R. Davis Layne describing the application of the general duty clause to terrorism as an open legal question).
148. See *Reich v. Arcadian Corp.*, 110 F.3d 1192, 1195, 1198 (5th Cir. 1997) (declining to defer to the Secretary of Labor’s interpretation of the general duty clause).
149. 11 O.S.H. Cas. (BNA) 1405 (1983), *aff’d*, 750 F.2d 28 (6th Cir. 1984).
150. EPW Report, *supra* note 115, at 8549 (quoting *Duriron*).
151. See *id.* (“This decision is cited to indicate that a similar standard is an appropriate application of the general duty to operate a facility free from accidents established by the [CAA general duty clause].”) In its guidance interpreting the CAA general duty clause, the EPA slightly rephrases the *Duriron* test, replacing “employer” with “owner/operator” and “workplace” with “facility,” among other minor changes. ENVTL. PROT. AGENCY, GUIDANCE FOR IMPLEMENTATION OF THE GENERAL DUTY CLAUSE CLEAN AIR ACT 112(r)(1), *supra* note 71, at 11 n.4.
152. See Van R. Delhotal, *The General Duty to Prevent Accidental Releases of Extremely Hazardous Substances*, 13 J. ENERGY NAT. RES. & ENVTL. L. 61, 101–02 (1993).
153. See *Nat’l Realty & Constr. Co. v. Occupational Safety & Health Review Comm’n*, 489 F.2d 1257, 1265–66 (D.C. Cir. 1973); *Donovan v. Royal Logging Co.*, 645 F.2d 822, 829 (9th Cir. 1981); *St. Joe Minerals Corp. v. Occupational Safety & Health Review Comm’n*, 647 F.2d 840, 844 (8th Cir. 1981).
154. When *Pepperidge Farm* challenged OSHA’s attempt to use the general duty clause to require ergonomic improvements in the workplace, it conceded that poor ergonomics presented a cognizable hazard and instead disputed whether the hazard was “recognized” by the employer. *Sec’y of Labor v. Pepperidge Farm, Inc.*, 17 O.S.H. Cas. (BNA) 1993 (1997).
155. See *St. Joe Minerals Corp.*, 647 F.2d at 845 (“A hazard is deemed ‘recognized’ when the potential danger of a condition or activity is either actually known to the particular employer or generally known in the industry.”) See also *Titanium Metals Corp. v. Usery*, 579 F.2d 536, 541 (9th Cir. 1978). Even when industry custom is used to establish constructive recognition, compliance with the industry standard is not necessarily a defense against general duty clause compliance. Instead, OSHA can require any feasible steps to abate a recognized hazard. See *supra* notes 153–155 and accompanying text.
156. See *Pratt & Whitney Aircraft v. Sec’y of Labor*, 649 F.2d 96, 101 (2d Cir. 1981).
157. See Steven J. Beaver, *Beyond the Exclusivity Rule: Employer’s Liability for Workplace Violence*, 81 MARQ. L. REV. 103, 129 (1997).

158. *In re Megawest Financial, Inc.*, 1995 OSAHRC Lexis 80, at \*29 (May 8, 1995).
159. *Id.* at \*24–26.
160. *Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199, 1206 (10th Cir. 2009).
161. *Megawest Financial*, 1995 OSAHRC Lexis 80, at \*29.
162. See DEP'T OF JUSTICE, ASSESSMENT OF THE INCREASED RISK OF TERRORIST OR OTHER CRIMINAL ACTIVITY ASSOCIATED WITH POSTING OFF-SITE CONSEQUENCE ANALYSIS INFORMATION ON THE INTERNET 2 (2000), available at <http://news.findlaw.com/cnn/docs/doj/dojinternetinfo041800.pdf> (describing the terrorist threat against U.S. chemical plants as “real and credible”); Pianin, *supra* note 13, at A8 (describing an unreleased Army surgeon general study that “ranked the threat of attacks against chemical plants second only to the widespread use of biological weapons”). See generally Diaz, *supra* note 50.
163. DHS Appropriations Rider, *supra* note 2. For a critique of this legislation, see *supra* Part I.
164. American Chemistry Council, Responsible Care Security Code, [http://www.americanchemistry.com/s\\_responsiblecare/doc.asp?CID=1298&DID=5085](http://www.americanchemistry.com/s_responsiblecare/doc.asp?CID=1298&DID=5085) (last visited May 11, 2010). The American Chemistry Council represents only seven percent of the nation’s chemical facilities; however, see GAO, *supra* note 5, at 27, and in 2002 a reporter for the PITTSBURGH TRIBUNE-REVIEW, armed with no more than a notebook and camera, penetrated security at several ACC member facilities. See Prine, *supra* note 35.
165. Env’tl. Prot. Agency, Chemical Accident Prevention: Site Security, *supra* note 74.
166. Eric Pianin, *Toxic Chemicals’ Security Worries Officials*, WASH. POST, Nov. 12, 2001, at A14.
167. *Megawest Financial*, 1995 OSAHRC Lexis 80, at \*22–23. While “freakish” or “utterly implausible” hazards do not violate the general duty clause, courts are generally deferential to OSHA determinations that a hazard is plausible. See also *Nat’l Realty & Constr. Co.*, 489 F.2d at 1265 n.33.
168. Eben Kaplan, Council on Foreign Relations, Targets for Terrorists: Chemical Facilities (Dec. 11, 2006), <http://www.cfr.org/publication/12207/>.
169. *Chemical Facility Security: What Is the Appropriate Federal Role?* Hearing before the S. Comm. on Gov’t Affairs and Homeland Sec., 109th Cong. 2 (2005) (statement of Gerald Poje, member of the U.S. Chem. Safety and Hazard Investigation Bd.), available at [http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing\\_ID=8ae8b090-f351-4ab4-8247-c84714b3b6f3](http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=8ae8b090-f351-4ab4-8247-c84714b3b6f3).
170. ORUM, *supra* note 23, at 4 (citing DHS estimates).
171. See, e.g., *Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902, 910 (2d Cir. 1977) (a single employee’s death as result of an open chute at a construction site was prima facie evidence that the hazard was likely to cause serious injury).
172. *Champlin Petroleum Co. v. Occupational Safety & Health Review Comm’n*, 593 F.2d 637, 640 (5th Cir. 1979); *Brennan v. Occupational Safety & Health Review Comm’n*, 502 F.2d 946, 952–53 (3d Cir. 1974).
173. *Nat’l Realty & Constr. Co. v. Occupational Safety & Health Review Comm’n*, 489 F.2d 1257, 1266–67 n.37 (D.C. Cir. 1973).
174. *Donovan v. Royal Logging Co.*, 645 F.2d 822, 830 (9th Cir. 1981) (“In [General Duty Clause] actions, the Secretary bears the burden of showing that the proposed safety measure will not result in a greater hazard as part of his obligation to demonstrate feasibility.”) This addresses a common critique of inherently safer technology and other chemical security mandates, which industry often claims shift risk but do not eliminate it. See, e.g., Press Release, Synthetic Organic Chemical Manufacturers’ Association, SOCMA Asks Congress to Make Security Rules Permanent: Government-Mandated Product Substitution, However, Could Create Unintended Consequences (Feb. 4, 2009), available at [http://www.socma.com/assets/File/socma1/PDFfiles/GR\\_PDF\\_files/Release-IST-For-Webpage-Feb-4-09.doc](http://www.socma.com/assets/File/socma1/PDFfiles/GR_PDF_files/Release-IST-For-Webpage-Feb-4-09.doc).
175. See DANA A. SHEA, CONGRESSIONAL RESEARCH SERV., LEGISLATIVE APPROACHES TO CHEMICAL FACILITY SECURITY 13 (2006), available at <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-9397:1>; Cal Dooley, Op-Ed., *Memo to Homeland Security chief: Chemical plant security is working*, WASH. TIMES, Jan. 26, 2009, at A19.
176. See *supra* note 14 and accompanying text.
177. Chemical and Water Security Act, H.R. 2868, 111th Cong. (2009) (as passed by the House of Representatives, Nov. 6, 2009).
178. See, e.g., Press Release, Sen. James Inhofe, Inhofe Concerned With GAO Recommendations on Chemical Security (Feb. 28, 2006) (“[I]nvolving the E.P.A. runs counter to what we should be accomplishing in terms of enhancing protections at chemical plants and other facilities.”).
179. H.R. 2868, §§ 222, 1433.
180. In response to a 2006 chemical security report, DHS accepted and acted upon most of the GAO’s recommendations. Tellingly, the one it chose to not to implement was, “The Secretary of the Department of Homeland Security should direct DHS to recognize EPA’s expertise in managing chemical risks, jointly study with EPA whether chemical facilities’ efforts to reduce vulnerabilities would benefit from the use of technologies that substitute safer chemicals and processes.” GAO, *DHS Is Taking Steps to Enhance Security at Chemical Facilities, but Additional Authority Is Needed: Recommendations*, <http://www.gao.gov/products/GAO-06-150#recommendations> (last visited Jan. 2, 2009).

