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The New York Environmental Lawyer

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of the New York State Bar Association

Message from the Chair

We didn't start the fire
It was always burning
Since the world's been turning
We didn't start the fire
No we didn't light it
But we tried to fight it

From Billy Joel's "We Didn't Start the Fire"

I was thinking of this song by Billy Joel when I was planning the Section's CLE program on Climate Change at the NYSBA annual meeting this past January. In sum, our generation did not bring into motion the surge in greenhouse gas production in the last century, but now we have to address it.

The first step is to ensure that we have the skilled environmental lawyers in place to meet the challenge. We picked up on that theme with the Section business meeting on Thursday January 27, which for the first time was held the day before the Section luncheon in an effort to generate attendance with a broader range of practice and diversity of Section membership.

Barry R. Kogut

We marked the evening with a look

- At our past by issuing Section Awards as part of the Section's celebration of its 30th anniversary in 2010. The selected honorees—Rosemary Nichols, Gail Port, Walter Mugdan, and Lou Alexander—each represent the best of our profession and have served as models for others in the environmental bar. (The inscriptions on their plaques appear on p. 83 in this issue of *The New*

Inside

From the Editor-in-Chief 3
(Miriam E. Villani)
From the Issue Editor 5
(Justin Birzon)
From the Student Editorial Board 6
(Genevieve Trigg and Anna Binau on behalf of the Student Editorial Board)
EPA Update 7
(Chris Saporita, Marla E. Wieder and Joseph A. Siegel)
DEC Update 19
(John Louis Parker)
Member Profiles
Long-Time Member: Rosemary Nichols 21
New Member: Jason Kaplan 21
BOOK REVIEW: *The Polluters: The Making of Our Chemically Altered Environment* by Benjamin Ross and Steven Amter 23
(Andrew B. Wilson)
The Legislative Forum Database, 1998-2010 25
(Michael J. Lesser)
Public Trust Doctrine Should Protect Public's Interest in State Parkland 28
(Greg Berck)
Model Municipal Ordinance Project Designed to Facilitate Wind and Solar Projects and Green Buildings 36
(Michael B. Gerrard and Danielle Sugarman)
New York City: Making the Most of Every Lot 40
(Jay Duffy)
Cap and Trade Legislation and Its Tax Consequences 42
(Philip A. Baumgarten)
Climate Change and the Coastal Zone Management Act: Are the Proposed Amendments Enough? 50
(Nicole Bishop)
Ethics Update 63
(Ann Lapinski and Randall Young)
Administrative Decisions Update 65
(Prepared by Robert A. Stout, Jr.)
Recent Decisions and Legislation in Environmental Law 67
Annual Meeting and Section Business Meeting 83

NYSBA

York Environmental Lawyer and in the minutes of the Section business meeting on the Section web site.)

- At our future by awarding funded minority law student fellowships to Noelle Diaz of Pace Law School and Letecia Whetstone of the University of Buffalo Law School. We applaud diversity in the environmental bar and the minority law student fellowship program has represented the Section's most visible effort in this regard.

The highlight of the evening was our opportunity to hear Acting Commissioner Joe Martens, who made his first public appearance since his designation by Governor Cuomo to become the next Commissioner of the New York State Department of Environmental Conservation. Commissioner Martens underscored the challenges ahead and his desire to work with the members of the Section in meeting those challenges. We share the desire for dialogue and hope that the Section can offer opportunities for the exchange of varying viewpoints as part of the effort to reach consensus in a way that focuses on what unites us rather than what divides us.

The CLE program on Friday was highlighted by Professor Michael Gerrard's presentation on the impacts of climate change, the most dramatic of which is sea level rise. His photographic presentation on the challenges that the Marshall Islands are facing was impressive and unfortunately, the predicament of that island nation is not unique. Robi Schlaff, who served as Chair of the NYS Sea Level Rise Task Force Steering Committee, then presided as moderator for the remarks made by an impressive panel of representatives of the federal, state, municipal, and public interest viewpoints on adaptation strategies to address the impacts of climate change.

Adaptation strategies in the private sector were the subject of the presentations made by Ted Keyes on required SEC and insurance responses to the impacts of climate change and by a panel moderated by Howard Tollin on the opportunities offered by the movement to make our buildings green. The Green Building revolution is a movement still in transition but the direction is clear—more focus on long-term sustainability rather than short-term block structures.

The key ingredient in sustaining the Green Building revolution is passion and that was very much in evidence in the remarks made by our luncheon speaker, S. Richard Fedrizzi, President, CEO and Founding Chairman of the U.S. Green Building Council. A Central New Yorker, Rick spoke on his topic of *LEED, Laws and Lawyers: The Force for Market Transformation* and challenged those in attendance to maintain the green revolution that he has been such an integral part in initiating. Rick's remarks were the perfect capstone to a very full and exciting series of professional exchanges that underscored the value of involvement with the Section.

I hope all enjoyed the bright light that was the annual meeting and I truly appreciate the many nice things that have been said on the efforts that were made to make the meeting such a success.

And so, as the euphoria of the annual meeting begins to recede, I turn to the following words from Robert Frost's poem "Stopping by Woods on a Snowy Evening" (*Syracuse snowfall for Winter of 2010-2011 as of 3/13—174.0 inches)* as we return to the challenges of our daily practice in an evolving political and natural environment:

The woods are lovely, dark and deep.
But I have promises to keep,
And miles to go before I sleep,
And miles to go before I sleep.

Barry R. Kogut

From the Editor-in-Chief

Miriam E. Villani

At long last, *The New York Environmental Lawyer* has been able to reduce its carbon footprint, so to speak. The Winter 2011 issue was published electronically—the first of the NYSBA's many Section journals to go electronic. There are some things you need to know about this innovative and historical step.

An electronic version of *TNYEL* Winter '11 issue was provided to members of the Environmental Law Section in addition to a hard copy. Members are being given the option to receive an electronic version of the journal, or continue to receive the hard copy. As a member, you have the opportunity to receive *The New York Environmental Lawyer* via email as you did the Winter '11 issue. You can opt to receive just the electronic copy by following the instructions provided on p. 4 in this issue. To be clear, if you follow the instructions, you will not receive a paper copy of the *TNYEL*. The Section's goal is to reduce the environmental impact of its journal, while continuing to provide members with this invaluable member benefit.

We note some glitches with the inaugural electronic issue. Barry's photo somehow morphed into a photo of a younger, more serious version of our fearless Chair. In addition, a few columns and articles were deleted from the electronic version. As a result, you will only find pages 32 through 36 of the Winter '11 issue in the paper version. The Association has assured me that this glitch was a result of first-time growing pains. Practice will make perfect.

I have raised with the Association some ideas for making the electronic version more user-friendly. For one thing, my suggestion to have one of the links in the email connected to a PDF version of the entire journal has been implemented for this issue. In the first e-version, the reader had to return to the email to link to and view another article or column in the journal. I welcome other ideas and suggestions for making your journal as accessible as possible. I anticipate that this process, as with all media today, will continue to evolve in its production and function.

Please review the opt-in instructions on p. 4 and elect to receive the electronic version of *The New York Environmental Lawyer,* and let's reduce our collective carbon footprint.

Miriam E. Villani

Errata

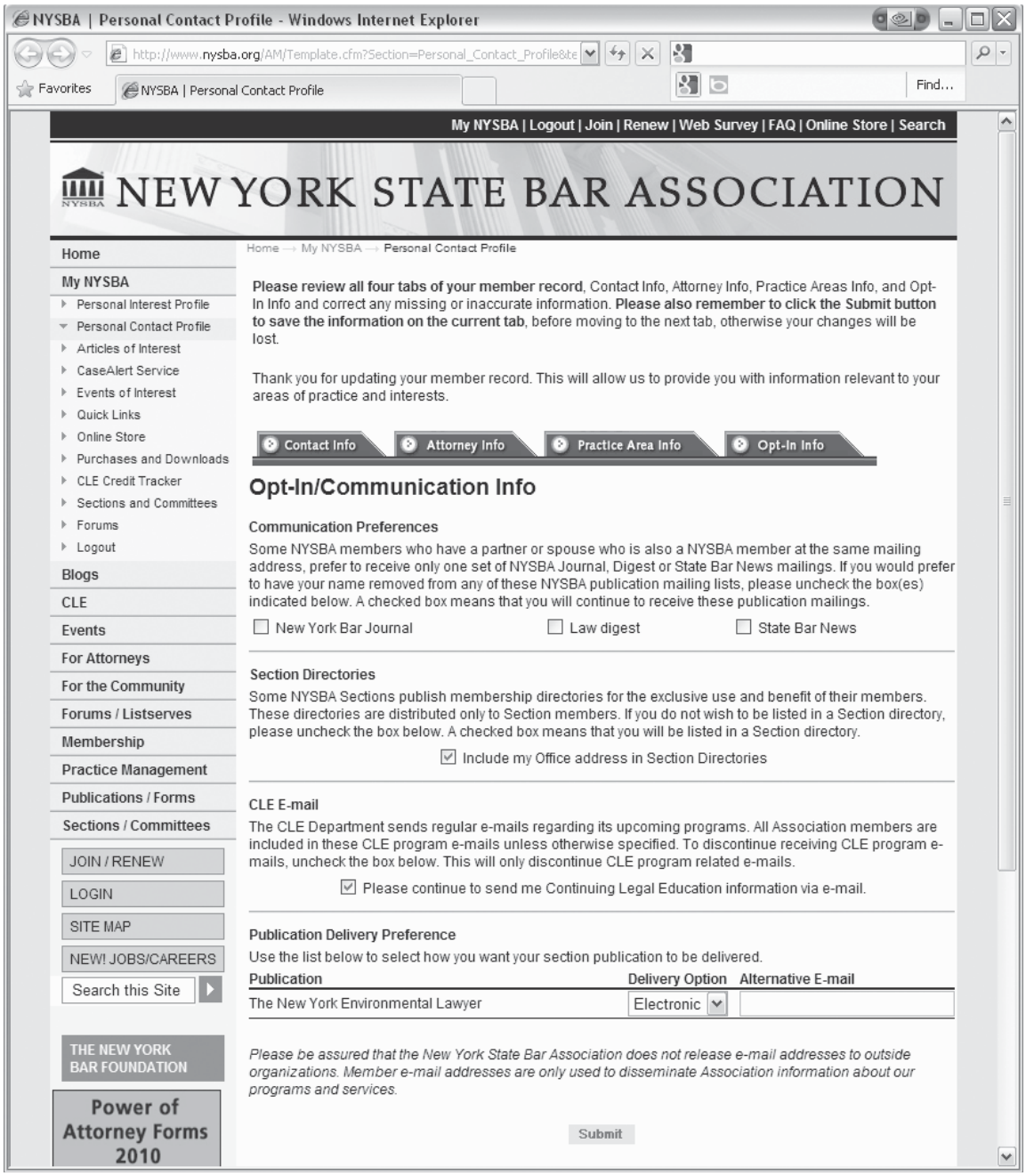
Kathleen L. Martens was incorrectly listed as a co-chair of the Historic Parks and Recreation Committee in the Winter 2011, Vol. 31, No. 1 issue of *The New York Environmental Lawyer*. Ms. Martens has never been a co-chair of that committee. We apologize for the error and any confusion it may have caused.

Jim Moorman was incorrectly identified as Hugh MacDougall in a photograph on page 31 of the Winter 2011, Vol. 31, No. 1 issue of *The New York Environmental Lawyer*. We apologize for the error and any confusion it may have caused.

Electronic Opt-In Instructions

Please log in to the www.nysba.org web site so that the system recognizes you as a member of the Environmental Law Section. Click Personal Contact Profile under MyNYSBA. Once there, please click on the Opt-In Info tab where there is an area titled Publication Delivery Preference. Next to *The New York Environmental Lawyer* is a drop-down list for Delivery Preference, and an optional field for an alternate email address. The choices on the Delivery Preference drop-down list are Electronic Copy Only, Print Copy Only, Both Electronic and Print Copy. If you enter an email address into the alternate email address field, that is where the electronic copy will be sent, otherwise it will use your NYSBA email address. You will need to click Submit at the bottom of the page to save your preferences.

A sample of the current Opt-In page is shown below.



From the Issue Editor

Justin M. Birzon

This is a very critical time for the future of New York's environment. Many important decisions will be made in 2011 that will have potentially far reaching impacts on issues affecting most New Yorkers. For example, there is pending legislation to expand the tax base for "Tax Increment Financing" districts that will encourage enhanced utilization of New York's Brownfield Cleanup Program. The Environmental Protection Agency has recently revised its Guide to Federal Tax Incentives for Brownfield Redevelopment, too.

By most measures, the battle over the natural gas in the Marcellus Shale has been the major environmental headline of 2011. Recently, Attorney General Eric Schneiderman threatened to sue the Delaware River Basin Commission (DRBC) and the Army Corps of Engineers (ACoE) if they do not commit to conducting a full environmental review of proposed regulations that would allow hydrofracking in the Delaware River Basin. The DRBC is a Federal-interstate body created through a Congressionally approved compact between the federal government and governors of the states of New York, New Jersey, Pennsylvania, and Delaware. As federal bodies, the DRBC and the ACoE are required by the National Environmental Policy Act (NEPA) to conduct a full review of any actions that may cause significant impacts to the environment. Whether the benefits of hydrofracking (local jobs, energy independence) will outweigh the negative effects on the environment (contamination of drinking water, aquifer destruction, methane release) remains to be seen.

While the aforementioned issues clearly address the quality of life in New York State, there is another larger, more pervasive issue that demands just as much or more attention than that paid to actions within its borders. Anthropogenic global climate change has faded from the headlines, but greenhouse gas emissions persist and the related concentration of carbon dioxide in the atmosphere is at a record high.

The articles in this issue remind us that we cannot forget to prepare for the worst consequences that a warming atmosphere will bring. Among them are rising seas, which are likely to occur both due to glacial retreat and thermal expansion. Of course, we must all seek to mitigate and reduce emissions where possible, but to ignore the need to adapt to the most immediate and unavoidable effects is purely irresponsible. Ms. Nicole Bishop, an environmental attorney, highlights the recent amendments to the Coastal Zone Management Act aimed at protecting communities and infrastructure from sea level rise and asks, "is this enough?" Another article explores the tax consequences of an incredibly powerful mitigation tool—cap and trade legislation. By addressing often overlooked, yet incredibly relevant issues such as tax implications of the cap and trade regime, we are advancing the discussion and, hopefully, helping to prepare people for a more beneficial decision-making process, both for the immediate and far-reaching future.

Justin Birzon

From the Student Editorial Board

Recently, members of Congress have proposed bills to prevent the United States Environmental Protection Agency (EPA) from regulating greenhouse gases (GHGs). Whether Congress is proposing to refuse funds for implementation of a cap and trade program, to amend the Clean Air Act to exclude GHGs from the definition of "air pollutant," or to prevent the EPA from promulgating regulations to control GHG emissions, these bills are stirring up controversy. Advocates of the bills and pro-industry politicians argue that the EPA's GHG actions are "job killing." However, others believe that the EPA is creating jobs by encouraging industry to adopt new, cleaner technologies.

As law students and environmental advocates, our interests are implicated in this debate: first, because we face a dismal job market, we support policies that open markets and encourage innovation; second, because EPA is finally facing our generation's most pressing environmental challenge, we hold our legislators to the standard of engaging in informed and effective lawmaking.

Despite a recent decrease in unemployment numbers, college and graduate students face much uncertainty. There may be no quick and easy fix, but certainly a push for new technology and renewable energies is a good start. EPA's efforts to regulate GHGs will force industries to implement and improve upon clean technologies that already exist. Advancing technologies that support carbon capture sequestration, renewable energy, and green infrastructure can help reduce GHGs and achieve the country's emissions reduction goals. Moreover, it is reasonably expected that the growth of clean technology industries will boost employment in such fields as construction, engineering, manufacturing, law, and others.

Second, it seems antithetical to our shared concern over human health for Congress to restrict the EPA's authority over the control of airborne pollutants. Recall that the EPA was needed specifically because Congress was unable to implement environmental goals on its own. It seems more sensible to allow an agency made up of experts in the field who carefully consider public opinion, scientific studies, and effects on industry, to be given deference.