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# Administrative Decisions Update

Prepared by Robert A. Stout Jr.

## *In the Matter of the Alleged Violations of Articles 27 and 71 of the Environmental Conservation Law and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York, by Thompson Corners, LLC and Metalico Syracuse Realty, Inc., Respondents*

Decision and Order of the Commissioner

September 15, 2010

### Summary of Decision

Commissioner finds that owners and operators of solid waste management units are jointly and severally liable for posting the “financial assurance” required by 6 NYCRR Part 373-2.6(a)(l)(ii) and 6 NYCRR Part 373-2.6(l). The ownership of the facility at the time the wastes were placed is irrelevant to this determination.

### Background

In 2005, Thompson Corners LLC (Thompson) purchased a metals recovery and smelting operation from Wabash Aluminum Alloys, LLC (Wabash) consisting of two plants located in East Syracuse. The sole shareholder of Wabash was Connell Limited Partnerships (Connell). In 2006, one of the two plants was sold by Thompson to Metalico Syracuse Realty, Inc. (MSR) (Thompson and MSR collectively referred to as “Respondents” herein). Following the sale, Wabash continued to perform operation and maintenance activities at the facility.

On January 2, 2008, the Department and Connell entered into an Order on Consent which required, among other things, remediation of the site and that acceptable financial assurance be provided to ensure that the work was carried out. The Department staff alleged that Respondents failed to provide financial assurance following their respective purchases in violation of an Order on Consent entered with Roth Brothers Smelting Corporation (“Roth”), a former site owner in 1994; 6 NYCRR Part 373; the Environmental Conservation Law and the facility’s permit conditions. The posting of a financial assurance was sought, as well as civil penalties of \$33,000 against Thompson and \$22,000 against MSR.

### Respondents’ Position

Respondents argued that they have no obligations under 6 NYCRR Part 373 and that the Department received adequate financial assurance from a former property owner. They further claimed that the 1994 Consent Order was only binding on the party that signed it, its corporate successors, and those to whom it assigned the

Consent Order, and that such Consent Order does not run with the land.

### The ALJ Ruling

The ALJ noted that a dispute of fact existed between the parties with respect to whether financial assurance provided by Connell was in place. However, the ALJ found that “the question whether Connell had provided adequate financial assurance as of the date of DEC staff’s reply to Respondent’s motion to dismiss is not relevant to whether the Respondents...are liable for the violations alleged in the complaint against them....” Rather, the ALJ observed that the question of which party provides the financial assurance may be relevant in a private matter between the parties.

The ALJ found that the Respondents are required by 6 NYCRR Part 373 to provide financial assurance for carrying out post-remedial operation and maintenance. The Respondents argued that under RCRA, the Department may only require corrective actions and financial assurance as conditions of a permit to own or operate a TSD facility, or as may be required in an Order on Consent. However, the ALJ ruled that “[w]hen Thompson, and later MSR, bought the land they also bought a facility that is the subject of an ongoing RCRA corrective action program under an order issued pursuant to ECL § 71-2727(3). As owners of the facility, they are responsible for providing financial assurance to ensure that the work is carried out.” The ALJ further found that the 1994 Consent Order is an enforceable document applicable to a facility that had a Part 373 permit for storage of hazardous waste and that is also a facility at which corrective action was required and is ongoing and that under 6 NYCRR Part 373-2.6(l)(2), the permit (or enforceable document) will contain assurances of financial responsibility. The ALJ found support in a Tenth Circuit decision, *United States v. Power Engineering Company*, 191 F3d 1224 (1999), which, although based upon Colorado’s regulations implementing RCRA, found that “by their terms, these regulations apply to all owners and operators of hazardous waste facilities; they are not limited to permit holders or applicants.” *Id.* at 1233.

The ALJ next considered Department staff’s argument that the 1994 Consent Order specifically binds Roth’s “successors and assigns.” Department staff took the position that Department orders for hazardous waste have always run with the property and contamination, and that such requirements were to be applicable to all future property owners and operators. Respondents countered that the “successors and assigns” language is more restrictive, and refers not to future property owners but to Roth’s corporate successors and express assignees.

Ultimately, the ALJ found more support for Respondents' position and ruled that neither Thompson nor MSR are "successors" of Roth in the context of the Roth Order on Consent.

The ALJ concluded that Respondents violated 6 NYCRR Part 373-2.6(a)(1)(ii) and 6 NYCRR Part 37302.6(1) commencing with their respective dates of purchase by failing to provide financial assurance for operation and maintenance required as part of the corrective action for the facility. As such, the ALJ found that Connell (pursuant to its Order on Consent), Thompson, and MSR are all jointly and severally responsible for providing financial assurance for the operation and maintenance required under 6 NYCRR Part 373-2 for the facility. (The ALJ noted, however, that only one of the entities would need to satisfy that requirement). The ALJ recommended that the Commissioner grant the relief sought by the Department.

### Decision and Order of the Commissioner

Subject to certain comments, the Commissioner adopted the ALJ's report, finding that all three entities remain liable for providing financial assurance and that the requested penalty for each Respondent is reasonable. The Commissioner noted that the penalty calculations did not take into account the economic benefit to the Respondents for not having secured the financial assurance and that DEC would have been "well within its right" to request a significantly higher penalty. The Commissioner noted in a footnote that since he determined that Respondents are liable for providing financial assurance under the Department's regulations, he declined to decide whether Respondents are also liable based on Department staff's assertion that they are "successors and assigns." Thus, the ALJ's analysis on the issue was neither accepted nor rejected.

*In the Matter of Alleged Violations of Article 33 of the New York State Environmental Conservation Law (ECL) and Parts 320 through 326 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), by Green Thumb Lawn Care, Inc., Respondent.*

Decision and Order of the Acting Commissioner

November 10, 2010

### Summary

Acting Commissioner finds that the renewal of a commercial lawn pesticide application contract must be effectuated with either a signed written contract or prepayment in full in order to constitute a valid written contract for the purposes of ECL § 33-1001(1) and 6 NYCRR Part 325.40(a)(6).

### Background

Respondent owns and operates a registered pesticide business in Schenectady. According to Department staff, in May 2005, Respondent applied lawn pesticides at a residential property in violation of the Environmental Conservation Law, 6 NYCRR Part 325, and the provisions of a previous Order on Consent executed with the Department. Respondent had resolved previous allegations by way of a Consent Order dated April 2, 2002, wherein it agreed to, among other things, "specific [sic] approximate dates of application with no more than a seven day range" and to "enter into signed contracts for service from all customers prior to providing such service."

A signed contract was entered between Respondent and the property owners on January 20, 2004, for the period of February 2004 through January 2005. By notice dated January 2005, the Respondent invited the owners to renew their contracts by mailing their first payment before February 1, 2005. The second page of the notice included a schedule of planned lawn services. The periods included in the schedule spanned approximately 60 days such as "Early Spring—April 1—May 30." By check dated May 6, 2005, the owners paid the Respondent \$147.32, a portion of the total price for 2005 service.

### Department Causes of Action

An amended complaint was filed, which contained the following causes of action: i) application of pesticides without written contract, in violation of ECL § 33-1001(1); ii) failure to list dates when pesticide applications would occur, in violation of 6 NYCRR Part 325.4(a)(1); and iii) failure to specify approximate dates of application with no more than 7-day range, in violation of 2002 Order on Consent. Subsequently, the Department's Motion for Order Without Hearing added 6 NYCRR Part 325.40(a)(6) as a regulatory citation for the first cause of action and added a fourth cause of action for "failure to obtain property owner's signature on written contract or on a separate document, such as a copy of any pre-payment check or a credit card [sic] authorization or other payment receipt in the exact amount specified in the written contract," in violation of 2002 Order on Consent.

### ALJ Ruling

With respect to the claim that Respondent violated ECL § 33-1001(1), 6 NYCRR Part 325.40(a)(6) and the 2002 Consent Order because it possessed a 2004 contract with a partial payment check for 2005, the ALJ found that the owner accepted the renewal with a partial payment. Further, the ALJ found that Part 325.40(a)(6), which requires the signature of the owner or an agent on a contract or payment in full of the contract by check, does not apply to renewals but rather applies only to original contracts. The ALJ pointed out that Part 325.40(a)(7) speaks to renewals and only requires written proof of acceptance by the owner, which the ALJ found was satisfied by the partial payment.

As part of its argument that partial payment without a signed contract is insufficient to prove a valid pesticide contract, Department staff referred to Policy DSHM-PES-05-11 (the "Guidance"). However, the ALJ noted that the policy did not take effect until over a month after the alleged violation took place and only served to reiterate the language of 6 NYCRR Part 325.40(a)(6). As such, Respondent was granted summary judgment on this cause of action.

With respect to the second and third causes of action relating to Respondent's alleged failure to specify the dates when pesticide applications would occur in violation of 6 NYCRR Part 325 (a)(1), the ALJ rejected the staff's argument that the failure to state a year in the 2004 contract results in a violation. Staff had cited the Guidance and the common usage of the word date as including the year. However, the ALJ noted again that the Guidance was not in effect at the time of the alleged violation and further found that the 2004 contract clearly stated that it was for 2/04 through 1/05 and that the periods specified further down in the document thus clearly refer to the 2004-2005 lawn season.

Finally, even though the ALJ denied the staff's motion of summary judgment, she noted that the staff's support for the \$19,000 penalty was deficient. She cited a lack of rationale and support for the requested penalty.

#### Decision and Order of the Acting Commissioner

With respect to the later added causes of action, the Acting Commissioner found that the inclusion of a regulatory citation in support of the first cause of action was without consequence. The inclusion of the fourth cause of action was also without consequence in the view of the Acting Commissioner, as the failure to obtain the property owner's signature is an additional basis for the first cause of action addressing Respondent's failure to have a valid contract with the property owner. The Acting Commissioner also agreed with the ALJ's position that the Guidance could not be relied upon by the Department for this case.

The Acting Commissioner turned the balance of the ALJ's decision on its head. He disagreed with the ALJ's conclusion that Respondent had a valid written contract with the owner for the 2005 commercial lawn application season, finding that the contract was not renewed in accordance with the ECL, the applicable regulations, or the 2002 Order on Consent. Looking to the language of the statute, he noted that the ECL requires that a pesticide applicator and a property owner enter into a written contract prior to the application of commercial lawn pesticides, and observed that the statute does not differentiate between initial contracts and renewal contracts, flatly rejecting the ALJ's conclusion that it does. He noted that the regulations provide that a contract is valid if it is signed by the property owner and the pesticide applicator. As an

alternative to the owner's signature on the contract itself, the applicator can have a separate document that specifically evidences the owner's signature as acceptance of the written contract. Thus, the mere letter referencing a renewal of service for the upcoming year, coupled with a check sent in partial payment of the full yearly sum, are not sufficient to satisfy the law's requirements. Rather, the renewal of the contract needed to be effectuated by way of a signed written contract or prepayment in full.

The Acting Commissioner then found that the \$19,000 civil penalty sought by Department staff is well within the penalties authorized under the ECL and the 2002 Order on Consent. He determined that Respondent violated the ECL, the regulations, and the 2002 Order on Consent in three ways: (1) failure to have a contract for the 2005 season in violation of ECL § 33-1001(1), 6 NYCRR Part 325.40(a)(6), and the 2002 Order on Consent; (2) failure to specify dates of application in violation of 6 NYCRR Part 325.40(a)(1); and (3) failure to specify dates of application with a seven day range in violation of the 2002 Order on Consent. Given that the violations were considered subsequent violations because of the prior Order on Consent, a maximum penalty of \$35,000 was calculated, bringing the staff's \$19,000 request well within the limit.

#### *In the Matter of the Alleged Violations of Articles 11 and 13 of the New York State Environmental Conservation Law and Parts 44 and 175 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York, by Anthony J. Reale, Respondent*

Decision and Order of the Acting Commissioner

December 1, 2010

#### Summary of Decision

Acting Commissioner found that Respondent did not materially misrepresent or make an inaccurate statement under 6 NYCRR Part 175.5(a)(1) when he checked the "yes" box in the renewal application indicating that he was a "NY State Resident," because he may be considered a NY resident. However, Respondent could not be considered a domiciliary of NY, and therefore was not in compliance with ECL Section 13-0329(1). The Acting Commissioner granted Department staff's request to revoke Respondent's permit.

#### Background

On or about October 13, 2006, Respondent applied for renewal of a New York State DEC Commercial Lobster Permit, Number 898, claiming to be a New York State resident by checking "yes" in the corresponding box on the application form. Department staff alleged that Respondent was in fact a permanent resident of Florida at the time. As such, Department staff claimed that the

materially false or inaccurate statements in the application and supporting documentation were grounds for permit revocation pursuant to 6 NYCRR Part 175.5(a)(1). Staff also claimed that Respondent violated ECL § 13-0329, which requires that persons domiciled within the State may take lobsters upon first obtaining a permit. Staff claimed Respondent was domiciled in Florida during the 2007 license year in question. Respondent had a New York State driver's license and presented evidence that he resided at his niece's house in New York for a period of time every year.

### The ALJ Ruling

The ALJ noted that Section 13-0329(1) of the ECL states that persons domiciled within the State of New York may take lobsters upon obtaining a permit. The motion claimed that Respondent violated that provision by making a false statement on his application in that he was not a "NY Resident."

Respondent presented testimony and evidence that he did not engage in lobstering during the 2007 period in question. The ALJ observed that in order for there to be a violation of Section 13-0329, the evidence must demonstrate that Respondent performed an act prohibited by the statute, or failed to perform a duty the statute requires. As such, the ALJ found that there was insufficient evidence to find that Respondent violated Section 13-0329 of the ECL, because he did not take or land lobsters in 2007.

With respect to Respondent's checking "yes" in the "NY Resident" box on the application form, the ALJ found that the Department staff did not establish by a preponderance of the evidence that Respondent made a material misrepresentation. There was no evidence showing that he was provided with an instruction sheet, which defined "residency" at the time he sought to renew his lobster license. The renewal application only asked if he was a New York State resident.

### Decision and Order of the Acting Commissioner

The Acting Commissioner first considered the first cause of action, relating to Department staff's contention that 6 NYCRR Part 175.5(a)(1) was violated by Respondent checking "yes" in the "NY Resident" box. The Acting Commissioner concurred with the ALJ, finding no material misrepresentation on the part of Respondent. The Acting Commissioner explored the definitional differences between "residence" and "domicile." The Acting Commissioner found that the Respondent was not provided with the instruction sheet to the application that defined "residence" as a "fixed, permanent and principal home or establishment in New York." The application form that was provided to the Respondent made no mention of "domicile" nor was there any indication on the application "residence" was meant to refer to one's fixed permanent home. The Acting Commissioner deter-

mined that since the Respondent held a valid New York State driver's license and resided at least for a time at his niece's residence in New York each year, the Department had not met its burden of proof in demonstrating Respondent was not a resident of New York State. The Commissioner noted that "[e]ven if Respondent is domiciled in a state other than New York, he could still be a resident of New York State."

With respect to the question of whether respondent violated Section 13-0329 of the ECL requiring persons to be domiciled within New York in order to obtain a lobster permit, the Acting Commissioner disagreed with the ALJ's opinion. The Acting Commissioner stated that the determination of an individual's domicile is based on conduct manifesting an intent to establish a permanent home with permanent associations in a given locality. He noted that Department staff presented considerable evidence in support of its position that Respondent was not domiciled in New York State at the time that he submitted his permit application renewal in 2006, or thereafter, in 2007, during the term of the permit. Upon reviewing Respondent's entire course of conduct, the Acting Commissioner found that respondent was domiciled in Florida and not New York during the term of the 2007 permit and at the time that he filed a renewal application in 2006. As such, Respondent was not eligible to hold a resident commercial license permit pursuant to ECL § 13-0329(1). The Acting Commissioner rejected the ALJ's distinction, finding that the fact that no lobsters were taken and landed, or no attempt was made to take and land lobsters, does not support dismissing the cause of action.