Despite opposing viewpoints, one thing is clear—it is time to "reinvent ourselves" and stop shrinking from difficult tasks. We must take the issue of reducing GHGs and hit it on the head once and for all. And in the end, it should not matter which arm of the government sets these laws and regulations so long as that arm has the long-term goal in mind, diligently informs itself, and considers the best interest of the Country.

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

EPA Update

By Chris Saporita, Marla E. Wieder and Joseph A. Siegel[1]

I. Introduction

Chris Saporita

Marla E. Wieder

Joseph A. Siegel

The results are in and it's good news for New York State—EPA's annual report on the amount of toxic chemicals released into the environment by industrial facilities in New York in 2009 showed a noteworthy decrease over the past reporting year. The Toxics Release Inventory (TRI) report included data on 646 New York facilities that are required to report their releases to the Agency. The facilities' total releases decreased by nearly 26% from 24.7 million pounds in 2008 to 18.3 million pounds in 2009.[2] For a full list of reporting NY facilities, go to: http://www.epa.gov/tri. To view an area fact sheet, visit: http://www.epa.gov/triexplorer/statefactsheet.htm.

Nationally, over 20,000 facilities reported on approximately 650 chemicals for calendar year 2009. The TRI provides information on which facilities are increasing and decreasing their output of toxic chemicals. Thanks to recent improvements in EPA's system, the vast majority of facilities now report data electronically, thus making detailed information more readily available to the public.[3]

Also in the "good news" column, in December, EPA posted its enforcement data for fiscal year 2010 (October 1, 2009 through September 30, 2010). All totaled, in the past fiscal year, EPA took enforcement and compliance actions in New York State that will result in the reduction of more than 41 million pounds of pollution and will require polluters to pay nearly $2 million in penalties.[4] Detailed information about EPA's enforcement actions can be viewed using an interactive web-based tool that includes highlights and statistics on a state-by-state basis. For more information, visit http://www.epa.gov/region02/capp/10results.html.

Now for the bad news…like NYSDEC, EPA will continue to experience its own budget issues. As of the drafting of this article, the White House has proposed a 12.6% decrease to EPA's fiscal year 2012 budget (proposed budget of $9 billion; decrease of $1.3 billion).[5] While clearly the reductions will have some impact on operations, funding for the Agency's core priorities, such as State and tribal categorical grants and enforcement of environment and public health protections will be maintained. Decreases in funding have been proposed for the State Revolving Funds (clean water, drinking water funds), the Great Lakes Restoration Initiative, the clean diesel grant program and the Superfund program.[6] Programs aimed at mitigating Climate Change, transitioning this Country to a "Clean Energy Economy," and addressing chemical risks in the environment continue to be funded at levels that we hope will allow the agency to meet its near-term goals.

II. Water News

Administrator Jackson, SBA Administrator Mills Announce Launch of Water Technology Innovation Cluster

On January 18, 2011, EPA Administrator Lisa P. Jackson and U.S. Small Business Administration (SBA) Administrator Karen Mills announced a new collaborative effort called the Water Technology Innovation Cluster (WTIC). The WTIC will develop and commercialize innovative technologies to solve environmental and public health challenges, encourage sustainable economic development, and create jobs. As a starting point, the WTIC will create a regional technology cluster focusing on developing state-of-the art safeguards for clean water in Ohio, Kentucky, and Indiana.

A regional technology cluster is a geographic concentration of interconnected firms—businesses, suppliers, service providers—and supporting institutions such as local government, business chambers, universities, investors, and others that work together in an organized manner to promote economic growth and technological innovation.

EPA has invested $5 million to conduct key studies of the environmental technology market place for drinking water, acquire the services of a cluster consultant, and conduct technology and knowledge mapping of the region to gauge its strengths. The WTIC will develop, test, and market innovative processes and technologies including those that are sustainable, are cost effective, address a broad array of contaminants, and improve public health.

For more information on the WTIC, visit: http://www.epa.gov/wtic/faqs.html.

A. Surface Waters

EPA Establishes Landmark Chesapeake Bay "Pollution Diet"

On December 29, 2010, EPA established a landmark "pollution diet" to restore clean water in Chesapeake Bay and the region's streams, creeks, and rivers. Despite extensive restoration efforts during the last 25 years, the pollution diet, formally known as the Chesapeake Bay Total Maximum Daily Load (TMDL), was prompted by insufficient progress in restoring the Bay. The TMDL is required under the Clean Water Act (CWA) and responds to consent decrees in Virginia and the District of Columbia dating back to the late 1990s.

The TMDL identifies the necessary reductions of nitrogen, phosphorus, and sediment from Delaware, Maryland, New York, Pennsylvania, Virginia, West Virginia, and the District of Columbia. Specifically, the TMDL calls for a 25 percent reduction in nitrogen, 24 percent reduction in phosphorus, and 20 percent reduction in sediment, and sets Bay watershed limits of 185.9 million pounds of nitrogen, 12.5 million pounds of phosphorus, and 6.45 billion pounds of sediment per year, and is designed to ensure that all pollution control measures to fully restore the Bay and its tidal rivers are in place by 2025, with at least 60 percent of the actions completed by 2017.

Among the significant improvements in the jurisdictions' plans are:

- Committing to more stringent nitrogen and phosphorus limits at wastewater treatment plants, including on the James River in Virginia. (Virginia, New York, Delaware)
- Pursuing state legislation to fund wastewater treatment plant upgrades, urban stormwater management and agricultural programs. (Maryland, Virginia, West Virginia)
- Implementing a progressive stormwater permit to reduce pollution. (District of Columbia)
- Dramatically increasing enforcement and compliance of state requirements for agriculture. (Pennsylvania)
- Committing state funding to develop and implement state-of-the-art-technologies for converting animal manure to energy for farms. (Pennsylvania)
- Considering implementation of mandatory programs for agriculture by 2013 if pollution reductions fall behind schedule. (Delaware, Maryland, Virginia, New York)

The TMDL also includes targeted federal backstops for those jurisdictions that did not meet all of their target allocations, or did not meet EPA's expectations for providing reasonable assurance that they will achieve the necessary pollution reductions. These included backstop allocations and adjustments for the wastewater sector in New York, the urban stormwater sector in Pennsylvania, and the agriculture sector in West Virginia. In addition, EPA will provide enhanced oversight of Pennsylvania agriculture, Virginia and West Virginia urban stormwater, and Pennsylvania and West Virginia wastewater. If the jurisdictions don't make sufficient progress, EPA may impose additional controls on permitted sources of pollution, such as wastewater treatment plants, large animal feeding operations, and municipal stormwater systems.

EPA has also committed to reducing air deposition of nitrogen to the tidal waters of the Chesapeake Bay from 17.9 to 15.7 million pounds per year. The reductions will be achieved through implementation of federal air regulations during the coming years. In addition, eleven federal agencies will contribute to restoration efforts on the same 2025 timeline as the TMDL, through a comprehensive suite of actions that implement the federal strategy created under President Obama's Executive Order. As part of this work, federal agencies will be establishing two-year milestones that directly support the jurisdictions' activities to reduce water pollution.

The TMDL, as well as evaluations of the state plans and EPA backstops and contingencies can be found at: http://www.epa.gov/chesapeakebaytmdl.

EPA and U.S. Coast Guard Enhance Coordination of Enforcement and Compliance Activities to Protect U.S. Waters

On February 11, 2011, EPA and the U.S. Coast Guard (USCG) signed a memorandum of understanding (MOU) that outlines steps the agencies will take to better coordinate efforts to prevent and enforce against illegal discharges of pollutants from vessels, such as cruise ships and oil tankers. Under the MOU, USCG has agreed to incorporate components of EPA's vessel general permit program into its existing inspection protocols and procedures to help address vessel pollution in U.S. waters. The MOU creates a framework for improving EPA and USCG cooperation on data tracking, training, monitoring, enforcement, and industry outreach. The agencies have also agreed to improve existing data requirements so that information on potential violations observed during inspections can be sent to EPA for evaluation and follow-up.

The vessel permit program applies to more than 61,000 commercial ships based in the U.S. and more than 8,000 foreign ships operating in U.S. waters. The vessel permit covers 26 types of discharges such as deck run-off from rain, ballast water used to stabilize ships, and waste-

water from showers, sinks and laundry machines. These discharges may result in negative impacts on the environment, including the spread of invasive species from ballast water that can harm sensitive ecosystems. The vessel permit program also specifies corrective actions, self-inspections and self-monitoring, record-keeping and reporting requirements. For more information on EPA's vessel permit program, visit: http://cfpub.epa.gov/npdes/home.cfm?program_id=350, and to read a copy of the MOU, visit: http://epa.gov/compliance/monitoring/programs/cwa/npdes.html.

B. Wetlands

EPA Issues Comprehensive Guidance to Protect Appalachian Communities from Harmful Environmental Impacts of Mountaintop Mining

As part of its increased efforts to prevent adverse environmental impacts from mountaintop mining, on April 4, 2010, EPA announced a set of actions to further clarify and strengthen environmental permitting requirements for Appalachian mountaintop removal and other surface coal mining projects, in coordination with federal and state regulatory agencies. Mountaintop removal is a form of surface coal mining in which explosives are used to access coal seams, generating large volumes of waste that bury adjacent streams. The resulting waste that then fills valleys and streams can significantly compromise water quality, often causing permanent damage to ecosystems and rendering streams unfit for swimming, fishing, and drinking. It is estimated that almost 2,000 miles of Appalachian headwater streams have been buried by mountaintop coal mining.

The EPA guidance identifies improvements in mining practices and operations that will reduce adverse impacts on water quality, and clarifies the standards that its regional offices should apply in permitting reviews of Appalachian surface coal mining projects. More specifically, the guidance:

- Incorporates the latest scientific information in clarifying how CWA permits should assure compliance with existing water quality standards to protect the use of streams by communities and to ensure healthy aquatic life.
- Clarifies how CWA requirements apply to the disposal of mining overburden in streams to reduce the size and number of valley fills, to limit water quality contamination of streams near mining operations, and to prevent significant environmental degradation of streams and wetlands.
- Improves opportunities for the voices of adversely affected Appalachian communities to be heard in the process of reviewing proposed new mining operations.

Other highlights of EPA's actions include:

- Improved Guidance and Clarity: EPA communicated comprehensive guidance to its regional offices with permitting responsibility in Appalachian states. The guidance clarifies existing requirements of the Section 402 and 404 Clean Water Act permitting programs that apply to pollution from surface coal mining operations in streams and wetlands. The guidance details EPA's responsibilities and how the agency uses its Clean Water Act (CWA) authorities to ensure that future mining will not cause significant environmental, water quality, and human health impacts. EPA also expects this information will provide improved consistency and predictability in the CWA permitting process and help to strengthen coordination with other federal and state regulatory agencies and mining companies.
- Strong Science: EPA made publicly available two scientific reports prepared by its Office of Research and Development (ORD). One summarizes the aquatic impacts of mountaintop mining and valley fills. The second report establishes a scientific benchmark for unacceptable levels of conductivity (a measure of water pollution from mining practices) that threaten stream life in surface waters.
- Increased transparency: EPA created a permit tracking Web site so that the public can determine the status of mining permits subject to the EPA-U.S. Army Corps of Engineers Enhanced Coordination Procedure (ECP).

For more information on the guidance, visit: http://www.epa.gov/owow/wetlands/guidance/mining.html.

EPA Halts Disposal of Mining Waste to Appalachian Waters at Proposed Spruce Mine

On January 13, 2011, after extensive scientific study, a major public hearing in West Virginia and review of more than 50,000 public comments, EPA announced that it would use its authority under the Clean Water Act to halt the proposed disposal of mining waste in streams at the Mingo-Logan Coal Company's Spruce No. 1 coal mine. EPA has used this Clean Water Act authority in just 12 circumstances since 1972 and reserves this authority for only unacceptable cases. This permit was first proposed in the 1990s and has been held up in the courts ever since.

EPA's final determination on the Spruce Mine comes after discussions with the company spanning more than a year failed to produce an agreement that would lead to a significant decrease in impacts to the environment and Appalachian communities. The action prevents the mine from disposing of the waste into streams unless the company identifies an alternative mining design that would avoid irreversible damage to water quality

and meets the requirements of the law. Despite EPA's willingness to consider alternatives, Mingo Logan did not offer any new proposed mining configurations in response to EPA's Recommended Determination.

EPA's decision to stop mining waste discharges to high quality streams at the Spruce No. 1 mine was based on several major environmental and water quality concerns. The proposed mine project would have:

- Disposed of 110 million cubic yards of coal mine waste into streams.
- Buried more than six miles of high-quality streams in Logan County, West Virginia with millions of tons of mining waste from the dynamiting of more than 2,200 acres of mountains and forestlands.
- Buried more than 35,000 feet of high-quality streams under mining waste, which will eliminate all fish, small invertebrates, salamanders, and other wildlife that live in them.
- Polluted downstream waters as a result of burying these streams, which will lead to unhealthy levels of salinity and toxic levels of selenium that turn fresh water into salty water. The resulting waste that then fills valleys and streams can significantly compromise water quality, often causing permanent damage to ecosystems and streams.
- Caused downstream watershed degradation that will kill wildlife, impact birdlife, reduce habitat value, and increase susceptibility to toxic algal blooms.
- Inadequately mitigated for the mine's environmental impacts by not replacing streams being buried, and attempting to use stormwater ditches as compensation for natural stream losses.

Finally, EPA's decision prohibits five proposed valley fills in two streams, Pigeonroost Branch, and Oldhouse Branch, and their tributaries. Mining activities at the Spruce site are underway in Seng Camp Creek as a result of a prior agreement reached in the active litigation with the Mingo Logan Coal Company. EPA's Final Determination does not affect current mining in Seng Camp Creek.

For a copy of the Final Determination, visit: http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/404c_index.cfm.

C. Drinking Water

EPA Issues Guidance for Enhanced Monitoring of Hexavalent Chromium in Drinking Water

In December, Administrator Jackson committed to address hexavalent chromium (also known as chromium-6) in drinking water by issuing guidance to all water systems on how to assess the prevalence of the contaminant. On January 11, 2011, the agency delivered on that promise and issued guidance recommending how public water systems might enhance monitoring and sampling programs specifically for hexavalent chromium. The recommendations are in response to emerging scientific evidence that chromium-6 could pose health concerns if consumed over long periods of time.

The enhanced monitoring guidance provides recommendations on where the systems should collect samples and how often they should be collected, along with analytical methods for laboratory testing. Systems that perform the enhanced monitoring will be able to better inform their consumers about any presence of chromium-6 in their drinking water, evaluate the degree to which other forms of chromium are transformed into chromium-6, and assess the degree to which existing treatment affects the levels of chromium-6 in drinking water.

EPA currently has a drinking water standard for total chromium, which includes chromium-6, and requires water systems to test for it. Testing is not required to distinguish what percentage of the total chromium is chromium-6 versus other forms such as chromium-3, so EPA's regulation assumes that the sample is 100 percent chromium-6. This means the current chromium-6 standard has been as protective and precautionary as the science of that time allowed.

EPA's latest data show that no public water systems are in violation of the standard. However, the science behind chromium-6 is evolving. The agency regularly re-evaluates drinking water standards and, based on new science on chromium-6, has already begun a rigorous and comprehensive review of its health effects. In September 2010, the agency released a draft of the scientific review for public comment. When the human health assessment is finalized in 2011, EPA will carefully review the conclusions and consider all relevant information to determine if a new standard needs to be set. While EPA conducts this important evaluation, the agency believes more information is needed on the presence of chromium-6 in drinking water. For that reason, EPA is providing guidance to all public water systems and encouraging them to consider how they may enhance their monitoring for chromium-6.

More information on the new guidance to drinking water systems: http://water.epa.gov/drink/info/chromium/guidance.cfm.

More information on chromium: http://water.epa.gov/drink/info/chromium/index.cfm.