The Acting Commissioner also rejected Respondent's assertion that ECL § 13-0329 is unconstitutional and cannot be applied until the State Legislature enacts a constitutionally adequate law allowing for licensure of non-resident/non-domiciliary lobsterman. Respondent cited *Connecticut ex rel. Blumenthal v. Crotty* 346 F3d 84 (2d Cir 2003) as support for his assertion. However, the Acting Commissioner rejected Respondent's argument and distinguished the case finding that the Second Circuit's decision was directed to the geographical limitation imposed on the lobstering activities of non-domiciliaries, rather than the general distinction between domiciliary and non-domiciliary permitting requirements. Accordingly, Respondent was adjudged to have violated ECL § 13-0329(1) by holding a resident commercial lobster permit during 2007 without being a domiciliary of New York State, which permit, as a result, was revoked and required to be surrendered to Department staff.

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# Recent Decisions and Legislation in Environmental Law

## Recent Decisions

*Coal. of Battery Recyclers Ass'n. v. Env'tl. Prot. Agency*, 604 F.3d 613 (D.C. Cir. 2010)

### Facts

Under the Clean Air Act, the Environmental Protection Agency (EPA) is authorized to establish National Ambient Air Quality Standards (NAAQS).<sup>1</sup> In 1978, the EPA began regulating lead. Lead (Pb) is present in the air and can be ingested or inhaled, by which it enters the bloodstream and may result in adverse health effects, particularly neurological effects in children. Measured by Pb levels in the bloodstream, the regulations set forth standards to prevent levels above 30 micrograms of Pb per deciliter of blood (30  $\mu\text{g}/\text{dL}$ ) in most children.<sup>2</sup> However, recent research has yielded data related to the neurocognitive effects of exposure to Pb, where children with blood levels below 10  $\mu\text{g}/\text{dL}$  were at risk.

In 2004, EPA began review of the NAAQS for Pb levels. The focus of the review shifted from appropriate population blood levels to neurocognitive effects. EPA sought to determine the relationship between air and blood Pb levels as well as between blood Pb levels and IQ loss. The review relied on data developed through risk assessment models, public comments, and independent scientific review by the Clean Air Scientific Advisory Committee (CASAC).<sup>3</sup>

EPA found that the concentration of Pb levels and its relationship to adverse effects was nonlinear, and that lower Pb blood levels resulted in greater IQ loss. Given the analysis, which accounted for uncertainties in the findings, the EPA set the loss of two IQ points from air-borne-related Pb as the maximum allowable because such loss constitutes a highly significant public health issue.<sup>4</sup> EPA further found that Pb levels should be measured and averaged over a three-month period because Pb levels initially increase quickly and can be correlated to IQ impact during that time period.

In 2008, EPA set the final standard of 0.15  $\mu\text{g}/\text{m}^3$  averaged over a rolling three-month time period.

### Procedural History

The Coalition of Battery Recyclers Association and Doe Run Resources Corporation challenged the EPA's process for revising NAAQS, requesting a review of the findings and administrative agency standards.

### Issues

- 1) Whether the EPA's standards for Pb exposure in children were based on a sufficient record of support that did not result in an overprotective standard.
- 2) Whether reliance on studies and selection of standard was arbitrary and capricious.

### Rationale

The EPA selected its rigorous standard to protect everyone, but particularly the most sensitive subpopulation, children, who are at greatest risk of exposure. The duty to protect all children did not result in an overprotective standard. EPA's explanation that a "mean population loss of two IQ points would cause both a substantial decrease in the percentage of the populations achieving very high IQ scores and a substantial increase in the percentage achieving very low scores" was significant.<sup>5</sup> This evidence supported the finding that the standard was not overprotective. Instead, it was specifically designed to protect those who need the most protection, sensitive subpopulations such as children, as well as the public health in general. The court found that the scientific evidence that the EPA relied on was reviewed by CASAC and endorsed by the American Academy of Pediatrics and was not arbitrary or capricious.

The court held that by accounting for increased IQ scores and adjusting accordingly, the EPA was adequately justified in setting the standards that it did.

Lastly, the court determined the EPA's reliance on results in four separate study groups was sufficiently representative to identify and address risks and by avoiding a single estimate of risk, allowed for an adequate margin of safety. Additionally, the court explained that reliance on published studies, which included yearly and not monthly or quarterly averages, was adequately explained and accounted for in measuring risk.

### Conclusion

The court concluded that the EPA standards are based on a sufficiently thorough review of scientific evidence that supports a finding that the standards are necessary to protect public health within an adequate margin of safety.

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### Endnotes

1. 42 U.S.C.A. §§ 7408-09 (West 2010).

2. See National Ambient Air Quality Standards for Lead, 73 Fed. Reg. at 66,964 (Nov. 12, 2008).
3. *Coal of Battery Recyclers Ass'n.*, 604 F.3d at 616.
4. *Id.*
5. *Id.* at 619 (citing National Ambient Air Quality Standards for Lead, 73 Fed. Reg. at 67,976).

\* \* \*

***Medina County Env'tl. Action Ass'n. v. Surface Transp. Bd.*, 602 F.3d 687 (5th Cir. 2010)**

**Facts**

Parent company, Vulcan Materials Co., owns the leaseholder of a 1,760-acre property in Quihi, Texas and SGR, a corporate entity seeking to construct a seven-mile rail line and loading loop. The proposed rail line would connect the Union Pacific Railway main line to the leased property where a limestone quarry is proposed to begin development on 640 acres (Phase One). Subsequent phases will be determined as economic feasibility and incentives become available at some point in the future.

SGR requested prior approval exemption from the Surface Transportation Board (STB) in order to construct the rail line under 49 U.S.C. § 10502. The quarry approval and permitting process is separate and distinct from the rail construction process. STB approved the exemption, granting conditional approval subject to § 7 of the Endangered Species Act (ESA), imposing an affirmative duty to ensure that such approval actions do not threaten endangered species.<sup>1</sup>

Medina County Environmental Action Association (MCEAA) is an incorporated non-profit organization formed to oppose the construction and operation of the quarry. It challenged whether the quarry threatened the endangered golden-cheeked warbler, in violation of § 9 of the ESA, which prohibits the take of any endangered species.<sup>2</sup> Violators are subject to criminal penalties, up to one-year imprisonment and a \$50,000 fine per violation, as well as civil penalties of up to \$25,000 per violation.<sup>3</sup>

In 2001, 2002 and 2003, Vulcan surveyed the Phase One property with advice and guidance from the U.S. Fish and Wildlife Service (FWS). There were no golden-cheeked warblers found, and the habitat was deemed as "poor to marginal." However, in one instance one warbler had been heard calling. FWS issued its reports to STB and additionally also noted that endangered karst invertebrate species had been listed as present in neighboring counties and could be adversely impacted by tainted groundwater at the quarry. Vulcan proceeded with more formalized studies of the area, resulting in draft, supplemental and final environmental impact statements (EIS). The impact statements included, among other things, a conclusion that if the rail construction approval was denied, Phase One of the quarry could proceed regardless and instead utilize trucks to transport materials. Trucking

estimates were for 1,700 trucks to run daily, as opposed to four rail trips to carry the same amount of materials. As such, it was found that not granting the permit would result in greater impact potential.

STB issued its Decision to grant the exemption in December 2008, conditioned on fulfillment of 91 environmental mitigation conditions, and Vulcan remained subject to provisions of § 9 of ESA if at any point during the construction of the rail line the actions threatened the protected species.

**Procedural History**

MCEAA brought suit in February 2009, appealing under the Administrative Procedure Act (APA),<sup>4</sup> on the grounds that the STB and FSW administrative agency decisions to grant the prior approval exemption were arbitrary and capricious and in violation of their obligations under § 7 of ESA. MCEAA also requested to supplement the record with additional materials and documentation. The court applied the narrow and highly differential APA standard of review.

**Issue**

Whether STB exercised its affirmative duty of assessment in compliance with obligations under § 7 of the ESA, when it made the Decision to grant the exemption based on an impact statement encompassing only Phase One of the quarry development, finding that the railroad construction was not likely to threaten the identified endangered species.