EPA to Develop Regulation for Perchlorate and Toxic Chemicals in Drinking Water

On February 2, 2011, EPA announced its decision to move forward with the development of a regulation for perchlorate to protect drinking water quality. The decision to undertake a first-ever national standard for perchlorate reverses a decision made by the previous administration and comes after Administrator Jackson ordered EPA scientists to undertake a thorough review of the emerging science of perchlorate. Perchlorate is both a naturally occurring and man-made chemical, and scientific research indicates that it may impact the normal function of the thyroid, which produces important developmental hormones. Thyroid hormones are critical to the normal development and growth of fetuses, infants, and children. Based on this potential concern, EPA will move forward with proposing a formal rule. This process will include receiving input from key stakeholders as well as submitting any formal rule to a public comment process.

In a separate action, the agency is also moving towards establishing a drinking water standard to address a group of up to 16 toxic chemicals, including trichloroethylene (TCE) and tetrachloroethylene (PCE) as well as other regulated and some unregulated contaminants that are discharged from industrial operations, which may pose risks to human health. As part of the Drinking Water Strategy laid out by Administrator Jackson in 2010, EPA committed to addressing contaminants as a group rather than one at a time so that enhancement of drinking water protection can be achieved cost effectively. Today's action delivers on the promise to strengthen public health protection from contaminants in drinking water.

For more information on perchlorate, visit: http://water.epa.gov/drink/contaminants/unregulated/perchlorate.cfm.

For more information on EPA's drinking water strategy, visit: http://water.epa.gov/lawsregs/rulesregs/sdwa/dwstrategy/index.cfm.

EPA Submits Draft Hydraulic Fracturing Study Plan to Independent Scientists for Review

On February 8, 2011, EPA submitted its draft study plan on hydraulic fracturing for review to the agency's Science Advisory Board (SAB), a group of independent scientists. Natural gas plays a key role in our nation's clean energy future and the process known as hydraulic fracturing is one way of accessing that vital resource. Hydraulic fracturing is a process in which large volumes of water, sand, and chemicals are injected at high pressures to extract oil and natural gas from underground rock formations. The process creates fractures in formations such as shale rock, allowing natural gas or oil to escape into the well and be recovered. Over the past few years, the use of hydraulic fracturing for gas extraction has increased and has expanded over a wider diversity of geographic regions and geologic formations.

EPA scientists, under this administration and at the direction of Congress, are undertaking a study of this practice to better understand any potential impacts it may have, including on groundwater. EPA announced its intention to conduct the study in March 2010, and use the best available science, independent sources of information, a transparent, peer-reviewed process and with consultation from others. Since then, EPA has held a series of public meetings across the country with thousands attending and the agency has developed a sound draft plan for moving forward with the study.

The scope of the proposed research includes the full lifespan of water in hydraulic fracturing, from acquisition of the water, through the mixing of chemicals and actual fracturing, to the post-fracturing stage, including the management of flowback and produced or used water and its ultimate treatment and disposal. The SAB reviewed the draft plan in March 2011, and accepted public comments. The agency will revise the study plan in response to the SAB's comments and promptly begin the study. Initial research results and study findings are expected to be made public by the end of 2012, with the goal of an additional report following further research in 2014.

For a copy of the draft study plan and additional information: http://yosemite.epa.gov/sab/sabproduct.nsf/02ad90b136fc21ef85256eba00436459/d3483ab445ae61418525775900603e79!OpenDocument&TableRow=2.1#2.

For more information on hydraulic fracturing, visit: www.epa.gov/hydraulicfracturing.

III. Air and Climate Change

A. Air

EPA Seeks Extension of Court-Ordered Schedule to Regulate Boilers and Incinerators Based on New Data and Extensive Public Comment

In December 2010, EPA filed a motion in the Federal District Court for the District of Columbia, seeking an extension of a court-ordered schedule for issuing a rule to reduce harmful air emissions from large and small boilers and solid waste and sewage sludge incinerators.[7] EPA proposed the rule in April 2010 to address emissions of mercury, particulates, and other pollutants from 200,000 boilers in the country. The motion requests an extension until April 2012, to re-propose and finalize these standards. After reviewing the data and the more than 4,800 public comments, the agency has determined that it is appropriate to issue a revised proposal that reflects the new data and allows for additional public comment.

More information is available at: http://www.epa.gov/airquality/combustion.

EPA Expands Monitoring Network for the Lead National Ambient Air Quality Standard

EPA issued a final rule in December revising the air monitoring network for lead.[8] The monitoring network measures compliance with the health-based National Ambient Air Quality Standards for lead.[9] EPA changed the emissions threshold that state monitoring agencies must use to determine if an air quality monitor should be placed near an industrial facility that emits lead. The new emission threshold of 0.5 tons per year (tpy), is more stringent than the previous threshold of 1.0 tpy. The rule also requires additional monitors in large urban areas.[10]

EPA Paves the Way for Increased Ethanol Use by Granting Waiver of E15 Motor Vehicle Fuel

On January 21, 2011, EPA waived a limitation on selling gasoline that contains more than 10 percent ethanol for model year (MY) 2001 through 2006 passenger vehicles, such as cars, SUVs, and light pickup trucks.[11] This waiver adds MY 2001 through 2006 to an earlier October 13, 2010 final waiver for MY 2007 and beyond. The waivers apply to passenger vehicles using fuel E15, which contains up to 15 percent ethanol. No waiver was granted for E15 use for motorcycles, heavy-duty vehicles, or non-road engines because EPA concluded that current testing data does not support such a waiver. The waiver for passenger vehicles is consistent with the Energy Independence and Security Act of 2007, which mandated an increase in the overall volume of renewable fuels into the marketplace, reaching a total of 36 billion gallons by 2022. Ethanol is primarily derived from corn but other grains or biomass sources may be used, such as corn cobs, cornstalks, and switchgrass. EPA's waiver was granted in response to a Clean Air Act petition from Growth Energy and ethanol manufacturers and after considering 78,000 comments.[12]

More information about the waiver is available at: http://www.epa.gov/otaq/regs/fuels/additive/e15/.

EPA Announces Settlement of Alleged Clean Air Act Violation at Nation's Second Largest Refinery

On January 26, 2011, EPA announced a settlement with Hovensa, owner of the second largest petroleum refinery in the United States, for alleged violations of pre-construction permit and control technology requirements.[13] Hovensa agreed to pay a civil penalty of more than $5.3 million and spend more than $700 million in new pollution controls at its Virgin Islands facility, which has the capacity to refine more than 525,000 barrels of crude oil per day. This settlement is the twenty-eighth under an EPA initiative to improve compliance among petroleum refiners and to reduce significant amounts of air pollution from refineries nationwide through comprehensive, company-wide enforcement settlements. The pollution controls required by the settlement are estimated to reduce emissions of nitrogen oxides (NOx) by more than 5,000 tons per year and sulfur dioxide (SO2) by nearly 3,500 tons per year, result in additional reductions of volatile organic compounds, particulate matter, and carbon monoxide, and also reduce greenhouse gas emissions by over 6,100 tons per year. The consent decree was lodged in the District Court of the Virgin Islands, and is subject to a 30-day public comment period and court approval.[14] For more information, visit: www.epa.gov/compliance/resources/cases/civil/caa/hovensa.html.

B. Climate Change

EPA Finalizes Greenhouse Gas Reporting Requirements for Petroleum and Natural Gas Sectors

On November 9, 2010, EPA finalized greenhouse gas reporting (GHG) requirements for the petroleum and natural gas industries under EPA's Greenhouse Gas Reporting Program (GHGRP).[15] The GHGRP was launched in October 2009, and requires annual reporting by large emissions sources across many sectors. Data collection pursuant to the October 2009 GHGRP began in January 2010, and the first reports were due on March 31, 2011. Data collection for the newly added petroleum and natural gas sectors began on January 1, 2011, and annual reports will be due on March 31, 2012. The new requirements apply only to petroleum and natural gas sources that emit over 25,000 metric tons per year of CO2 equivalent.[16] These sources emit carbon dioxide and methane, which is 20 times as potent as carbon dioxide, as well as other GHGs. Data collected will help identify cost effective ways to minimize the loss of methane, which is also a valuable fuel. For more information on the final rule, visit: http://www.epa.gov/climatechange/emissions/subpart/w.html.

EPA Issues Pollution Permitting Guidance for States Under the Clean Air Act's Prevention of Significant Deterioration Program

In November 2010, EPA released guidance and tools to help permitting authorities implement provisions of the Clean Air Act's Prevention of Significant Deterioration (PSD) program as it applies to greenhouse gases (GHGs).[17] Regulation of GHGs under the PSD program began on January 2, 2011.[18] The PSD program applies to sources of pollution in industries with the largest emitters, such as power plants, refineries, and cement producers, and requires them to install Best Available Control Technology (BACT). The new EPA guidance recommends that permitting authorities use the same process already used for other pollutants for many years and, in doing so, consider technical feasibility, cost and other energy, environmental, and economic factors. The Agency indicated that, in most cases, this process will result in the selection of energy efficiency as the most cost-effective option for controlling GHGs. However, BACT is determined on a case-by-case basis so, in this guidance, EPA did not prescribe any presumptive BACT

for any industry. The guidance also provides examples of how BACT would apply.[19]

The guidance and tools can be found at: http://www.epa.gov/nsr/ghgpermitting.html.

EPA Finalizes Two Rules on Carbon Capture and Sequestration to Protect Drinking Water and Monitor Mitigation of Carbon Dioxide

EPA issued two final rules in November concerning carbon capture and sequestration (CCS) projects. CCS enables large emitters of carbon dioxide (CO2) to capture emissions of CO2 and inject the gas underground for long-term storage in a process known as geologic sequestration.[20] One of the rules issued by EPA is designed to ensure the safety of the drinking water supply and was promulgated under the Safe Drinking Water Act's Underground Injection Control (UIC) program. EPA added a new class of wells, Class VI, to ensure that wells used for geologic sequestration of CO2 are appropriately sited, constructed, tested, monitored, and closed. The other final rule was issued under the Clean Air Act's Greenhouse Gas Reporting Program, and will monitor emissions of CO2 sequestered by geologic sequestration activities. Both rules are consistent with the recommendations of the federal Interagency Task Force on Carbon Capture and Storage,[21] established by President Obama to overcome the barriers to widespread, cost effective deployment of CCS within ten years. For more information, visit: http://water.epa.gov/type/groundwater/uic/wells_sequestration.cfm.

For more information on the greenhouse gas reporting final rule, visit: http://www.epa.gov/climatechange/emissions/ghgrulemaking.html.

EPA Takes Action on Business Confidentiality Under the Greenhouse Gas Reporting Program

On December 20, 2010, EPA took several actions regarding the public availability of information claimed as business confidential by sources under EPA's Greenhouse Gas Reporting Program (GHGRP).[22] The GHGRP requires large sources of greenhouse gases to report their emissions to EPA on an annual basis. The first year of data collection was 2010, with reports due the end of March 2011. EPA proposed to defer, until 2014, reporting of data elements that are inputs to emission equations for calendar years 2010-2012. EPA also issued an interim final rule delaying the calendar year 2010 reporting deadline until August 31, 2011.[23] EPA had previously proposed to classify inputs from emissions equations as "emissions data," which is not protected as confidential business information. EPA is now seeking information and comment from stakeholders about whether such inputs should be publicly available.[24]

More information on these actions can be found at: http://www.epa.gov/climatechange/emissions/CBI.html.

EPA Agrees to Regulate Greenhouse Gases Under the Clean Air Act's New Source Performance Standards

In late December 2010, EPA entered into an agreement with New York, New York City, and other states and environmental groups to regulate greenhouse gases (GHGs) from fossil fuel power plants and oil refineries under the Clean Air Act's New Source Performance Standards (NSPS) program.[25] Pursuant to the agreement, EPA will propose standards for power plants in July 2011, and for refineries in December 2011, and will issue final standards in May 2012 and November 2012, respectively.[26] This schedule will allow sufficient time for EPA to host listening sessions with stakeholders before the rules are proposed. The NSPS provisions of the Clean Air Act require EPA to set standards by industry category. These standards are distinct from the source-specific standards, discussed in the Tailoring Rule,[27] which are applicable to new and modified major sources under the Clean Air Act's Prevention of Significant Deterioration program. The new NSPS standards for the power and oil refinery sectors will allow for flexible and innovative approaches that take into account cost, health and impacts, and energy requirements.[28]

For more information, visit: http://www.epa.gov/airquality/ghgsettlement.html.

EPA Issues Final Rules Ensuring Smooth Transition to Permitting of Greenhouse Gas Sources

In late January 2011, EPA released several rules that prepared the way for permitting emissions of greenhouse gases (GHGs) under the Clean Air Act's Prevention of Significant Deterioration (PSD) program, beginning in January 2011.[29] These final actions will help implement the Tailoring Rule by ensuring that there will be sufficient government authority to issue permits to new major sources and modifications of existing major sources. EPA will assume that authority in seven states (Ariz., Ark., Fla., Idaho, Kan., Ore., and Wyo.) until those states revise their regulations to cover greenhouse gases. EPA will also assume that authority in Texas but will, in addition, take steps to disapprove part of Texas' permitting program under the Clean Air Act. These actions will ensure that EPA can act as the GHG permitting authority in those states for sources requiring PSD permits. The second set of final actions involve states that do have authority to regulate GHGs but lack authority to impose the 75,000 TPY and 100,000 TPY Tailoring Rule thresholds. In this set of rules, EPA ensured that states will not have to issue permits, as a matter of federal law, to sources below those thresholds. In this final action, EPA noted that when it originally approved New York's New Source Review State Implementation Plan in November 2010, the approval was limited so that it excluded the part of New York's PSD program that applies to GHG emissions below the tailoring rule thresholds.[30] EPA worked closely with states in developing these rules to provide a smooth transition as GHG permitting begins this year.[31]

EPA to Defer GHG Permitting Requirements for Industries that Use Biomass

On January 12, 2011, EPA announced its plan to defer, for three years, greenhouse gas (GHG) permitting requirements for carbon dioxide (CO2) emissions from biomass-fired and other biogenic sources.[32] During this period, EPA will seek independent scientific analysis to determine how emissions from these sources should be treated for purposes of Clean Air Act permitting. EPA will also further consider the more than 7,000 comments it received from its July 2010 Call for Information. The three year deferral is expected to be finalized by July 2011. The Agency expects to finalize another rule during the three year period that will determine how emissions from these sources will be treated. In order to address the need for permitting before the final determination is made, EPA will soon issue guidance that will provide a basis from which state or local permitting authorities may conclude that using biomass as fuel is the best available control technology for GHG emissions. Sources covered by this announcement include facilities that emit CO2 as a result of burning forest or agricultural products for energy, wastewater treatment and livestock management facilities, landfills and fermentation processes for ethanol production.[33]

EPA Seeks Public Comment on the 16th Annual U.S. Greenhouse Gas Inventory

On February 16, 2011, EPA issued the draft Annual Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2009.[34] The inventory report is prepared annually to comply with the United States' obligations as a party to the United Nations Framework Convention on Climate Change (UNFCCC), ratified by the U.S. in 1992. The reports are issued each year by EPA in collaboration with other federal agencies and submitted to the Secretariat of the UNFCCC after public comment. The draft report shows that in 2009, as compared with 2008, overall U.S. greenhouse gas (GHG) emissions decreased by 6 percent. This downward trend was attributed to a decrease in fuel and electricity consumption across all U.S. economic sectors. Overall, emissions have grown by 7.4 percent from 1990 to 2009, but emissions in 2009 represent the lowest total U.S. annual GHG emissions since 1995. The inventory covers emissions of six GHGs, including carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride, and also calculates carbon dioxide emissions that are removed by "sinks," which are natural processes that result in uptake of carbon by forests, vegetation, and soils.[35] The draft report can be found at: http://www.epa.gov/climatechange/emissions/usinventoryreport.html.

IV. What's New in Waste

A. Superfund—Policy

In December 2010, EPA released for comment the draft Integrated Cleanup Initiative Plan (ICI), a three-year strategy, focusing on improving the Agency's land cleanup programs (Superfund, federal facilities, brownfields, RCRA corrective action, and underground storage tank). The goal of the ICI is to accelerate cleanups of contaminated sites where possible, address a greater number of sites, and facilitate the reuse of such sites while protecting human health and the environment. The initiative also seeks to improve the transparency and accountability of the various programs.[36] Comments on the ICI were accepted through mid-January. While many actions identified in this plan are under way, EPA will use the comments received to further refine the draft plan. For more information on the ICI, see: http://www.epa.gov/oswer/integratedcleanup.htm.

On January 28, 2011, EPA announced that it will accept public input on whether to include vapor intrusion threats as a component for including hazardous waste sites on the National Priorities List (NPL). Vapor intrusion generally describes the migration of volatile chemicals from contaminated groundwater or soil into the atmosphere, and is a particular concern if vapors enter an overlying building.[37]

EPA will be accepting comments on specific issues related to potential revisions to the Hazard Ranking System (HRS), which is used to evaluate sites for the NPL. EPA will consider information gathered during the comment period, as well as input from three public listening sessions before making a decision on whether to issue a proposed rulemaking to add a vapor intrusion component to the HRS. Comments were submitted on or before April 16, 2011.[38] For more information on EPA listening sessions and the potential change to the HRS, see: http://www.epa.gov/superfund/sites/npl/hrsaddition.htm More information on vapor intrusion issues, see: http://www.epa.gov/oswer/vaporintrusion/.

In February's Fiscal Year 2012 proposed budget, President Obama again called for reinstating the Superfund tax. The proposal called for a 9.7-cents-per-barrel tax on crude oil to help EPA pay for the cleanup of our nation's hazardous waste sites.[39] The tax would raise significant revenue for the program as EPA estimates that it would generate $23.5 billion over 10 years.[40] It's safe to assume that there will be significant opposition to reinstating the tax.

B. Superfund—Site Update

1. Remedial Investigation of the Gowanus Canal Is Complete

EPA completed its remedial investigation of the Gowanus Canal Superfund site in Brooklyn, New York in February 2011. The investigation confirmed the widespread presence of numerous contaminants in the canal, including polychlorinated biphenyls (PCBs), polycyclic aromatic hydrocarbons (PAHs), and various metals, including mercury, lead, and copper, at high levels

in the canal sediments. PAHs and metals were also found in the canal water. PCBs are suspected carcinogens and can have neurological effects. PAHs are also suspected carcinogens.[41]

Not surprisingly, a companion human and ecological risk assessment found that exposure to the contaminants in the canal poses threats to people's health and the environment. The human health risk assessment concluded that people are at risk from exposure to PCBs if they consume fish and crabs from the canal. Additionally, people coming in regular contact with water and sediment from the canal could be at risk from exposure to PAHs. The ecological risk assessment revealed that organisms living in the sediment of the canal could be at risk due to contamination in the sediment, primarily PAHs, but also PCBs and metals. Ducks may be threatened by exposure to PAHs in the canal's sediment and heron could be at risk from eating contaminated fish.[42]

Based on the results of the remedial investigation and the human and ecological risk assessment, EPA will commence work on a "feasibility study" that will outline the various options for addressing contamination in the Canal. It is anticipated that a draft feasibility report containing an assessment of the cleanup options will be completed by the end of 2011.[43] To review EPA's Remedial Investigation Report or for more information on the canal, go to: http://www.epa.gov/region02/superfund/npl/gowanus/.

2. Phase 2 of the Hudson River PCB Cleanup Began this Spring

On December 17, 2010, EPA presented General Electric (GE) with requirements for the next phase of the cleanup of the Hudson River. The second phase of the cleanup—which is designed to address potentially cancer-causing chemicals released for decades from two GE plants into the Hudson—would require GE to remove far more contaminated sediment from the river before "capping" any remaining polychlorinated biphenyls (PCBs).[44] The new requirements were formulated after months of analyzing the technical information gleaned from the Phase 1 dredging and consultation with GE, the State of New York, and a wide range of stakeholders. On December 23, 2010, GE notified EPA that it would proceed with this phase of the cleanup, and, in fact, it began in June 2011.

As discussed in prior articles, the cleanup of this site, one of the largest Superfund sites in the Country, was divided into two phases. GE began the first phase in May 2009, completing it in November 2009. While during Phase 1, GE successfully removed approximately 300,000 cubic yards of contaminated sediments and debris from the River, Phase 2 will require GE to dredge deeper into the sediment and, by relying on better information and lessons learned during the initial phase, will remove more contaminated sediment in fewer dredging passes. Additionally, EPA has set a stringent limit on what percentage of the total project area can be capped if dredging does not meet the cleanup goals. This limit will be set at 11% of the total project area, not including areas where capping is unavoidable. This limit represents a significant improvement from Phase 1. Over the next few months, EPA will work with GE on technical plans for the cleanup. GE is expected to resume dredging this spring.[45] Phase 2 will take approximately 5 to 7 years to complete; EPA estimates that between 300,000 to 500,000 cubic yards of PCB sediments will be removed from the river during each dredge season.

For further information on the Phase 2 requirements and other information about the Hudson River PCBs cleanup, see: http://www.epa.gov/hudson.

C. Superfund—Litigation News

And speaking of GE, the decade-old battle continues. On December 29, 2010, GE petitioned for *certiorari* to the Supreme Court in the case of *General Electric Co. v. Jackson*. Originally brought in 2000, this case became a "systemic" challenge to the constitutionality of CERCLA as it does not challenge any particular superfund cleanup but, instead, challenges the CERCLA statute and program as a whole. In June 2010, the D.C. Circuit rejected GE's facial constitutional challenge to EPA's statutory authority to issue CERCLA Unilateral Administrative Orders (UAOs) under CERCLA §106. The Court found that the "pattern and practice" by which EPA implements its UAO program passes constitutional, due process, muster. *General Electric Co. v. Jackson*, 610 F.3d 110 (D.C. Cir. 2010). GE filed a Petition for Rehearing and a Petition for Rehearing En Banc, which were denied by the Court. By the publication of this article, the United States will have filed its papers in opposition to GE's *certiorari* petition.

D. Electronic Waste

In November 2010, the Council on Environmental Quality (CEQ), the Environmental Protection Agency (EPA), and the General Services Administration (GSA) formed a task force, under the Executive Order on Federal Sustainability (Executive Order (E.O.) 13514, Federal Leadership in Environmental, Energy, and Economic Performance), charged with assisting the federal government, one of the largest consumers of electronics, to lead by example in responsibly managing used electronics.[46] On November 16, 2010, also known as America Recycles Day, President Obama signed a proclamation celebrating the strides the U.S. has made in recycling generally, while also highlighting the need for greater attention to addressing electronic waste (e-waste).[47]

We are sure it comes as no surprise to our readers that e-waste has become the fastest growing segment of our waste stream. According to the Consumer Electron-

ics Association (CEA), Americans own approximately 24 electronic products per household.[48] Old cell phones, computers, television sets, and other devices often contain toxic chemicals and heavy metals. As the majority of e-waste is still landfilled in this country, the potential health and environmental hazards are significant. The e-waste that is not landfilled is too often shipped to developing countries that lack the capacity to manage these wastes safely, threatening the health and environment of those communities. In recognition of this unfortunate situation, EPA has made addressing the e-waste problem one the agency's top international priorities.[49]

The interagency task force, co-caired by EPA, GSA, and CEQ, will develop a national strategy for responsible electronics stewardship, including improvements to federal procedures for managing electronic products. This strategy will also include steps to ensure e-waste containing hazardous materials is not exported to developing nations that will not properly manage the recycling and/or disposal of these products.[50]

By reusing or recycling electronics we can help reduce our carbon footprint and conserve valuable resources. Aside from the toxic materials, electronic equipment contains valuable materials such as precious metals and rare earth minerals, which can be extracted from the e-waste and recycled. Recycling these components conserves materials, prevents air and water pollution, and reduces the GHG emissions that are produced during the extraction, manufacturing and processing of such materials. For example, for every 1 million cell phones recycled, 75 pounds of gold, 772 pounds of silver, 33 pounds of palladium, and more than 35,000 pounds of copper can be recovered.[51] For information and resources on how you can put your used electronics back into reuse, see the table below.

E. From Waste to Watts—Green Power

In January 2011, EPA recognized six landfill methane capture projects and partners for their innovation in generating renewable energy and reducing GHG emissions.[52] The six winners, announced at the 14th Annual Landfill Methane Outreach Program (LMOP) Conference, include a project that powers manufacturing operations at a green business park in Indiana and a 10 megawatt combined cycle power plant in Ohio. Methane, a primary component of landfill gas, is a GHG with more than 20 times the global warming potential of carbon dioxide. Utilizing landfill gas not only provides communities with a significant local energy resource, but also prevents GHG emissions, and reduces odors and other hazards associated with landfill emissions.

EPA has assisted with more than 490 landfill gas energy projects over the past 16 years, transforming waste—which is one resource that is not in short supply—into a community asset. Landfill gas electricity generation projects have a capacity of 1,680 megawatts and provide the energy equivalent of powering more than 994,000 homes annually as a clean energy source. The United States currently has about 540 operational landfill gas energy projects.[53]

LANDFILL METHANE OUTREACH PROGRAM

For information on EPA's Landfill Methane Outreach Program, a voluntary assistance and partnership program to support landfill gas energy project development, see: http://www.epa.gov/lmop. For information on the international Global Methane Initiative, see: http://www.globalmethane.org.

ink E-waste—Reuse, Repair, Resell, Recycle	
How to donate or recycle electronic products	www.epa.gov/osw/conserve/materials/ecycling/donate.htm •Find a Local Program •Manufacturer and Retailer Programs •Gov't-Supported Donation & Recycling Programs
Clearing Personal Data from Computers	www.epa.gov/osw/partnerships/plugin/pdf/pcthing-con.pdf •Information on clearing personal data from your computer before donating
ReCYCLE YOUR CELL PHONE. it's an easy call.	www.epa.gov/osw/partnerships/plugin/cellphone/index.htm •Drop-off and mail in options •Note: Many charities & non-profits also accept cell phones
PLUG-IN TO eCYCLING WITH U.S. EPA	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

V. Conclusion

Since the release of EPA's proposed 2012 budget, the political rhetoric has approached historic levels (or at least 1995/1996 levels). Attacks on specific environmental programs, calls to curtail EPA's rulemaking authority, and even arguments for the dismantling of the Agency have been advanced by various lawmakers. While the budget battles will rage on and the political shift in Congress may prevent EPA from legislatively advancing some of its highest priorities, to paraphrase President Richard M. Nixon, EPA will not be finished if it is defeated—it will only be finished if it quits, and there are no signs that the Agency is quitting.

For more information on what's new in EPA, Region 2, to report environmental violations, or to sign up to follow EPA Region 2 on Twitter or Facebook, visit the Region's 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.
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33. *Id.*
34. Press Release, U.S. Envtl. Prot. Agency, EPA Seeks Public Comment on the 16th Annual U.S. Greenhouse Gas Inventory (Feb. 16, 2011).
35. *Id.*
36. Press Release, U.S. Envtl. Prot. Agency, EPA Seeks Public Comment on Integrated Cleanup Initiative Implementation Plan (Dec. 9, 2010).
37. Press Release, U.S. Envtl. Prot. Agency, EPA Solicits Public Input on Using Vapor Intrusion Threats as Criteria for Superfund Sites (Jan. 28, 2011).
38. Details on where to submit comments are available in the Federal Register Notice for Potential Addition of Vapor Intrusion Component to the Hazard Ranking System, 76 Fed. Reg 5370 (Jan. 31, 2011), also available at http://www.epa.gov/superfund/sites/npl/a110131.pdf.
39. See Superfund: Obama's call for reinstating Superfund tax faces uphill battle on Hill, Greenwire (Feb. 18, 2011).
40. *Id.*
41. Press Release, U.S. Envtl. Prot. Agency, EPA Investigation of Gowanus Canal Identifies Widespread Contamination, Health and Ecological Problems; Hundreds of Samples find PAHs, PCBs, Heavy Metals and Other Toxins (Feb. 2, 2011).
42. *Id.*
43. *Id.*
44. Press Release, U.S. Envtl. Prot. Agency, EPA Announces Requirements for Next Phase of Hudson River PCB Cleanup (Dec. 17, 2010).
45. EPA Press Release, Statement of Judith Enck, Regional Administrator, U.S. EPA on GE Hudson River Decision (Dec. 23, 2010).
46. Press Release, U.S. Envtl. Prot. Agency, President Signs America Recycles Day Proclamation/Proclamation, new task force focus on electronic waste (Nov. 16, 2010). *See also* Exec. Order No. 13514 §2(j), 74 FR 52117, 52119 (establishing electronics stewardship goals).
47. Proclamation No. 8601, 75 FR 71003, *available at* http://www.epa.gov/epawaste/conserve/rrr/2010recycles.prc.rel.pdf.
48. Consumer Elec. Ass'n, Market Research Report: Trends in CE Reuse, Recycle and Removal (2008).
49. Press Release, U.S. Envtl. Prot. Agency, Administrator Jackson Announces EPA's International Priorities / Agency to work with other countries to curb pollution at home and abroad (Aug. 17, 2010).
50. More information on the Interagency Task Force on E-waste Management, *see eCycling*, U.S. Envtl. Prot. Agency, http://www.epa.gov/osw/conserve/materials/ecycling/.
51. Press Release, U.S. Envtl. Prot. Agency, President Signs America Recycles Day Proclamation/Proclamation, new task force focus on electronic waste (Nov. 16, 2010).
52. Press Release, U.S. Envtl. Prot. Agency, Energy Projects Transform Trash to Green Power / Landfill gas projects protect health while fueling industry and job creation (Jan. 19, 2011).
53. *Id.*

Chris Saporita is Assistant Regional Counsel with the Water and General Law Branch, Marla E. Wieder is an Assistant Regional Counsel with the New York/Caribbean Superfund Program and Joe Siegel is an Assistant Regional Counsel with the Air Branch and Alternative Dispute Resolution Specialist of the United States Environmental Protection Agency, Region 2, in New York City.

DEC Update

By John Louis Parker

DEC Today: Re-Calibration to Revitalize New York for FY 11/12

The Department of Environmental Conservation continues to be impacted by the challenges of New York State's fiscal reality. The budget for the State of New York closes a $10 billion deficit without raising taxes. The Department continues to make adjustments to perform the agency's core mission. These savings will be realized through re-assessment of the ways the Department conducts business and through a re-calibration of those efforts. The steps the Department will undertake include an examination of the reductions that have already been achieved to determine whether they can continue into the next fiscal year, identification of additional measures that will help the Department continue to deliver services with existing resources, and a re-assessment of Department operations to find opportunities for shared services with other agencies and to eliminate redundancies wherever they exist. These efforts are currently underway.

The Environmental Protection Fund will play an important role for Fiscal Year 11/12. As Commissioner Martens testified before the Legislature, the Governor recognizes the importance of the EPF, maintaining it at $134 million, and the budget does not propose new categories, sweeps, or funding for state staff. These funds are investments that produce many benefits to New Yorkers and leverage the billions spent in New York by those who enjoy and take active advantage of the State's magnificent natural resources. An effective DEC issues the decisions and the permits necessary for economic success in New York. Further, Departmental efforts can exemplify that economic progress and environmental benefits are inextricably linked with New York's future. The DEC in the coming weeks and months will continue to advance important and significant initiatives and projects in every DEC region.

Major Staffing Changes and Additions to DEC

Joe Martens
Commissioner

Between 1998 and 2010, Joe Martens served as President of the Open Space Institute, directing and overseeing land acquisition, sustainable development, historic preservation and farmland protection. Mr. Martens served as Deputy Secretary to the Governor for Energy and the Environment from 1992-94 and, before that, Assistant Secretary from 1990-92.

He is a member of the Olympic Regional Development Authority, which operates the 1932 and 1980 winter Olympic venues in Lake Placid and Gore Mountain Ski Area. Mr. Martens also chairs the Adirondack Lake Survey Corporation which continuously monitors Adirondack lakes and streams to determine the extent and magnitude of acidification in the Adirondack region. Mr. Martens studied Resource Economics at the University of Massachusetts at Amherst and received a Master of Science degree in Resources Management from the State University of New York, College of Environmental Science and Forestry at Syracuse University.