**Rationale**

MCEAA alleged that Phase One of the project included 650 acres of the whole 1,760-acre parcel and that the entire parcel should be included as part of the cumulative effects analysis in the EIS. The court found that the proposed rail line was only related to Phase One because it was the only part to be developed with reasonable certainty.<sup>5</sup> The court held that because there was not a substantial degree of certainty that subsequent development of the property would happen, it was not reasonably foreseeable under a National Environmental Policy Act (NEPA) standard. The court found that the existence of the long-term leasehold did not ensure that the project would move forward in any set way to enable a meaningful analysis of the impacts. The court further found that any future findings of endangered species or protected habitat on the additional property would preclude development in order to meet Vulcan's obligation to avoid a "take." If there were a take, development would stop because the provisions of the ESA carry citizen action sanctions, significant and undesirable fines, and criminal penalties.

The effects of the rail line construction were found to be non-adverse because surveys found no presence of endangered species and insufficient habitat resources to be disturbed by any development.<sup>6</sup> For example, there were no species present in areas where noise or vibrations would be an issue.

Additionally, because the STB Decision related only to whether or not the rail line approval process exemption would be granted or denied, it would not preclude any impact of the quarry, which would go ahead with or without the rail line. In fact, a decision to deny the exemption would have more adverse effects because the quarry would then employ the more intensive truck option to meet its needs.

The court held that the materials that MCEAA requested to add to the record in its motion to supplement were not allowed because MCEAA did not sufficiently show unusual circumstances warranting a departure from protocol on admissibility of documentation.<sup>7</sup>

## Conclusion

The court held that the Decision made by STB was in compliance with its duties under § 7 of the ESA, was based on actual findings, and that development that was more intensive would permissibly occur if the permit was denied, and therefore denied MCEAA's request to review the Decision. The court also denied the request to supplement.

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## Endnotes

1. See 16 U.S.C.A. § 1536(a)(2) (Westlaw 2010).
2. *Id.* § 1538(a)(1)(B).
3. *Id.* § 1540(a), (b).
4. 5 U.S.C. §§ 701 et seq.
5. *Medina County Env'tl. Action Ass'n*, 602 F.3d at 701.
6. *Id.* at 705.
7. *Id.* at 706-07.

\* \* \*

## ***Agere Systems, Inc. v. Advanced Environmental Technology Corp.*, 602 F.3d 204 (3d Cir. 2010)**

### Facts

This Comprehensive Environmental Response, Cleanup and Liability Act<sup>1</sup> (CERCLA or the "Act") case addresses the gap left by the U.S. Supreme Court in *United States v. Atlantic Research Corp.*<sup>2</sup> regarding a party's rights to cost recovery and contribution for hazardous waste cleanup under §§ 107 and 113.<sup>3</sup>

From 1972 to 1976, DeRewal Chemical Corporation (DCC), a business that "removed, transported, and disposed of chemical waste generated by other companies," illegally dumped more than a million gallons of hazardous wastes generated by over twenty companies at a site near Philadelphia, PA, known as the Boarhead Site (the "site").<sup>4</sup> The Environmental Protection Agency (EPA) investigated the site in the mid-1980s, added it to the list of Superfund sites in 1989, and shortly thereafter began cleanup actions.<sup>5</sup> Throughout the 1990s EPA performed a remedial investigation while removal actions were ongoing, eventually issuing a Record of Decision (ROD) on November 18, 1998, laying out the remedial plan. The remediation was divided into two separate operable units, designated OU-1 and OU-2.<sup>6</sup>

### Procedural History

On June 2, 2000, EPA sued three Potentially Responsible Parties (PRPs), Cytec Industries, Inc. (Cytec), Ford Motor Co. (Ford), and SPS Technology, LLC (SPS) in the United States District Court for the Eastern District of Pennsylvania under § 107 of CERCLA to recover costs incurred due to cleanup at the site. The EPA complaint was filed along with a consent decree ("OU-1 Consent Decree"), entered September 28, 2000, wherein the three PRPs agreed to fund the remedial work at OU-1 and reimburse EPA for administrative and oversight costs. The following year, EPA brought another § 107 suit against the three aforementioned PRPs and one additional, TI Automotive Systems LLC (TI), for the remediation of OU-2. Again, the PRPs agreed to a consent decree ("OU-2 Consent Decree"), approved by the District Court on March 14, 2002, whereby the PRPs would perform the work required for OU-2 and reimburse EPA for approximately \$7 million in past removal costs as well as any future response costs incurred by EPA at that operable unit.<sup>7</sup>

Meanwhile, TI and Agere Systems, Inc. (Agere) entered into private settlement agreements with the PRPs to contribute to funding the remedial work at OU-1. Agere also entered into a private settlement with the four PRPs under the OU-2 Consent Decree to also help fund that remediation effort.<sup>8</sup>

All five of these parties subsequently brought cost-recovery claims under CERCLA §§ 107 and 113 against twenty-three other PRPs in June of 2002. After six years of dismissals and out-of-court settlements, by June 23, 2008, only Carpenter Technology Corp. (Carpenter) remained as a defendant.<sup>9</sup> At trial, Carpenter was found liable for 80% of \$13.7 million of the plaintiffs' past costs plus pre-judgment interest, as well as 80% of their future costs.<sup>10</sup>

Carpenter appealed the judgment on six grounds, two of which will be discussed here.<sup>11</sup>

## Issues

- 1) Whether parties—Agere and TI—to a private settlement with other PRPs may bring a cost-recovery claim under § 107(a) of CERCLA against another PRP for sums paid pursuant to the settlement.
- 2) Whether parties to a consent decree with the EPA have a right to recover costs under both CERCLA § 107(a) and § 113(f), where those parties fund and perform the cleanup work directly.

## Rationale

Under CERCLA, a PRP has two means of mitigating its financial liability for a cleanup effort. As set out in *Atlantic Research*, § 113(f)(1) of the Act provides a party with a right to bring contribution claims against other PRPs as long as the party seeking contribution has been the subject of a suit or settlement under § 106 or § 107; the party's recovery is limited to any payments for cleanup costs in excess of its equitable share.<sup>12</sup> § 107(a)(4)(B), by contrast, authorizes a private party that voluntarily incurs cleanup costs (as opposed to resolving its CERCLA liability) to recover those costs from other PRPs.<sup>13</sup> Since § 107 allows for recovery on a joint and several liability theory, the party seeking to recover cleanup costs can potentially recuperate all of its expenses from other PRPs.<sup>14</sup>

As to the first issue, the court held that the amounts paid by Agere and TI to the parties to the two consent decrees were recoverable from Carpenter under CERCLA § 107(a). The court rejected Carpenter's argument that the amounts paid into the trust accounts for the OU-1 and OU-2 remediation were not "incurred" costs of response, stating that the plain meaning of that word encompassed such payments.<sup>15</sup> It further stated that to hold otherwise would deprive parties like Agere and TI of any right to recover costs under CERCLA, since they had not themselves been sued by the EPA and therefore had no right to bring § 113(f) contribution claims. Without the right of action under § 107(a), the court said that parties in similar circumstances would be deterred from voluntarily assisting in cleanup efforts, and would instead wait to be sued—a result that would be contrary to CERCLA's "primary purposes" of "encourag[ing] the timely cleanup of hazardous waste sites" and "plac[ing] the cost of that [cleanup] on those responsible for creating or maintaining the hazardous condition."<sup>16</sup>

As to the second issue, the court found that the parties to the OU-1 and OU-2 Consent Decrees could only bring CERCLA § 113(f) contribution claims against Carpenter and had no valid § 107(a) cost recovery claim for funding the remediation work. The problem, as the court put it, was that the remedial costs "were neither 'incurred voluntarily,' because the parties were in fact sued by the EPA, nor were they 'reimbursed to another party,' because they were expended in performing the OU-1 and OU2 work directly."<sup>17</sup> Though the Supreme Court in

*Atlantic Research* had suggested that the two causes of action might overlap under these circumstances,<sup>18</sup> the court here found that allowing plaintiffs such as these to pursue joint and several liability under § 107(a) would be "perverse," because, having already settled their liability to the government, they would themselves be shielded from § 113(f)(1) counterclaims.<sup>19</sup>

## Conclusion

The case was reversed in part and remanded to the District Court to make a "clear and unequivocal finding" with regard to the statute of limitations issue and to further examine the evidence for assessing the equitable allocation of liability for the site.<sup>20</sup>

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## Endnotes

1. 42 U.S.C. §§ 9601 *et seq.*, including the Superfund Amendments and Reauthorization Act (SARA) of 1986.
2. 551 U.S. 128 (2007).
3. 42 U.S.C. §§ 9607, 9613, respectively.
4. *Agere Sys., Inc. v. Advanced Env'tl. Tech. Corp.*, 602 F.3d 204, 211 (3rd Cir. 2010).
5. *Id.*
6. *Id.* at 211–12. In general, a "removal" action refers to short-term measures taken to protect against an immediate threat to human health or the environment due to hazardous wastes at a site; this may include erection of a security fence, removal of contaminated soil, proper disposal of waste drums, etc. *See, e.g.*, U.S. Environmental Protection Agency, Frequent Questions, "What is the difference between a removal action and a remedial action?," <[http://epa.custhelp.com/cgi-bin/epa.cfg/php/enduser/std\\_adp.php?p\\_faqid=119&p\\_created=1064430489](http://epa.custhelp.com/cgi-bin/epa.cfg/php/enduser/std_adp.php?p_faqid=119&p_created=1064430489)>, and 42 U.S.C. §§ 9601(23)–(24). A "remedial" action is a long-term solution designed to minimize any future threat to human health or the environment at the site; an example is the installation of wells and pumps to treat contaminated groundwater over several years. *Id.*
7. *Agere Sys.*, 602 F.3d at 212–13.
8. *Id.*
9. *Agere Sys., Inc. v. Advanced Env'tl. Tech. Corp.*, 602 F.3d 204, 214 (3rd Cir. 2010).
10. *Id.* at 215–16.
11. The other four issues are: whether the plaintiffs' claims were barred by the statute of limitations; whether the total volume of waste disposed at the site was erroneously determined; whether the allocation of costs was inequitably determined; and whether claims under the overlapping PA law (the Hazardous Sites Cleanup Act) were viable given the uncertain viability of plaintiffs' CERCLA § 107 claims.
12. *United States v. Atl. Research Corp.*, 551 U.S. 128, 138–39 (2007).
13. *Id.* at 139.
14. *Id.* at 140. *See also Agere Sys., Inc. v. Advanced Env'tl. Tech. Corp.*, 602 F.3d 204, 217 (3rd Cir. 2010).
15. *Agere Sys.*, 602 F.3d at 225.
16. *Id.* at 225–26 (quoting *W.R. Grace & Co. v. Zotos Int'l, Inc.*, 559 F.3d 85, 88 (2nd Cir. 2009)).
17. *Agere Sys.*, 602 F.3d at 227.

18. *United States v. Atl. Research Corp.*, 551 U.S. 128, 139 n.6 (2007).
19. *Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.*, 602 F.3d 204, 228 (3rd Cir. 2010). To encourage PRPs to settle with the EPA or a state agency, CERCLA § 113(f)(2) bars non-settling parties from bringing § 113(f)(1) contribution suits against parties to the settlement “regarding matters addressed in the settlement.” 42 U.S.C. § 9613(f)(2).
20. *Agere Sys.*, 602 F.3d at 236–37.

\* \* \*

## ***Gintis v. Bouchard Transportation Company, Inc.*, 596 F.3d 64 (1st Cir. 2010)<sup>1</sup>**

### **Facts**

This case concerns the standard for certifying a class of plaintiffs who claimed injuries to property arising from an oil spill off the coast of Massachusetts.

On April 27, 2003, barge Bouchard No. 120, towed by the tug Evening Tide, struck a reef in Buzzards Bay. The vessels had strayed off course while navigating a marked channel.<sup>2</sup> The barge had been carrying 99,000 gallons of fuel oil, up to 98,000 gallons of which spilled into the bay.<sup>3</sup> Cleanup was conducted by a “Unified Command,” run by government entities and Bouchard Transportation Company, Inc. (Bouchard), which “divided the shoreline into 149 segments. Shoreline Cleanup Assessment Teams inspected and categorized the segments according to the degree of oiling observed[,]...the final tally being that 120 of the 149 segments were contaminated.”<sup>4</sup>

The Plaintiffs were residential property owners in Fairhaven, Mass., who also had a property interest in a beach on Buzzards Bay. Defendant Bouchard wholly controlled and directed the co-defendants, each a corporation owning and operating one of the vessels involved in the spill.<sup>5</sup>

### **Procedural History**

In April 2006, Plaintiffs sued Bouchard and its co-defendants on three claims: (1) a claim in strict liability under Massachusetts General Law ch. 21E, § 5 for damage to real property on the owner of a vessel from which oil has spilled; (2) a claim providing for double damages under Massachusetts General Law ch. 91, § 59A for the negligent discharge of petroleum; and (3) a claim for common law public nuisance.<sup>6</sup> Plaintiffs “moved the district court to certify a class consisting of all persons having an interest in property damaged by the spill....”<sup>7</sup>

The motion was denied, the district court finding that common issues of law and fact did not predominate throughout the many potential claims of those owning, or owning an interest in, the bay shoreline, thereby failing to satisfy the requirements of rule 23(b)(3) of the Federal Rules of Civil Procedure. Relying heavily on the denial of class certification in *Church v. General Electric Co.*, 138 F. Supp. 2d 169 (D. Mass. 2001),<sup>8</sup> the district court held that

“an adjudication of damages...would require various individualized inquiries;” and that with respect to the public nuisance claim, an adjudication of liability and causation “would require an examination into the individual characteristics of the proposed class members’ properties and the extent of contamination.”<sup>9</sup>

Plaintiffs appealed the denial of their motion for class certification.

### **Issue**

Whether the Plaintiffs presented sufficient evidence to meet their burden under Federal Rules of Civil Procedure 23(b)(3) to merit class certification given Defendants’ admission of liability for the oil spill and the availability of the contamination assessment and cleanup records prepared by the Unified Command.

### **Rationale**

To certify a class in federal court, a plaintiff must satisfy several elements. First, the class members must be capable of ascertainment, meaning that they exist and are capable of identification.<sup>10</sup> Second, Fed. R. Civ. P. 23(a) requires that the court find that “(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.”<sup>11</sup> Finally, one of the subsections of Rule 23(b) must be satisfied; relevant here is 23(b)(3) which requires a court to determine that “(1) ‘the questions of law and fact common to the case predominate over questions affecting only individual members’ and (2) that a class action is superior to other available methods for the efficient adjudication of the controversy.”<sup>12</sup> Additionally, a trial court is required to make a “rigorous analysis” before rendering its decision whether to certify a class,<sup>13</sup> and the decision is reviewed for abuse of discretion.<sup>14</sup>

Here, the appellate court found that the analysis of the court below was not sufficiently rigorous, given that the “substantial evidence of predominating common issues” merited a “searching evaluation.”<sup>15</sup> The court criticized in particular the lower court’s reliance on the *Church* case to the exclusion of “others in the same genre [that] go the other way.”<sup>16</sup> It also noted that the Defendants’ objections to Plaintiffs’ evidence “would require repetitious resolution” if brought on a plaintiff-by-plaintiff basis, and that Defendants’ arguments overall “appear to show that substantial and serious common issues would arise over and over in potential individual cases.”<sup>17</sup> Finally, on whether the class action would be the superior method of adjudication, the court found the question to be “a serious one” given that the low claims to recovery (in the range of \$12,000–\$39,000) could not sensibly be litigated by all individual plaintiffs, “especially with the prospect of expert testimony required.”<sup>18</sup>

## Conclusion

The decision was vacated and the case remanded for a more thorough examination of the issues noted above. The court did not determine whether the court below abused its discretion in denying the motion to certify the class, stating that “spare treatment of the contending factual claims” in its decision made such a determination “inadvisable.”<sup>19</sup>

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## Endnotes

1. Opinion by Associate Justice David H. Souter, sitting by designation.
2. *Gintis v. Bouchard Transportation Company, Inc.*, 597 F.3d 64, 65 (1st Cir. 2010).
3. *Gintis v. Bouchard Transp. Co.*, 593 F. Supp. 2d 335, 337 (D. Mass. 2009).
4. 596 F.3d at 65.
5. 593 F. Supp. 2d at 336–37.
6. 596 F.3d at 66.
7. *Id.* The class excluded “shorefront residents of the town of Mattapoisett, who had been certified as their own class in a state court action against the [same] defendants.” *Id.*
8. *Id.*
9. 593 F. Supp. 2d at 341.
10. *Id.* at 339 (citing *Crosby v. Soc. Sec. Admin. of the U.S.*, 796 F.2d 576 (1st Cir. 1986)).
11. *Id.* (quoting Fed. R. Civ. P. 23(a)).
12. *Id.* (quoting Fed. R. Civ. P. 23(b)(3)).
13. 596 F.3d at 66 (citing *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982) and *Smilow v. Sw. Bell Mobile Sys.*, 323 F.3d 32, 38 (1st Cir. 2003)).
14. 596 F.3d at 68.
15. *Id.* at 66.
16. *Id.* at 67.
17. *Id.*
18. *Id.* at 68.
19. *Id.*