Steven C. Russo
Deputy Commissioner and General Counsel

For the past 16 years, Steve Russo was employed by Sive, Paget & Riesel in New York City, one of the oldest environmental law firms in the Country. Mr. Russo brings to DEC a wealth of experience in environmental law. While at Sive, Paget & Riesel, Mr. Russo worked on myriad environmental issues, and wrote articles and lectured on various aspects of environmental law. He served as Deputy Assistant Chief for the Environmental Law Division of the Office of the New York City Corporation Counsel, where he was responsible for the ongoing Clean Water Act permitting of the City's sewage treatment plants. Mr. Russo is a graduate of Columbia Law School.

Ronald A. Gatto
Emergency Services and Law Enforcement

Since 2002, Ronald Gatto served as the Director of Environmental Security Unit as the Chief Investigator for the Westchester County Police Department. In that capacity, Mr. Gatto supervised all environmental complaints, investigations, and criminal arrests, and provided and supervised security for vital infrastructure such as waste water treatment plants, transfer stations, and others. Mr. Gatto's environmental enforcement and environmental protection experience is extensive, and includes making over 950 environmental arrests, with a 100 percent conviction rate, and supervising or managing over 3,000 criminal environmental investigations. For 21 years before working for Westchester County, he worked his way to the rank of Captain with the New York City Department of Environmental Protection Police Department, where he was in charge of the Investigations Unit for the East and the West of the Hudson River covering over 2,000 square miles of the City's watershed. Mr. Gatto is married and has four children—3 girls and a boy.

E-Waste Law Now in Effect in New York

On April 1, 2011 the new State e-waste law came into effect to help address the need to properly dispose of the ubiquitous tools of modern life—consumer electronics. The law establishes a comprehensive statewide recycling

goal and requires manufacturers to recycle their share of the statewide goal based on market share. The e-waste law addresses typical electronic items such as computers, printers, keyboards, computer mouse (mice), video game consoles, MP3 players, DVD players, VCRs, DVR players, and televisions.

The law has two significant environmental benefits. The toxic heavy metals, including lead, mercury, and cadmium that are frequently found in electronics will not have the potential to contaminate groundwater and air when improperly disposed of, thereby leading to decreased adverse effects on human health and the environment. This is particularly true when these items are re-used and recycled, eliminating the need for them to be disposed of in landfills or incinerated in waste-to-energy facilities. Extracting the recyclable materials from these discarded products also eliminates the need for mining virgin/raw materials needed to manufacture new products.

There is no cost to consumers to recycle their used electronics. Fees are possible. For example, those for-profit businesses with **50** or more full-time employees and not-for-profit corporations with **75** or more full-time employees may be assessed a charge by manufacturers, and those providing "premium services" to erase personal information may also charge. Manufacturers are required to accept any electronic product they manufacture, or an item of another manufacturer's brand if offered to the consumer when purchasing the same type of electronic equipment. For example, if someone is buying a new computer that is a different brand than the one they currently own the manufacturer must accept the old computer. Common sense must also be brought to e-waste recycling efforts. Consumers are advised to destroy and remove personal information and to seek out how to perform such tasks from manufacturers since reformatting or erasing a computer hard drive, for instance, is not enough.

The items deemed e-waste under the law can be returned by a variety of means, including: mail or ship back return programs; fixed acceptance locations such as retail stores, sales outlets, not-for-profit organizations, or municipalities, which have agreed to provide facilities for the collection of electronic waste; community collection events; and any combination of these or other acceptance methods which effectively provide for the acceptance of electronic waste for recycling or reuse through means that are available and reasonably convenient to consumers in the state.

The provisions of the Electronic Equipment Recycling and Reuse Law are being implemented in two key phases: *April 1, 2011*—for manufacturers, retailers, collection sites, and consolidation and recycling facilities; and *January 1, 2015*—individuals and households will no longer be able to place or dispose of any electronic waste in a landfill or waste-to-energy facility, nor will they be permitted to put such electronic waste out for collection which is intended for disposal at these facilities. For additional answers and links to additional references, please visit the DEC's website at http://www.dec.ny.gov/chemical/66872.html.

John L. Parker is a Regional Attorney with the NYS 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 are not to be construed as an authoritative expression of the DEC's official policy or position expressed here with respect to the subject matter discussed.

Member Profiles

Long-Time Member: Rosemary Nichols

For this issue we have focused the Long-Time Member Profile on Rosemary Nichols, whose career in Environmental Law has included being a law teacher, legal editor, partner in various-sized law firms, general counsel to a developer, and, most recently, public official. She was truly one of the pioneers of the Section. Indeed, she was active in the Section before the Section existed, as a member of the special committee that became the environmental law committee that became the Environmental Law Section. While many in the Section are familiar with Rosemary's work and she was recently honored by the Section for that work, the following will describe some of the highlights of her career.

Rosemary was active in environmental law and policy as a law student at the University of Chicago where she was the student representative on a City of Chicago administrative board. Among the activities of the board while she was a student representative was a role in cleanup of a major Chicago steel plant. When she graduated from law school, Rosemary accepted a teaching position at the University of Albany, which was in the process of creating an Environmental Studies program. At that time (1972), environmental law was not on the curriculum of many law schools and Albany Law School permitted its students to take her undergraduate courses for credit. She left New York for a short period of time to teach at the University of Pittsburgh Law School and returned to New York to create the New York Land Institute, a foundation committed to environmental education and policy advocacy from multiple perspectives.

While listening to Rosemary talk about her law practice, I was struck by how varied it has been. The wide variety of positions she has held shows that she loves new challenges and is an expert not only in environmental law, but also in problem solving—making sure that the right thing is done and it is done the right way. She has represented municipalities, developers and project opponents in SEQRA matters, handled the first GE PCB administrative litigation, and regularly worked with and against many of the other leaders in the field. Rosemary spent 5 years as general counsel to a developer, which she described as "fun" because the developer had the capital to invest in quality projects.

Rosemary was the first woman to chair the Section. In the early days, the Section was very active in environmental legislation and tended to be an advocate for liberal positions. She recalls some tension between the Section and the Bar Association regarding program costs. The Section was committed to education and felt that the cost of programs made it difficult for those who were not in large law firms to attend. At one point, the Section was talking about seceding from the Bar Association over this issue. Being one of the first chairs of the Section, Rosemary felt that her predecessors had set a good foundation of organizational process, but she nevertheless saw room for improvement and took on the challenge. She described the task of organizing a group of environmental lawyers as "a lot like herding brilliant, iconoclastic cats."

Now a public official in Watervliet, New York, Rosemary Nichols is someone who has done just about everything an environmental lawyer can do and more. Looking back at our discussion, I regret not having asked "what's next for you?" I am sure that she would have reeled off a list of fascinating challenges that both showcase her skills and experiences, and her understanding of where the legal field is headed in the future.

Aaron Gershonowitz

New Member: Jason Kaplan

For this issue we are focusing our new member profile on Jason L. Kaplan, an associate at Sahn Ward Coschignano & Baker, PLLC. Focusing on transactional, regulatory, and litigation matters, Mr. Kaplan is involved with some of the most far-reaching and current environmental issues in New York. For example, Jason is currently working on the litigation involving the cleanup of the Lower Passaic River Site Area. Jason is also involved in a cost recovery case brought by an estate against a former partner of the deceased who has failed to contribute to the costs of cleaning up petroleum contamination at jointly owned property. On the transactional side, Jason is gaining experience reviewing and negotiating lease agreements and purchase and sale agreements. Jason's recent experiences have demonstrated that understanding how to manage environmental risks through contractual language is crucial. A few clients signed agreements without favorable environmental clauses prior to contacting Jason's firm, and are facing the consequences. Many of the cases that Jason works on involve leaking underground storage tanks, and hazardous waste and petroleum contamination. Jason's goal is to help clients resolve their environmental issues and educate them so that similar issues do not arise in the future.

The senior members of Sahn Ward Coschignano & Baker call Jason a "schmoozer." Jason is quickly becoming an expert in networking, and has shared the benefits of his experience with younger attorneys in his article, *How to Land an Environmental Law Job*, which was featured in the NYSBA's *Electronically-In-Touch* newsletter. Jason credits networking, developing genuine connections, and persistence as key factors to his own success. According to Jason, environmental attorneys truly want to help young aspiring environmental lawyers enter the field and achieve their dreams, and there is no shortage of networking opportunities for those with the gusto to put them-

selves out there. Between the many New York State Bar Association functions, continuing legal education courses in environmental law, and other environmental organization meetings and events, there is a plethora of opportunities of which full advantage should be taken by young attorney seeking entry into the environmental law field.

Jason is very active in the New York State Bar Association. He was recently appointed as the NYSBA's Young Lawyers Section co-liaison to the Environmental Law Section, as well as co-chair of the Environmental Law Section's Membership Committee. Jason is also a Young Professionals Group Member of the Nature Conservancy, where he is involved with the development of new membership and increasing advocacy of the Conservancy's work both domestic and abroad.

Sure, Jason is a budding young attorney, and sure, he can tell you about Phase I and Phase II Environmental Site Assessments or how to network a room full of experienced attorneys, but did you also know that Jason moonlights as a stage performer? In his spare time, Jason studies and performs improvisational comedy at Upright Citizens Brigade Theatre in Manhattan. Clearly, Jason is meant to be in the spotlight. If the formative years of his career forecast anything for his future, it is safe to say that Jason will be making people—hopefully his clients—smile and laugh for years to come.

Prior to joining Sahn Ward Coschignano & Baker, Jason worked for two Garden City law firms. Before that, he was a law clerk for General Electric Company, where he focused on Environmental, Health and Safety (EHS) matters for the Corporate Environmental Programs EHS management. Mr. Kaplan also served as a legal intern in the Environmental Protection Bureau of the New York State Attorney General's office, and on the Environmental Team at Holland & Knight's Washington D.C. office.

Jason Kaplan graduated from Colgate University cum laude with a B.A. in geology and received his Juris Doctor, cum laude, and Master of Studies degree in Environmental Law and Policies, cum laude, from Vermont Law School in 2009. Jason was a Notes Editor on the *Vermont Law Review*.

Justin Birzon

BOOK REVIEW

The Polluters: The Making of Our Chemically Altered Environment

By Benjamin Ross and Steven Amter

Reviewed by Andrew B. Wilson

Dr. Benjamin Ross and Steven Amter of Disposal Safety, Inc., are two individuals who make it their business to stay informed about the evolution and dangers of chemicals found in our water and soils. Who better to author a book entitled *The Polluters: The Making of Our Chemically Altered Environment?* Bringing to bear their professional knowledge into the history and development of many of the most notorious chemicals, these two authors follow the trail of the chemical industry's development as well as its parallel manipulation of government forces and subsequent underwriting of many of the policies that are still in place today. Most importantly, this book offers one of the better case studies and attempts to answer the classic iron triangle question: How do private economic interests shape the political policies which affect everyone's daily lives?

The Polluters, published by Oxford University Press, creates a compelling history of the chemical industry, bringing to terms controversial incidents such as the burning of the Cuyahoga River and ubiquitous images such as the smog over London and Los Angeles. The authors look back at the chemical industry during its infancy, before thoughts of public health or environmental safety entered the picture, at times when leaders such as Thomas Jefferson promoted economic boons. They analyze a diverse history of chemical usage, known for its utility both in war—in the forms of gunpowder and controversial chemical warfare agents such as chlorine gas—and in modern life—such as for crops and fuels.

However, this is not a love story of capitalism: *The Polluters* places historical blame where it is due—highlighting the public health costs that resulted from decades of poor regulation and even concealment. While DuPont is not chastised for the introduction of Freon in the 1930s as a refrigerant, pointing out that these dangers were not generally knowable until after World War II and CFC-specific dangers to the ozone layer were not known until the 1970s, its role in the spreading of DDT is not given such a pass. In fact, when it comes to discussing some of the more egregious chemical impacts on public health, such as the Donora air pollution disaster and dangers of TCE, the authors barely pull a punch: "Failure to warn does not prove ignorance, and an artfully worded warning proves even less."

The authors' treatment of the interweaving between public relations and political strategy is perhaps what makes this book such a compelling read. Showing the political machine as a double-edged sword when it comes to the chemical industry, Ross and Amter demonstrate the perils masterfully and succinctly in 171 pages (223 with footnotes). The same machine that protects patents while allowing for little regulation can be turned by public opinion to instead vilify industry. The big names in chemicals such as DuPont, Dow, and Monsanto have been around for literally hundreds of years. DuPont, for instance, was originally a gunpowder mill formed by Monsieur du Pont in 1802 in Delaware. The authors explain how companies with such dramatic timelines do not work on a four-year political cycle. With some missteps, they learn when to fight regulation, when to push for their political issues, and how to lay low when political favor has turned to political ire, pushed by some often-justifiable outrage to a problem kept latent by industry allies in the right positions. *The Polluters* truly comes into its own in the interplay between the chemical manufacturers and the political process.

This book also goes far into illustrating the dreaded iron triangle of politics—the closed loop of industry providing monetary and electoral support for members of Congress, and the members of Congress who direct funding to executive agencies that lessen regulations on that industry. Really, it is an illustration of interest group politics—the idea that small wealthy groups can push the right gatekeepers to stop or push legislation and/or funding. Recognizing this pitfall of modern democracy, the authors write early on that "Political writers of all schools recognize that private economic interests can turn government policies to their advantage."

The authors continually ask, "*Why are studies always vitally important?*" Certainly some questions must surely be so obvious as to not require a study to accomplish an answer, right? The authors weave this issue into the story with such discussions as the tale of Dr. Robert Kehoe who, when called upon by the government to determine the health hazards of tetraethyl lead in gasoline, stated that substances should be banned only if "actual hazard" were demonstrated. Society should err upon the side of utility such that "demonstrable economic benefits should

always outweigh unproven risks." Should the benefit of the doubt be granted and an "innocent until proven factually guilty" be applied? Or rather, should the presumption favor public health and the burden be upon the chemical developers to prove no harm? When facing national policy and billion-dollar industries, the choice is duly complicated.

Without giving away the ending, *The Polluters* does not provide simple answers or pass blanket judgments. Instead, it leaves history to unfold and industry to answer the question of whether it has indeed changed its nefarious ways. While the authors develop certain historical presumptions in the reader's mind, such as "[h]onest error cannot fully explain the triumph of industry's favored ideas about pollution," they leave room for absolution. Thus, as a reader, if you have already developed a belief that some of the practices of industry have polluted both our physical surroundings and our politics, then this may well stoke the flames. The authors do well, however, to simply present the story and balance out some of the blows with hope. That being the case, this is a book that may be safely passed not only to those readers already well-read on the issue of pollution, but also may be handed to even the staunch defenders of industry.

As dense as it is with historical facts, the read is compelling and moves quickly. This book should hold a place on your bookshelf as a go-to for an overview of the history of chemical pollutants as they permeated both our physical surroundings and our political arenas. Most importantly, this book offers a compelling analysis of the historical interplay between industry and politics and how its ripples are still felt today. Its relevance reaches from the regulators to the regulated—all of us are affected by that interplay today; our society remains swimming in chemicals, and we are still in the throes of vital political times long since past.

The Legislative Forum Database, 1998-2010

By Michael J. Lesser

Earlier this Spring, the Environmental Law Section's Legislation Committee went through the process of planning, worrying and panicking about the speakers and topic for the Spring Legislative Forum and Luncheon. Of equal importance was the coordination of a Forum date with room availability, the luncheon and luncheon speakers and events, and the Section's Executive Committee meeting. Somehow, the Committee manages despite more than a little anxiety to pulling off this event every year.

For those readers who do not follow news about the Environmental Law Section's annual Legislative Forum, the Forum brings together a panel of Albany insiders to speak and, hopefully, interact regarding the environmental initiatives under review in that year's current legislative session. The Committee tries to engage legislators and their staffs in real-time discussions about legislation while the session is under way. The topics can be focused on a single issue in the news, or on general legislative priorities.

To make life easier for the Section and ourselves, the current Legislation Committee Co-chairs decided to compile a directory of the Forum's topics and speakers for the past thirteen years (1998-2010) and we share it with you here. We have listed the topics chronologically, and our speakers alphabetically with their then current titles and the year they were invited. As we developed the list we had more than a few pleasant surprises and learned interesting facts about our speakers and Forums.