\* \* \*

## ***General Electric Company v. Jackson*, 610 F.3d 110 (D.C. Cir. 2010)**

### Facts

Appellant General Electric Company (GE) had gained the much maligned status of potentially responsible party (PRP) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) due to its ongoing and past involvement with numerous hazardous waste sites.<sup>1</sup> Under CERCLA’s provisions a PRP is required to assume the oftentimes vast financial and/or cleanup responsibilities for hazardous waste sites where there is a release or substantial threat of release, whether through short-term removal actions or longer term remedial actions.<sup>2</sup> CERCLA § 106, the primary object of GE’s

suit, is one of the methods available to the EPA to ensure that PRPs end up with the final bill for response costs. Per § 106, once the EPA determines that cleanup of a hazardous site is required, it has the power to issue a unilateral administrative order (UAO) requiring PRPs to clean up the site.<sup>3</sup> To issue a UAO, the EPA first has to determine that there is a threat to the public health or welfare due to an actual or threatened release of hazardous substances, and then it must provide for periods of public notice and comment.<sup>4</sup> Once a UAO is issued, the recipient PRP has two choices 1) comply with the order, clean up, and seek reimbursement from the EPA, and if the EPA refuses, then the PRP may sue the agency in federal court to recover its costs or 2) refuse to comply, whereupon the EPA can either bring suit in federal district court to enforce the UAO or engage in self-cleanup of the site and sue the PRP to recover costs.<sup>5</sup> In either case, upon a finding that a PRP willfully failed to comply with a UAO without sufficient cause, the court may then impose a fine, currently set at \$37,500 per day, or punitive damages.<sup>6</sup>

GE had been the recipient of at least sixty-eight UAOs over the years and was currently involved in response actions in seventy-nine active CERCLA sites, one of which was the roughly 200-mile long Hudson River site extending from Hudson Falls to Manhattan.<sup>7</sup> Faced with potentially staggering financial consequences, GE brought suit against the EPA and its UAO regime in 2000. GE asserted that CERCLA § 106 was an unconstitutional violation of its Fifth Amendment rights because it deprived it of its rights to liberty and property without the procedural safeguards required by the Due Process Clause.<sup>8</sup> GE’s constitutional argument boiled down to what it considered a “Hobson’s choice”: by refusing to comply with a UAO, it risked harsh punishment and court-levied fines; therefore, the only “real” option was to comply with a UAO before having an opportunity to be heard on the subject.<sup>9</sup> The second thrust of its facial challenge of CERCLA § 106 asserted that stock prices, brand value, and financing opportunities all declined whenever a UAO was issued, that these were all property interests protected by the Due Process Clause, and that therefore fundamental fairness required an opportunity to be heard *prior* to the issuing of the UAOs, not after.<sup>10</sup> Lastly, GE claimed the way in which the EPA administered the UAO regime increased the UAOs frequency and their inaccuracies, thereby making PRPs more likely to suffer pre-hearing deprivations and depriving it of due process under the law.<sup>11</sup> These arguments having been rejected by the district court, GE appealed.

### Procedural History

In a constitutional challenge to CERCLA, GE asserted that § 106 of the act violated the Due Process Clause of the Fifth Amendment to the United States Constitution on its face, and as administered by the Environmental Protection Agency (EPA).<sup>12</sup> The District Court for the District of Columbia dismissed for lack of jurisdiction, but the

Court of Appeals, D.C. Circuit, reversed, finding no bar to jurisdiction, and on remand, the district court granted the EPA's motions for summary judgment as to both of GE's constitutional claims.<sup>13</sup> On appeal, the district court's judgments were affirmed.<sup>14</sup>

## Issues

- 1) Whether CERCLA § 106's UAO regime denies a PRP of its right to due process by imposing the cost of compliance, or fines and punitive damages for non-compliance, with a UAO.
- 2) Whether harm to stock prices, brand value, and creditworthiness owing to the issuance of a UAO constitutes a deprivation of "property" which is protected by the Due Process Clause.
- 3) Whether the district court lacked jurisdiction to hear the case originally.
- 4) Whether GE had standing to bring a pattern and practice claim.
- 5) Whether the EPA's pattern and practice of administering CERCLA's UAO regime violated the Due Process Clause.

## Rationale

The jurisdictional and standing issues were dispensed with quickly by the court. The EPA relied on a CERCLA provision, which stated in effect that a Federal court could not review UAOs until cleanup work was complete or the EPA brought an enforcement action against PRPs.<sup>15</sup> GE was quick to note, however, that its challenge involved no review of, nor relief from, any particular UAO, and the court agreed that the only possible conclusion was that this case fell outside the jurisdictional statute's ambit.<sup>16</sup> As to standing, the court applied the "now familiar elements of injury in fact, causation, and redressability."<sup>17</sup> GE argued that the allegedly unconstitutional UAO regime had repeatedly injured the company and the court was sufficiently swayed that the sixty-eight prior UAO's and the seventy-nine active GE CERCLA sites did in fact represent a threat sufficient to give GE a stake in the litigation.<sup>18</sup> If proven, the injuries allegedly suffered were "certainly" traceable to the EPA's enforcement of CERCLA and, as such, could be remedied by a declaratory judgment finding certain procedures unconstitutional.<sup>19</sup>

The court then began by noting that facial challenges to legislative acts are the hardest to sustain, indicating an uphill battle for GE.<sup>20</sup> The familiar test for whether due process' requirements have been satisfied was then stated by the court: first, there must be a deprivation of some sort of protected property or liberty interest.<sup>21</sup> Having identified a protected interest, the court can then assess procedural adequacy via the three-pronged *Mathews v. Eldridge* balancing approach, wherein it must weigh the

significance of the private party's interest versus that of the government and then evaluate the risk of erroneous deprivation and any additional or alternative safeguards.<sup>22</sup> GE had asserted the deprivation of two types of property, the first being the money spent by PRPs either complying with a UAO or paying fines and damages for non-compliance, and the second being the alleged harm done to stocks, brand value, and creditworthiness.<sup>23</sup>

In terms of the constitutional validity of the fines and damages, GE's basic position was that CERCLA failed to provide any realistic mode of pre-deprivation review, and that this lack of notice and opportunity to be heard was fatal to the act.<sup>24</sup> The court disagreed, and after noting that levying such fines and damages does require due process, it stated that CERCLA did in fact have several safeguards for PRPs facing fines and damages under § 106. Most importantly, fines and damages could only be assessed under the statute if a federal court found that 1) the UAO was proper 2) that the PRP "willfully" failed to comply "without sufficient cause" and 3) that the fines and damages were appropriate in a given instance.<sup>25</sup> Applying this rubric, the court placed emphasis on the facts that a district court reviews the EPA's determinations de novo and gives them no judicial deference, and that whether or not fines and damages are assessed is completely discretionary and need not be imposed at all.<sup>26</sup> Given the above safeguards, the court concluded that the effect of CERCLA was not to preclude a resort to courts and that the "Hobson's choice" argument of GE was incorrect.<sup>27</sup> In other words, the procedures in place under CERCLA were constitutionally adequate in regards to GE's first due process claim.