Statistically, fifty-eight distinct speaker slots have been shared by forty-six invited speakers over the years examined. As the numbers indicate, the Forum has been honored to have seven repeat speakers over the years with some appearing in different roles and titles in separate years. The most appearances with four Forums: the Honorable Carl Marcellino, the former (and, perhaps, the future) long-time Chairman of the State Senate's Environmental Conservation Committee (2000, 2001, 2006, 2007).

Another factoid that is always of interest to Forum observers is the balance between the general affiliations of our speakers. Using four arbitrary and general categories, the results show that the fifty-eight separate invited speaker slots can be categorized as: state legislators and staff—20; private industry/law firms/Bar Association—15; state government (executive agencies only)—13; and, public interest—10.

We are proud to say that several invited speakers have gone on to more prominent positions in the public arena. These include Congressman Paul D. Tonko (D-21st Congressional District N.Y.), who previously was invited to speak at the Forum on three panels (2002, 2003, 2008). On the first two occasions, he spoke as the Chairman of the NYS Assembly Energy Committee (2002, 2003), while his last appearance to date was as the NYSERDA CEO and President (2008).

Judith Enck, the current USEPA Region 2 Regional Administrator, spoke at the Forum as the Deputy Secretary to the Governor for the Environment (2007). Erin Crotty appeared in 1999, as a NYSDEC Deputy Commissioner before later becoming the Commissioner of that agency. Finally, the current NYS Comptroller, Thomas P. DiNapoli, was invited to the Forum (2006) while the Chairman of the NYS Assembly Environmental Conservation Committee. Many, if not most, of our former Forum panelists remain active in the environmental and energy fields.

By topic, the Forum has had three recent sessions focused on general legislative agendas (2007, 2009, 2010). This fact may reflect the lack of focus, general turmoil, and budget travails of recent legislative sessions. Regarding specific topical areas, the Forum has seen three sessions focused on Superfund reform or brownfields (1999, 2001, 2006). The remaining Forum sessions covered a diverse list of environmental and energy topics as indicated by the compilation. Some of the issues raised in the Forums still remain mostly unresolved (wetlands regulation, 2005). Some have become a regular part of the state's environmental agenda (green initiatives, 2003), and at least one is a sleeping giant (Article X renewal—power plant permitting, 2002) that will certainly be revived in some future form. Despite certain snide remarks made to the Committee members (you know who you are), the Forum has devoted only one session to the "Bottle Bill" (2004) since 1998.

If there have been any glaring omissions over the years, it is the paucity of speakers and topics focused on the legislative priorities that involve state agencies other than the NYSDEC, such as the NYS Department of Health, NYSERDA, ESD, the APA, and others. In this regard, this compilation may provide some useful ideas for future Forums and panelists.

Note that the Legislation Committee also hopes to research the pre-1998 Forums and incorporate that data into this compilation. Section members who still have pre-1998 Forum materials (or good memories) should contact the Committee Co-Chairs. Your assistance is greatly appreciated.

One final caveat about this compilation: It is based on the Forum's existing source materials which list "invited" speakers. However, from experience, the "real-time" aspect of the Forum means that there have been several last-

minute additions and substitutions to the speaker panels, which did not appear in the prepared materials. Forgive us then for any omissions or errors in this initial compilation. Please feel free to contact the Legislation Committee with any corrections or other historical information about the Legislative Forums.

Unfortunately, the Section has never formally tracked the attendance of the Legislative Forums over the years. However, I think that anecdotal evidence (and an educated guess or two) supports a total attendance figure over the thirteen most recent sessions of approximately one-thousand attendees. This would indicate that the Legislative Forum is accomplishing its core mission of providing a high profile public outlet for New York's environmental policy makers.

Lisa Bataille and Kathy Plog of the Bar Association assisted in the research for this compilation.

* * *

2010-2011, Legislation Committee Co-Chairs
Jeffrey Brown
Michael Lesser
Andrew Wilson

Past Co-Chairs (from 1998)
Louis Alexander
Terresa Bakner
Philip Dixon
Joan Leary Matthews

Legislative Forums by Year and Topic

Year	Topic
1998	Waste Tire Initiatives
1999	Proposals for State Superfund Reform
2000	Pesticides and the Environment
2001	Superfund Reauthorization and Reform
2002	Renewing Article X: The Future of Power Plant Siting in New York
2003	Renewable Energy/Green Initiatives
2004	The Future of the Bottle Bill
2005	State Wetland Regulation: Should it be Expanded?
2006	Brownfields Legislation: How is it Working?
2007	The Environment: A New Agenda for New Times
2008	Climate Change: Initiatives, Policy, and Incentives
2009	New Possibilities: Environmental Legislative Initiatives for 2009
2010	Legislative Initiatives on the Environment in Tough Economic Times

Invited Speaker	Title (at Time of Forum Invitation)	Forum(s)
Allen, James	Executive Director RISE (Responsible Industry for a Sound Environment)	2000
Bakner, Terresa M.	Co-Chair Committee on Coastal and Wetland Resources, NYSBA Environmental Section	2005
Briccetti, Heather	Vice President of Government Affairs, NYS Business Council	2008
Brodsky, Richard L.	Hon. Chairman, Committee on Environmental Conservation, NYS Assembly	2001
Bruening, Glen T.	Executive Deputy Commissioner, NYSDEC	2001
Cahill, Kevin A.	Hon. Chairman of the Energy Committee, NYS Assembly	2008
Colden, William C.	Bureau Director, Bureau of Waste Reduction and Recycling, NYSDEC	1998
Crotty, Erin	Deputy Commissioner, NYSDEC	1999
Desnoyers, Dale A.	Division Director, Division of Environmental Remediation, NYSDEC	2006
DiNapoli, Thomas P.	Hon. Chairman, Committee on Environmental Conservation, NYS Assembly	2004, 2006
Donohue, Gavin	Executive Director, Independent Power Producers of NY	2002
Enck, Judith	Deputy Secretary to the Governor for the Environment	2007

Invited Speaker	Title (at Time of Forum Invitation)	Forum(s)
Englebright, Steven C.	Hon. Vice Chairman, Legislative Commission on Toxic Substances and Hazardous Wastes, NYS Assembly	2000
Freeman, David J.	Co-Chair, NYSBA Environmental Law Section Task Force on Superfund Reform	2001, 2006
Ferguson, Marcus	NYS Business Council	2010
Gahl, David	Policy Director, Environmental Advocates of NY	2009
Haight, Laura	Senior Environmental Associate, NYPIRG	2004
Iwanowicz, Peter M.	Deputy Secretary to the Governor for the Environment	2010
Izeman, Mark A.	Senior Attorney NRDC	1999
John, Susan V.	Hon. NYS Assembly Member	1998
Johnson, Carl	Deputy Commissioner for Air/Waste Management, NYSDEC	2000
Kennedy, Katherine	Special Deputy Attorney General for Environmental Protection, NYS Attorney General's Office	2007
Klotz, Charles	NYS Portland Cement Association	1998
Kusler, Jon A.	Associate Director, Association of State Wetland Managers	2005
Lanahan, Kevin M.	Director of State Government Affairs, Consolidated Edison	2003
LaValle, Kenneth P.	Hon. Member NYS Senate	2004
Lehner, Peter H.	Chief Environmental Protection Bureau NYS Attorney General's Office	1999
Marcellino, Carl L.	Hon. Chairman, Committee on Environmental Conservation, NYS Senate	2000, 2001, 2006, 2007
McGrath, Christopher	NYS Portland Cement Association	1998
Moroney, Frank	Counsel to Sen. George D. Maziarz, Chairman Energy and Telecommunications Committee, NYS Senate	2008
Patka, Carl F.	Senior Assistant Counsel to the Governor	2005
Pokalsky, Kenneth J.	Senior Director of Government Affairs, NYS Business Council	2009
Reynolds, Anne K.	Director Air and Energy and Environmental Programs, Environmental Advocates Director, Commissioner's Policy Office, NYSDEC	2002, 2003 2009
Sinding, Kate	Natural Resources Defense Council	2010
Snyder, J. Jared	Assistant Commissioner for Air Resources, Climate Change & Energy, NYSDEC	2008
Stouffer, John E.	Legislative Director, Sierra Club—Atlantic Chapter	2005
Sweeney, Robert K.	Hon. Chairman, Environmental Conservation Committee, NYS Assembly	2009, 2010
Their, Audrey	Project Director, Environmental Advocates	2000
Tierney, James M.	Assistant Attorney General, Environmental Protection Bureau, NYS Attorney General	1998
Thompson, Antoine	Hon. Chairman, Environmental Conservation Committee, NYS Senate	2009, 2010
Tonko, Paul D.	Hon. Chairman, Energy Committee, NYS Assembly President and CEO of NYSERDA	2002, 2003 2008
Vacek, Michael E.	President, NYS Beer Wholesalers Association	2004
Walsh, Thomas F.	NYS Superfund Management Board	1999
Ward, Douglas H.	American Wind Energy Association	2003
Washington, Val	Executive Director, Environmental Advocates Counsel, NYS Trial Lawyers Association	2001 2006
Wright, James W.	Hon. Chairman, Committee on Energy and Telecommunications, NYS Senate	2002

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Public Trust Doctrine Should Protect Public's Interest in State Parkland

By Greg Berck

Foreword

By Phil Weinberg and Nick Robinson

This excellent article highlighting the threats to New York's superb State Park system could not be more timely. It clarifies how the Public Trust Doctrine protects park land, state or municipal, from sale or non-park use in New York. Our Court of Appeals has so ruled historically, and in its recent *Friends of Van Cortlandt Park* decision preventing a water filtration plant in a New York City park without express State legislative approval. As we write, our State's parks are in jeopardy. Budget reductions have already led to the State contracting with municipalities to maintain some of our parks, and some of these towns—themselves short of funds—are weighing inappropriate non-park uses. It's essential that State officials, the Governor, Legislature and the Office of Parks, Recreation and Historic Preservation, be reminded that parks are to be parks in perpetuity—a major public resource, vital to the State's economy as well as its citizens' quality of life.

I. Introduction

New York State has had a long and prominent role in the preservation and protection of its parklands and historic sites. The State is home to both the oldest State park in the nation—the Niagara Reservation founded in 1885—and the oldest publicly funded historic site—Washington's Headquarters State Historic Site, 1850. New York is also home to the largest State protected area in the contiguous United States, the 6.1 million-acre Adirondack Park established in 1892, which is also the largest National Historic Landmark in the country. 1904 saw the establishment by New York State of the Catskill Park, a 700,000 acre private/public park preserve with a constitutionally protected wild forest similar in structure to the Adirondack Park.

New York State has also been the birthplace and home of some of the United States' greatest conservation and preservation advocates in the nation's history, including Theodore Roosevelt, the first President to make land conservation a national topic; landscape architect and renowned park designer Frederick Law Olmstead; topographical engineer Verplanck Colvin; and nature photographer Seneca Ray Stoddard. It can be argued that the modern State park system was brought fully to realization by New York's controversial public builder Robert Moses, whose provocative approach to public works projects nonetheless helped lead to the formation of the State Park system.[1] Today, the New York State Park system is made up of 178 parks and 35 historic sites constituting over 325,000 acres of protected landscape. The parks include scenic assets, heritage areas and various types of recreational opportunities as well as "some of the state's most imperiled and significant biological treasures."[2]

The legislature in establishing the State Office of Parks and Recreation in 1972 stated "[t]he State of New York is abundant in natural, scenic and other recreational resources, which for over a century have educated, edified, uplifted and delighted our citizens. The establishment and maintenance of a statewide system of parks, recreation and historic preservation are hereby declared to be policies of the State."[3] This statutory declaration of purpose leaves no doubt that the State of New York and her people have a vested interest in all parkland. The laws of 1993 codify this vested interest:

> The legislature hereby finds and declares that there are over one hundred ninety State parks, recreational facilities and historic sites situated across the State and more than two hundred fifty thousand acres of land under the jurisdiction of the office of parks, recreation and historic preservation. This system of State parks, recreational facilities and historic sites contains unique and irreplaceable natural, ecological, historic, cultural, and recreational resources. The residents of the State have expressed their strong interest in and support of actions designed to protect these critical resources.[4]

Additionally, the legislature has recognized the importance of historic sites for the State park system. New York parks law has codified eleven of the state's historic sites.[5] New York has added statutory protections to its parkland and historic sites to emphasize the importance of these lands to the State and its citizens. New York's State heritage area system and its statutory declaration of policy support the importance of historic sites and heritage areas; stating:

> The urban and regional areas of the State are rich in cultural and natural resources of statewide significance associated with our growth and attainments over time… It is the State's interest to protect, preserve, enhance and promote the natural and cultural resources found in significant historic settings that reveal the State's heritage.[6]

In creating the New York Park Preserve System, the legislature directs OPRHP to "maintain the integrity of park land, flora, fauna, and scenic vistas; restore and maintain historical and archeological sites; and provide for the management of all unique, rare or endangered species of flora and fauna within park preserve areas."[7]

The Public Trust Doctrine commentator David Slade has written, "We are a tiny planet with very serious 'carrying capacity' problems, and are in dire need now of sound and wise environmental stewardship."[8] Environmental and park stewardship must be at the forefront of those responsible for our public lands. Natural sites and heritage areas are often looked down upon by entities concerned primarily with fiscal results. This is a mistaken view. These natural areas are the most important sites in the United States and in New York. We must keep these areas open and pristine for future generations.

In 2010, the administration of Governor David Paterson ordered the closure 64 State parks and 15 historic sites unless eleven million dollars were added to the parks budget. In response to the proposed closures, Dennis R. Reidenbach of the National Park Service (NPS) reminded the Governor that "[u]nder the Land and Water Conservation Fund (LWCF), New York has received approximately $230 million in LWCF assistance since 1965." Furthermore, "the closure of any State park or historic site that has received LWCF and/or Federal Lands to Parks assistance would be viewed by the NPS as being in noncompliance with Federal requirements for those programs"[9] and thus jeopardize million in Federal LWCF and FLP assistance.

To prevent these closures, the legislature moved eleven million dollars from the Environmental Protection Fund and shifted it to the parks budget. With this budgetary compromise, Governor Paterson promised not to close any state parks or historic sites. As the Cuomo administration commenced, Governor Cuomo declared that he would not close any state parks or historic sites in 2011. The Acting Commissioner of OPRHP, Andrew Beers, reiterated this. Despite these statements of support, OPRHP has compromised three State parks (Woodlawn Beach, Knox Farm, Joseph Davis Park) and one historic site (the Herkimer Home). Without the advice and consent of the legislature, OPRHP has entered into "Cooperative Agreements" with the Town of Hamburg (Woodlawn Beach) and the Town of Lewiston (Joseph Davis). The "Cooperative Agreement" with the Town of Hamburg was signed on December 29, 2010. It is not a coincidence that this signing occurred just after Christmas and before Governor Cuomo took office: the timing was intended to prevent public outrage at the alienation of a state treasure. OPRHP also shuttered the Herkimer Home and has reduced access to the property.

Joseph Davis Park is a 387 acre park in the Niagara Frontier region of New York. Two-hundred-thirty acres of this park have been identified as a bird conservation area and OPRHP has designed a bird conservation area management guide.[10] The park Management Plan permits development of only 24 acres of the park. The small section of Joseph Davis where development has been permitted has been greatly restricted in terms of what type of development may occur. For example, the Management Plan rejected a proposed use of an abandoned golf course because it would have increased traffic. Recent news articles indicate that the Town of Lewiston is in discussions with private entities to build a hotel and conference center at Joseph Davis Park.[11] These types of projects must not be permitted and our State parks must be protected from development and alienation.

This article contends that these closings and alienations of State parks and historic sites, without the consent of the legislature, are in violation of the Public Trust Doctrine. The article also argues that the State Environmental Quality Review Act has been violated, and makes recommendation on how the State can better protect its public lands and duties under the Public Trust Doctrine.

II. History of the Public Trust Doctrine in the United States and in New York

The Public Trust Doctrine is a common law doctrine that the citizens and courts in the United States have used to protect our parks and historic sites. The Public Trust Doctrine originated in the Roman Empire 1,500 years ago.[12] The Public Trust Doctrine was codified in Roman civil law through the Institutes of Justinian and its accompanying digest.[13] "The Institutes assured the citizens of Rome that all could 'approach the seashore, provided that he respects habitations, monuments, and the buildings, which are not, like the sea, subject only to the law of nations.'"[14] The Doctrine then became vested in two titles: (1) *Jus publicum*, the collective rights of the public to fully use and enjoy trust lands and waters for commerce, navigation, fishing, bathing and other related public purposes and (2) *Jus privatum*, the private proprietary rights in the use and possession of trust land.[15] Regardless of who owns the land and holds title to it, the state or sovereign is responsible for protecting the public's interest.

Slade and many other commentators and courts have recognized that the Public Trust Doctrine no longer applies solely to water issues, but also to land resources above the water table:

> The Public Trust Doctrine has evolved in our own time from an ancient code, designed to keep the seas, shorelands and fish open to the public, to a modern doctrine of environmental stewardship.

> Although it remains pegged to "navigable" waters in most states, it is clear that the principles inherent in the Public Trust Doctrine can be, perhaps should be, applied to all publicly-held resources.[16]

These trusts are intended to be reserved solely for the benefit and enjoyment of the public. Through common law, the concept of the Public Trust Doctrine is rooted in our society and our courts. The U.S. Supreme Court has held that the Public Trust Doctrine "is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, [] a reason as applicable to navigable fresh waters as to waters moved by the tide."[17] Although water rights helped develop the Public Trust Doctrine, the doctrine is now amphibious.

In modern times the Public Trust Doctrine has been used to protect not just waterways and navigable rivers, but also parks and historic sites. Parks have evolved with a joint purpose of beneficial enjoyment and as a vehicle for preserving significant natural and cultural resources for future generations. This is explicit in the National Park Service Organic Act[18] and has been the guiding principle in New York statutory language, the courts' application of public trust to municipal parks, and the practice of the state with regard to the forest preserve and management of State parks. The Supreme Court of California has held that,

> [t]he public trust is more than affirmation of state's power to use public property for public purposes; it is an affirmation of duty of state to protect people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when abandonment of that right is consistent with purposes of trust.[19]

Parks, historic sites and heritage area resources in New York State are without question a public trust asset.

Parks are more than just recreational areas and serve more than a recreational purpose. Parks may be included within the examples of "public fora," open spaces to which the public generally has unconditional access.[20] The concept that the stae must protect and keep parks for the public's unconditional use is prevalent in New York's judicial history and the Court of Appeals has made several keynote decisions supporting the applicability of the Public Trust Doctrine.[21] As these cases demonstrate, "New York has a long tradition of extending public trust protections to municipal parks by requiring specific state legislative authorization for sale, alienations, or non-park uses of the land."[22] As the Court of Appeals has held, "our law is well settled: dedicated park areas in New York are impressed with a public trust for the benefit of the people of the State."[23] The Public Trust Doctrine is intended to be used as a sword and a shield by policy makers: sword when it comes to the need to acquire park space for the benefit of the public and a shield when the executive or administrative agencies attempt to endanger parks' intended purpose because of fiscal restraints or a desire to sell to private interests.

III. The New York Legislature Has Acted Consistently with the Virtues of the Public Trust Doctrine

The New York State Constitution embodies elements of the Public Trust Doctrine. Article XIV § 1 states, "The lands of the State…constituting the forest preserve… shall be forever kept as wild forest land. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private.…"[24] Article XIV § 3 states "[f]orest and wild life conservation are hereby declared to be the policies of the State."[25] Although the New York Constitution does not explicitly state that "the forest shall be held in trust for the people," it can be deemed to be a codification of the Public Trust Doctrine. Finally, the New York Constitution also recognizes that the State canal system is a public trust.[26] Article XV, Section 1: "Disposition of canals and canal properties prohibited."

Furthermore, New York's legislature has passed laws that accept the concepts of the Public Trust Doctrine.[27] New York Public Lands Law authorizes the use of state-owned submerged lands as long as the use is consistent with the original purpose for which the submerged lands were intended.[28] The legislature also expressed the critical environmental importance of these state-owned lands by including seven factors that must be considered before the appropriate agency authorizes a land grant or lease: (1) the environmental impact of the project; (2) the values for natural resource management, recreational uses, and commercial uses of the pertinent underwater land; (3) the size, character and effects of the project in relation to neighboring uses; (4) the potential for interference with navigation, public uses of the waterway and rights of other riparian owners; (5) the effect of the project on the natural resource interests of the state in the lands; (6) the water-dependent nature of the use; (7) and any adverse economic impact on existing commercial enterprises.[29] This law recognizes that property owned by New York can be leased and granted, but the public interest cannot be extinguished.

The State's canal system is also a public trust. The legislature has recognized this and New York Canal Law provides,

> on preparation of a Canal Recreationway Plan for the State's Canal System provides that the plan shall include:… provisions which protect the public interest in such lands and waters for purposes of commerce, navigation, fishing, hunting, bathing, recreation and access

> to the lands and waters of the state, and otherwise encourage increased public access through the establishment of parks, scenic by ways and recreational trails on the canal system.[30]

New York Executive Law authorizes the Department of Environmental Conservation to create master plans for all State-owned lands.[31] These master plans are intended to have the force of law since the legislature authorized their creation. The master plans are also guiding documents that will help all future parties responsible for State parks understand what the intended purpose of the park is. It is critical that OPRHP respect the original purposes of all Master Plans.

New York Environmental Conservation Law also reflects the purposes of the Public Trust Doctrine. "All the waters of the state are valuable public natural resources held in trust by this state, and this state has a duty as trustee to manage its waters effectively for the use and enjoyment of present and future residents and for the protection of the environment.…"[32] Another section of the Environmental Conservation Law states, "[t]he waters impounded by any dam hereafter constructed for power purposes on any stream or waterway in the State shall be impressed with a public interest and open to the public to fish thereon.…"[33] Again, the legislature has recognized that regardless of any changes that are allowed to occur on State owned waterways, the waterways and (lands) must still be available for the public's use. These statutes are evidence that the legislature has long recognized the importance of the Public Trust Doctrine with respect to parks, historic sites and heritage areas. If the Office of Parks, Recreation and Historic Preservation acts to temporarily or permanently shutter any State park or historic site, the agency will violate principles expressed in the laws of New York and will be in violation of the Public Trust Doctrine.

IV. Public Trust Doctrine in Action in the Courts

The Public Trust Doctrine is the main vehicle by which New York courts have protected the public's rights to parkland. One of the earliest applications of the Public Trust Doctrine in New York came out of the Court of Appeals in *Brooklyn Park Com'rs v. Armstrong* in 1871.[34] In that case, the issue was whether the Borough of Brooklyn could sell and convey property that was given to it in trust to be used for a public park.[35] The Court held, "[t]he city took the title to the lands…for the public use as a park, and held it in trust for that purpose…receiving the title in trust for a special public use, it could not convey without the sanction of the legislature…."[36] This was the first case recognizing that the legislature must act before a municipality can remove a park from the public's use. The trend toward requiring legislative approval for changes to parks continued with further decisions from the Court of Appeals.[37]

The Handbook on the Alienation and Conversion of Municipal Parks distributed by OPRHP highlights that all cases dealing with the Public Trust Doctrine have focused on the alienation of "municipal" parkland.[38] Contrary to the principles inherent in the decisions of our courts, and the notion of public interest, OPRHP reasons that since all of the cases have dealt with municipal parks "the discontinuance or conveyance of State parkland, is most often, governed by statute, so legislative authorization is not required."[39] OPRHP concludes that municipal parks differ from State parks because there is no case law dealing with the discontinuance or conveyance of State parkland or historic sites. The reason for the lack of case law is clear: as exemplary stewards of the State park system, OPRHP has not closed a State park or a historic site. Thus there has been no cause/injury justifying a lawsuit against OPRHP. Additionally, statutes cited in the handbook as justification for the contention that "discontinuance or conveyance" of State parks being exempt from legislative authorization, do *not* provide sufficient support for this argument.[40]

The OPRHP handbook cites N.Y. Parks, Rec. & Hist. Preserv. Law §§ 3.09(1), 3.17, 3.19, and 13.09.[41] However, these statutes for park law all deal with acquisition of parkland, utilities, licenses and easements. None of these statutes reference OPRHP's power to close or alienate parks. The Handbook further cites four statutes from New York Environmental Conservation Law.[42] These statutes do not reference an authority granted to the Commissioner or any other figure at OPRHP to discontinue, close or alienate State parks. These statutes authorize acquiring real property; acquiring and managing forest, trails and parkland; operating and maintaining the 6th park region; and the authority to acquire lands from the Federal Government for use as reforestation, parkland, and game management. Finally, the handbook cites five statutes from New York Public Lands Law.[43] These statutes authorize methods of handling abandoned state lands; authorize Commissioner of the Office of General Services (OGS) to sell strips of abandoned canal lands; authorize transfer of title of lands outside Adirondack and Catskill Preserves for use as additional forest preserve lands; authorize OGS to sell or transfer lands once used by militia; and authorize OGS to acquire any real property as deemed necessary for the purposes and functions of the department. None of these statutes authorizes OPRHP to discontinue, close or alienate State parks or historic sites.

Temporary closures, even if only a year with the intent to reopen a State park or historic site, violate the Public Trust Doctrine. In *Bates v. Holbrook*, the Court held that structures could not be considered "temporary" when "authorized to remain until the completion of the work" on a project that would take at least three years.[44] *The Friends of Van Cortlandt Park Court* held that "there may be de minimis exceptions from the public trusts doctrine.…"[45] The park area at issue in *Van Cortlandt*

Park would have been out of public use for five years. Although the Court did not lay out examples of "*de minimis*" exceptions, a temporary closure or a lease of a park or historic site is unlikely to be acceptable to New York courts. Contracts limited in scope for the purposes of operation and management of parks similar to current arrangements with Central Park in New York City may be acceptable; however, these contracts must not allow for any changes to the parks essential purpose and its intended use described in the Master Plan.

OPRHP incorrectly believes that legislative action is not required to authorize the discontinuance or conveyance of State parkland or historic sites. The law set out by the Court of Appeals, most recently in 2001, is the law that should be applied to state parks and historic sites.[46] Specific legislative action is required prior to the discontinuance or conveyance, including a lease that does not guarantee public enjoyment and protection, of municipal parks and state parks because there is no appreciable difference between municipal and State parks. Both types of parks are intended for the use and enjoyment of the public and taxpayer revenue funds the operations of State and local parks. The only difference is the entity that owns and operates that park. At its roots, the Public Trust Doctrine does not distinguish between the public's interests in State-owned or municipality-owned properties. The Doctrine is only concerned with the promise that park resources be protected and remain open for the public's use. No New York court will find persuasive OPRHP's contention that legislative action is not required to close a State park or historic site.

V. Different State Approaches to the Public Trust Doctrine

Application of the Public Trust Doctrine is left to the states. This allows states to strengthen and improve their own version of the Public Trust Doctrine. Beyond New York, many other states have adopted intelligent approaches to interpreting the Public Trust Doctrine. Courts in other states have embodied the principles of the Public Trust Doctrine in their common law and Constitutions. New York would be wise to consider other approaches in an effort to further protect the public's innate right to interact with nature.

A. Hawaiian Constitution

Hawaii makes the strongest use of the Public Trust Doctrines in the country. The Doctrine is set forth in the Hawaiian Constitution: "[a]ll public natural resources are held in trust by the State for the benefit of the people."[47] The crux of this constitutional statement is that the State holds all public natural resources in trust for not only the current generation, but also all future inhabitants of Hawaii. This recognition forces the State of Hawaii to consider the impacts of its decisions regarding public lands and natural resources well beyond the immediate future.

As discussed, New York common law has adopted its own variation of the Public Trust Doctrine through various Court of Appeals decisions and the "forever wild" protection in the constitution and Article 14 Section 3.[48] Citizens of New York and the legislators entrusted with protecting this State's public resources should not have to rely on an ever-evolving judiciary to protect property that rightfully belongs to current and future generations. The Public Trust Doctrine has been a strong legal tool in Hawaii because it is ingrained in the Hawaiian Constitution. Recent threats to State parkland are cause to consider constitutional protections, at least, codification by designation of State parks, natural and cultural resources under Article 14 Section 3.

B. California Approach: Protecting Ecology and Natural Resources

California's Public Trust Doctrine has recognized the importance of ecology and natural resources to the State.

> There is growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.[49]

The California Public Trust Doctrine does not just protect the recreational uses of the public's land; it also protects the environmental purpose of the land.[50] "The public may use such properties…as well as for environmental…purposes. These lands may be conveyed to private persons only to promote trust uses, and grants not made for that purpose remain subject to the rights of the public."[51]

As New York negotiates its way through the greatest fiscal crisis of the 21st century and further fiscal restraint, the State will undoubtedly seek out public-private partnerships to take some burden off of the general fund and the taxpayers. It is likely that the State will attempt to sell or lease public parks in an effort to alleviate budget constraints. New York Courts have allowed private and public entities to form partnerships with municipalities for the purpose of operating parks so long as the land is used for its *intended* public purpose.[52] A partnership does not mean handing unilateral responsibility for the operation of a State park to a municipality or private company. The State must not be allowed to sell a park or abandon it financially and then, for example, permit a natural section of that park to be turned into a recreation area. California courts have long recognized the value of natural and ecological areas, and it is important that New York courts do the same. The Public Trust Doctrine is not only intended

to keep public land for current and future generations, it is also intended to make sure the public lands keep their original characteristics and purpose.

C. The Wisconsin Approach

The "Wisconsin Approach" advocates that courts have the responsibility to act as a check on the legislature when the legislature approves removing public land from the public's use. The "Wisconsin Approach" creates a second method through which courts may prohibit public lands from being closed or used for another purpose even if the legislature authorizes the change. The diversion or alienation of public parks would be permitted based on an analysis of five criteria:

> (1) Public bodies will control the use of the area; (2) The area will be devoted to public purpose and open to the public; (3) The diminution of the [area of original use would be] small compared with the entire area; (4) [That none of the public uses of the original area would be] destroyed or greatly impaired; and (5) That the disappointment of those wanting to use the public area in its former use is negligible compared to those wanting to use the area in its new condition.[53]

When used appropriately, these five criteria act as a check and balance on legislative power.

New York Courts should consider the "Wisconsin Approach." The Pubic Trust Doctrine is integral to protecting public lands and the courts have an obligation to ensure that the legislature is acting in the public's best interest. Beyond the oversight benefit this approach offers, it also makes it very difficult to take public lands away from the public. Once land is dedicated to the people of the State, it should be exceedingly difficult to transfer that land away from the people. The "Wisconsin Approach" offers a strong judicial method to protect the key elements of the Public Trust Doctrine.

D. New Jersey "Evolving Approach"

The New Jersey Supreme Court has recognized that the Public Trust Doctrine is an evolving principle that can be molded to fit an ever evolving world.[54] "The public trust doctrine, like all common law principles, should not be considered fixed or static but should be molded and extended to meet changing conditions and needs of the public it was created to benefit."[55] The New Jersey Public Trust Doctrine also recognizes the unique right of the people to use public lands for health and recreation: tidal waters should be available for the "public accessibility to and use of such lands for recreation and health, including bathing, boating and associated activities."[56]

This evolutionary approach is precisely the reason that the Public Trust Doctrine is a powerful common law principle. Slade has written, "the Doctrine is evolving; it is in motion."[57] Slade has further explained that the Doctrine "has been used to ban jet skis…require leasing of bottomlands for marinas…and reserve groundwater for future use."[58] The Public Trust Doctrine truly has no limit to its scope when it comes to protecting public resources. This scope should be constantly expanded through an evolutionary approach to the Doctrine.