The court was swayed even less by GE's due process arguments on the subject of the harm posed to stock price, brand value and cost of financing owing to the stigma that attaches to recipients of UAOs. It did not even find it necessary to apply the *Mathews v. Eldridge* test because GE stumbled at the first gate: it failed to show that harm to such "property" was an interest protected by the Due Process Clause.<sup>28</sup> Property interests, the court said, accrue by way of legal rights stemming from sources such as state law.<sup>29</sup> The court then cited precedent that indicated that reputational harm to a protected interest, by itself, is not enough to invoke the Due Process Clause, rather, reputational harm must be accompanied by the deprivation of a benefit owing to a legal right or such "severe government-imposed" stigma that it essentially precludes a plaintiff from pursuing a chosen trade or business.<sup>30</sup> Siding with the EPA, the court concluded that the damages resulting from the GE's UAOs were consequential (owing to market forces) and did not result from the extinguishing or modification of any previously existing right recognized by law. Because the reputational harm the UAOs did to GE did not rise to a level where the asserted harm could be the stand alone subject in a due process challenge, the court concluded that the requisite property or

liberty interests needed to invoke the protections of due process were not present.<sup>31</sup>

GE's last claim, that the way in which the EPA administered CERCLA violated due process, was a simple matter for the court. The basis for the argument was that the EPA's "enforcement first" policy resulted in increased frequency and decreased accuracy of UAOs, which in turn harmed GE's stock, brand value and financing options.<sup>32</sup> The court found it unnecessary to even apply the *Mathews v. Eldridge* balancing test in light of its previous findings; indeed it could not, because it had already held that the harm done to stocks, brand value, and credit availability did not fall into a class of interests protected by the Fifth Amendment.<sup>33</sup>

## Conclusion

Both the district and circuit court had jurisdiction over the case to begin with, GE had standing to bring suit, and CERCLA's UAO regime was held Constitutional, both facially and as applied. Thus, the Court of Appeals, D.C. Circuit, "join[ed] three of our sister circuits that have rejected similar...challenges to CERCLA's UAO regime."<sup>34</sup>

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## Endnotes

1. *Id.* at 115.
2. See 42 U.S.C. §§ 9601(14), (23), (24), 9604, 9607, 9613 (2006).
3. *Gen. Elec. Co.*, 610 F.3d at 114 (citing 42 U.S.C. § 9606).
4. *Id.* (citing 42 U.S.C. §§ 9606, 9613(k)).
5. *Id.* at 115 (citing 42 U.S.C. § 9606(b)(2)(A), (B)).
6. *Id.* (citing 42 U.S.C. § 9606(b)(1)).
7. *Id.*
8. *Id.* at 116.
9. *Id.*
10. *Id.*
11. *Id.* at 127.
12. *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 113 (D.C. Cir. 2010).
13. *Id.* at 116.
14. *Id.*
15. *Id.* at 124 (quoting 42 U.S.C. § 9613(h)).
16. *Id.* at 125.
17. *Id.* at 127 (quoting *Lance v. Coffman*, 549 U.S. 437, 439 (2007)).
18. *Id.*
19. *Id.*
20. *Id.* at 117 (citing *United States v. Salerno*, 481 U.S. 739 (1987)).
21. *Id.* (citing *Amer. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999)).
22. *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1975)).
23. *Id.*

24. *Id.* at 118.
25. *Id.* (citing 42 U.S.C. §§ 9606(b)(1), 9607(c)(3)).
26. *Id.* at 118, 119.
27. *Id.* at 119.
28. *Id.* at 120.
29. *Id.* at 119 (citing *Bd. Of Regents of State Colls. v. Roth*, 408 U.S. 564, 570 (1972)).
30. *Id.* at 121 (citing *Paul v. Davis*, 424 U.S. 693 (1976), *Doe v. United States Dep't of Justice*, 753 F.2d 1092, 1108-1109 (D.C. Cir. 1985)).
31. *Id.* at 121.
32. *Id.* at 127-128.
33. *Id.* at 128.
34. *Id.* at 119. The 4th, 7th and 9th Circuits are the sister circuits which the court refers to.

\* \* \*

## Recent Legislation

### Open Parks and Closed Budgets

Due to severe budget shortfalls, New York State was faced with the prospect of locking the gates to its 178 state parks, campgrounds, and historic sites beginning Memorial Day weekend 2010. Facing significant pressure from their constituents, the state's legislative leadership and Governor Paterson arrived at a solution to allocate the necessary funds to the Office of Parks, Recreation and Historic Preservation.

Senate Bill S7988 and Assembly Bill A11308 entitled "Relates to real estate transfer tax deposits into the environmental protection fund; penalties; E-waste and makes appropriations for the support of government; repealer," was signed into law by Governor Paterson on May 28, 2010 and was sponsored by the Senate Standing Committee on Rules with Senator Malcolm A. Smith sitting as Chairperson.<sup>1</sup>

The bill consisted of 19 sections, the first of which allocated the critical \$11.2 million for the operation of state parks, historic sites, and campgrounds. Due to the state-wide budget cuts, a greater portion of Parks funding will be taken from the Environmental Protection Fund (EPF).<sup>2</sup> Although the need for operational parks garnered and focused the public's attention, the key to the bill's passage is found in subsequent provisions intended to compensate for the increased burden on the EPF. The most significant compensatory provision is in the "Electronic Equipment Recycling and Reuse Act," which was enacted with the bill's passage.<sup>3</sup>

The Act requires electronics manufactures statewide to establish effective recycling and reuse programs at their own expense beginning in April 2011.<sup>4</sup> Violators of the standards set forth in the Act, or the subsequent rules promulgated by the DEC, will meet costly penalty fees, the entirety of which will be deposited into the EPF.<sup>5</sup> The bill also amends one tax provision affecting the EPF<sup>6</sup> and

repeals another<sup>7</sup> to effectively create from two fees paid by “hazardous waste generators” a single fee, a change that is estimated to generate approximately \$2 Million in new EPF revenues. Traditionally funded by real estate transfer tax deposits, these additional EPF deposits are intended to offset the drastic cuts as well as the increased spending necessary to open, and keep open, New York’s campgrounds, historic sites, and parks for summer use and enjoyment.

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## Endnotes

1. 2010 N.Y. Sess. Laws Ch. 99 (McKinney); N.Y. Tax Law § 1421 (2010); *see also*, S.7988, 233rd Leg., Reg. Sess. (NY. 2010), available at <<http://open.nysenate.gov/legislation/api/1.0/html/bill/S7988>>.
2. The legislation allocated \$109 million, which is more than three times higher than the previously allocated \$33.5 million.
3. N.Y. Environmental Conservation Law §§ 27-2601–21 (2010) (ECL).
4. *Id.* § 27-2605.
5. *Id.* §§ 27-6021, 71–2729
6. N.Y. Tax Law § 142.
7. ECL § 72-0403.

\* \* \*

## What About *Our* Water?

Before the first globule of crude emerged from the seafloor under the Gulf of Mexico, the New York State Legislature took action to curb the potential for catastrophe presented by modern drilling. Senate bill S6654-B, sponsored by Senators Addabbo and Duane, is an act to amend the Environmental Conservation Law to establish a moratorium on the issuance of new permits for the drilling of oil and natural gas wells.<sup>1</sup> As of June 8th, 2010 the bill, descriptively titled “Establishes a moratorium on the issuance of permits for the drilling of wells and prohibits drilling within two miles of the New York city water sup-

ply infrastructure,” was pending in the State Assembly Rules Committee and, if passed, will become effective immediately.

The bill, if passed, will prohibit the Department of Environmental Conservation (DEC) from granting any new drilling permits for a period of two years. Despite the outcome of the Supplemental Generic Environmental Impact Statement (SGEIS) currently under DEC review, the significant natural gas deposits contained in the Marcellus Shale formation in western New York, an area cited by name in the bill’s justification, would remain untapped until the moratorium is lifted. The purpose of the moratorium is to provide state agencies with sufficient time to determine the regulatory needs and environmental effects of modern drilling methods. Additionally, the bill enumerates “critical areas” within the state that are *permanently off-limits* to “hydraulic fracturing” drilling, or “fracking.” Among the most expansive areas deemed critical are the ten miles surrounding the New York City water supply infrastructure, the New York City Watershed, and any water system that the United States Environmental Protection Agency has ever given a “Filtration Avoidance Determination.”

The act further authorizes the DEC to determine the appropriate proximity to which “fracking” is allowed relative to a number of other environmentally sensitive areas within the state including: critical endangered species habitats, “Natural Heritage Areas,” floodplains; in addition to all park, wilderness, and forest areas under the control of the State of New York.

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## Endnote

1. S. 6654-B 232nd Leg., Reg. Sess. (NY. 2009), available at <<http://open.nysenate.gov/legislation/bill/S6654B>>.

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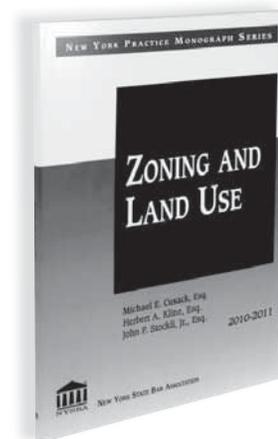
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