New Jersey's recognition that the Public Trust Doctrine can be molded and adapted is a feature that the New York legislature and courts should consider. As New York's economy continues to struggle to come out of the "Great Recession," State parks and historic sites remain a resource that all New Yorkers can utilize. Unlike many for-profit entertainment options in the State, parks offer a low-cost alternative. Despite the economic difficulties that many families are suffering through, parks can offer a temporary reprieve from these struggles. The Public Trust Doctrine protects the social purpose that parks provide. This social purpose must be respected. Wealthy or indigent, future generations of New Yorkers are entitled to the use of our State parks, historic sites and heritage areas. If New York recognizes an evolutionary approach to the Public Trust Doctrine, the State will understand that parks must receive greater protection than ever before. If we take away the public's right to access public lands, very little may be left for the least fortunate among us. This right must not be infringed upon and the Public Trust Doctrine is the sharpest sword that can be used in the fight to keep parks open and accessible.

VI. The State Environmental Quality Review Act Must Be Obeyed if a Park or Historic Site Is Slated for Closure

The State Environmental Quality Review Act (SEQRA) took full effect in New York on November 1, 1978.[59] According to the NY Department of Environmental Conservation Website, "SEQRA applies to all State or local government agencies including districts and special boards and authorities whenever they must approve or fund a privately or publicly sponsored action. It also applies whenever an agency directly undertakes an action." SEQRA casts a wide net of responsibility over governmental bodies in this State as a declaration of a State policy to protect our environmental and natural resources. SEQRA also requires the government to complete an Environmental Impact Statement (EIS) when certain conditions are met.[60]

> An EIS provides a means for agencies, project sponsors and the public to systematically consider significant adverse environmental impacts, alternatives and mitigation. An EIS facilitates the weighing of social, economic and environmental factors early in the planning and decision-making process.[61]

Certain governmental actions carry a presumption that the proposed action will have a detrimental impact on the environment and an EIS is required. These actions are classified as "Type I Actions."[62] Under SEQRA, "the acquisition, sale, lease, annexation or other transfer of 100 or more contiguous acres of land by a State or local agency" is considered a Type I action.[63] Nearly every State park and historic site in New York will fit within the confines of the "100 or more contiguous acres of land" definition and therefore an EIS will be required before OPRHP, any other agency or the executive acts to close or lease a State park or historic site. SEQRA also directs agencies to consider alternatives and provide for mitigation as a way of minimizing impacts.[64] These alternatives should include fund-raising possibilities, strict enforcement of already required State park fees and any other reasonable method to keep State parks and historic sites open to the public. It is also the responsibility of the Department of Environmental Conservation to then take a "hard-look" at the EIS and ensure that the agency has considered all reasonable alternative and mitigation measures.

In addition to the regulations set out in SEQRA, the New York Department of Environmental Conservation (DEC) has released an advisory opinion supporting the contention that OPRHP must follow SEQRA before the legislature acts to alienate "municipal" parkland.[65] The advisory opinion goes further by stating: "[p]arkland alienation clearly affects the environment. Over eighty years ago in *Williams v. Gallatin*…the Court of Appeals explained, '[a] park is a pleasure ground set aside for the recreation of the public, to promote its health and enjoyment.'"[66] In reference to significant parks in the state, the advisory opinion adds, "[t]hey are the breathing space of New York's metropolitan area. Smaller neighborhood parks, as do larger parks, provide essential playground and recreational space for young families, small children and senior citizens."[67] Once again, a State agency is attempting to limit the scope of environmental protections to municipal parks. This advisory opinion clearly recognizes the benefits that parks provide the people of this State. In light of this recognition, there is no colorable reason that SEQRA and the legislative action requirement of the Public Trust Doctrine would not apply to State parks in the same manner that these restrictions apply to the alteration and alienation of municipal parks.

VII. Conclusion

The New York court system and the legislature have recognized and applied the Public Trust Doctrine. They have used the doctrine with some success. However,

> [t]he Public Trust Doctrine is by no means a panacea. But, with the Doctrine's inherent flexibility to evolve as the mores and needs of society evolve, as our scientific understanding advances, and as we recognize more every day that our natural resources are suffering under the weight of modern society, the Doctrine's essential place in resource stewardship is abundantly clear.[68]

The State and the Office of Parks, Recreation and Historic Preservation have espoused a view that State parks and historic sites are immune to the Public Trust Doctrine. The State and OPRHP have formulated this view without any corroborating legal precedent. The only legal precedent dictates that legislative approval is needed when closing or altering municipal parks. It needs to be made clear by the appropriate authorities that the Public Trust Doctrine's purpose is to protect all public spaces, not just those owned and operated by municipalities. The Public Trust Doctrine does not discriminate based on ownership and neither should New York.

Endnotes

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8. David C. Slade, *The Public Trust Doctrine in Motion*, pg. 273 (2008).
9. Reidenbach, D. (2010, March 31). [Letter to Governor David A. Paterson].
10. http://www.dec.ny.gov/animals/27161.html.
11. http://niagara-gazette.com/communities/x1527125553/Developers-outline-plans-for-hotel-conference-center-at-Joseph-Davis.
12. *See* David C. Slade, *Putting the Public Trust Doctrine to Work*, xvii (1991).
13. *Putting Public Trust Doctrine to Work* at xvii.
14. *Id.* at xvii.
15. *Id.* at xix.
16. *Id.* at 215.
17. *Illinois Cent. R. Co. v. State of Illinois,* 146 U.S. 387, 454 (1892) states: "with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State.
18. 16 U.S.C. § 1. "The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified…which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."
19. *The Public Trust in Motion*, pg. 274; *National Audubon Society v. Superior Court*, (Mono Lake Case), 33 Cal.3d 419, 441 (Cal. 1983).

20. *U.S. v. Kokinda*, 497 U.S. 720, 743 (1990). Freedom of Speech and Public Forum's were the issue at hand in this case. Nonetheless, this case has relevance for the Public Trust Doctrine as it affirmed that parks are intended for the use and enjoyment of the public and are protected under the Public Trust Doctrine.
21. *See Brooklyn Park Com'rs v. Armstrong*, 45 N.Y. 234 (1871); *Williams v. Gallatin*, 128 N.E. 121 (1920); and *Friends of Van Cortlandt Park v. City of New York*, 750 N.E.2d 1050 (2001).
22. 13 Fordham Envtl. L.J. 259, 268, Cyane Gresham, *Improving Public Trust Protections of Municipal Parkland in New York* (2002).
23. *Friends of Van Cortlandt Park*, 750 N.E.2d at 1055.
24. N.Y. Const. Art. XIV § 1.
25. N.Y. Const. Art. XIV § 3.
26. N.Y. Const. Art. XV § 1.
27. 16 Penn St. Envtl. L. Rev. 1, 84, Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines*: *Classifications of States, Property Rights and State Summaries*.
28. N.Y. Pub. Lands Law § 75. "…authorizes grants, leases…for the use of state-owned land underwater…consistent with the *public interest*…for purposes of navigation, commerce, fishing, bathing and recreation." Emphasis added.
29. N.Y. Pub. Lands Law § 75(f)(i-vii).
30. N.Y. Canal § 138-c(1)(c).
31. N.Y. Exec. § 816.
32. N.Y. Envtl. Conservation Law § 15-1601.
33. N.Y. Envtl. Conservation Law § 15-1713.
34. *Brooklyn Park Com'rs v. Armstrong*, 45 N.Y. 234 (1871).
35. *Brooklyn Park*, 45 N.Y. at 243.
36. *Id.* at 243.
37. *See Williams v. Gallatin*, 128 N.E. 121, 122 (N.Y. 1920) ("A park is a pleasure ground set apart for recreation of the public.… It need not, and should not, be a mere field or open space, but no objects, however worthy…which have no connection with park purposes, should be permitted to encroach upon it without legislative authority plainly conferred…."); *see also Friends of Van Cortlandt Park v. City of New York*, 750 N.E.2d 1050, 1053 "([O]ur courts have time and again reaffirmed the principle that parkland is impressed with a public trust, requiring legislative approval before it can be alienated or used for an extended period for non-park purposes.)"
38. *Handbook on the Alienation and Conversion of Municipal Parkland* at fn. 47, Office of Parks, Recreation and Historic Preservation. http://www.nysparks.com/publications/documents/AlienationHandbook.pdf.
39. *Id.* at 16.
40. *Id.* at fns 48-50 (emphasis added).
41. *Id.* at fn. 48.
42. *Id.* at fn. 49.
43. *Id.* at fn. 50.
44. *Bates v. Holbrook*, 171 N.Y. 460, 468 (1902).
45. *Friends of Van Cortland Park*, 750 N.E. 2d at 1054.
46. *Id.* at 1053.
47. Haw. Const. Art. XI § 1.
48. N.Y. Const. Art. XIV § 3.
49. *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971).
50. *City of Los Angeles v. Venice Peninsula Props.*, 644 P.2d 792 (1982).
51. *City of Los Angeles*, 644 P.2d at 793-794.
52. Emphasis added.
53. *State v. Public Service Commission*, 275 Wis. 112, 114 (1957).
54. 16 Penn St. Envtl. L. Rev. 1, 23, Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines*: *Classifications of States, Property Rights and State Summaries*.
55. *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 61 N.J. 296, 309 (1972).
56. *Borough of Neptune City*, 61 N.J. at 306.
57. *The Public Trust in Motion*, pg. 268.
58. *Id.* at 268.
59. Env. Con. Law §§ 3-0301(1)(b), 3-0301(2)(m) and 8-0113.
60. 6 NYCRR § 617.1(c).
61. 6 NYCRR § 617.1(d).
62. 6 NYCRR § 617.4(a)(1-2).
63. 6 NYCRR § 617.4(b)(4).
64. 6 NYCRR § 617.2(af).
65. Alison H. Crocker, NYS DEC, *Petition of New Yorkers for Parks for a Declaratory Ruling or Advisory Opinion with Respect to SEQRA and Alienation of Municipal Parkland*: http://www.ny4p.org/pdfs/planningforparks/DEC_SEQRA_Advisory_113007.pdf.
66. *Id.* at 3.
67. *Id.*
68. *The Public Trust Doctrine in Motion*, pg. 272.

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Model Municipal Ordinance Project Designed to Facilitate Wind and Solar Projects and Green Buildings

By Michael B. Gerrard and Danielle Sugarman

Soaring oil prices and the reality of climate change have underscored the need to reduce U.S. fossil fuel dependence by improving energy efficiency and by developing and expanding renewable sources of energy. The International Energy Agency declared in 2010 that "[i]ncreasing energy efficiency, much of which can be achieved through low-cost options, offers the greatest potential for reducing CO2 emissions over the period to 2050."[1] Furthermore, increasing our reliance on renewable resources such as wind and solar energy is not only a prudent measure in helping America to improve its energy security, but is a necessary component of a basket of measures that must be employed in order to limit atmospheric CO2 to a concentration that would avert the most damaging climate change. Presently, wind and solar energy account for only around one percent of the U.S. electricity supply.[2] Yet the Department of Energy projects that as much as twenty percent of America's electric power could be generated from wind energy alone by the year 2030.[3]

With the pressing need for action and with comprehensive climate legislation stalled at the federal level, local governments are playing an increasingly important role in pursuing energy efficiency and renewable energy alternatives. Municipalities not only account for a large portion of our national energy consumption, but control many aspects of local energy efficiency standards and zoning laws which promote or inhibit the installation of renewable energy resources.

These factors have not been lost on local officials. The last several years have seen a proliferation of municipal ordinances that address energy efficiency through green building practices. Yet, these ordinances vary widely in their design, content and coverage, and in the quality of their drafting. Similarly, municipal laws regulating wind turbine and solar panel installation vary widely among cities, towns and villages, with some jurisdictions offering strong protection for renewable energy generation, others enacting uneccessarily restrictive provisions, and most having no provisions at all. This patchwork of laws can complicate the work of architects, engineers and lawyers who must try to conform their clients' projects to local requirements. In this way, many opportunities to promote energy independence and to combat climate change are lost.

In an effort to address these problems, Columbia Law School's Center for Climate Change Law (CCCL) has undertaken a municipal ordinance project that seeks to address local siting challenges faced in the area of green buildings, commercial wind and residential solar energy generation. The goal of the project is to create "best practices" for municipal ordinances that avoid the drafting problems and legal pitfalls that often pervade other ordinances. These model ordinances were derived from the best aspects of existing municipal ordinances. While they were designed with New York municipalities in mind, they offer a framework that can be easily modified by any local government to fit its particular needs.

CCCL has already released a model green building ordinance, which is currently being considered for adoption by a number of New York municipalities. A commercial wind siting ordinance is currently open for comment and will soon be circulated in revised form. Finally, a model residential solar ordinance will be released in the coming weeks for an initial comment period. The design and function of each ordinance are laid out below.

In drafting each ordinance, CCCL first compiled as many existing ordinances and policies in the relevant areas as possible and posted them online. The provisions were then analyzed to find their best features and compiled into a cohesive model ordinance. Draft versions were next posted online for comment by interested parties and ultimately revised into a final model. Each of the published ordinances contain detailed commentaries on their features, the rationale behind the choices they embody, the associated legal issues, as well as optional add-ons that municipalities may adopt to make their ordinances more widely encompassing.

Model Green Building Ordinance

In developing the Model Green Building Ordinance, CCCL looked to what has emerged as the nation's leading system of green building standards, the Leadership in Energy and Environmental Design (LEED) rating system of the non-profit U.S. Green Building Council (USGBC). LEED is a points-based system rather than a prescriptive standard. Different building or site features such as high energy efficiency, water conservation and material selection entitle a project to LEED points. If enough LEED points are accumulated, the building can receive a level of LEED certification ranging progressively from plain vanilla (certified) to silver, gold and platinum. The CCCL model ordinance starts with the LEED NC-3.0 standard, which is the latest standard for new constructions and major modifications. Covered buildings must meet the LEED silver level (the level CCCL found to be most often applied by existing green building ordinances). To achieve LEED silver, buildings must attain half of all possible LEED points. The ordinance provides for an option

which would require that a certain minimum number of points be obtained from energy efficiency measures. Due to the ever progressing nature of green building standards, the model ordinance provides that a municipality may take administrative action (without requiring a new vote by its city council or other governing body) to move to a different green building standard if that new standard meets certain criteria specified in the ordinance.

The LEED silver requirement would apply to new construction of municipal buildings, commercial buildings, and high-rise multifamily residential buildings that are at least 5,000 square feet in size. It would also apply to "major modifications" of those buildings, defined as rehabilitation work in at least two major building systems, construction work affecting at least half of the building's floor area, or construction increasing the square footage of the building by at least half.

As LEED is not well suited for smaller buildings, the model ordinance instead requires an adequate rating under the Energy Star Homes Rating System for all new construction of one- and two-family dwellings and low-rise multifamily residential buildings. Energy Star Homes was developed by the U.S. Environmental Protection Agency and the U.S. Department of Energy. It prescribes a set of energy efficiency guidelines.

While the USGBC certifies buildings under its standards, this has at times led to long delays. As such, the CCCL model ordinance does not require formal USGBC certification, but rather requires that, in order to obtain a building permit, the applicant must demonstrate that the building is designed to achieve the 50 LEED points required for LEED silver certification. Thus, after completion, a building would receive a certificate of occupancy only after it was determined to have achieved these points. If during construction, certain planned LEED points cannot be achieved leaving the building short, a temporary certificate of occupancy may be available until those points are achieved or appropriate mitigation measures are taken.

Under the CCCL green buildings ordinance, determinations of compliance with the LEED standards, Energy Star ratings, and other requirements would be made by a Green Buildings Compliance Official. This Official would be designated by the municipality and will often, but not always be, the building inspector. This official is empowered to conduct inspections, stop work orders, and take other enforcement actions. Recognizing that smaller towns and villages may not be able to support an inspector with sufficient training to make these determinations, the model ordinance is accompanied by a model intermunicipal agreement that would allow several municipalities to pool their resources when hiring inspectors.

The ordinance also provides applicants with the ability to apply for a partial exemption from the requirements of the ordinance based on hardship or infeasibility. Optional provisions would also allow municipalities to exempt certain historic buildings, or buildings where the added cost of complying with the green building standard would exceed a set percentage.

Appeals from determinations of the Green Building Compliance Official may be made to an appellate body designated by the municipality (typically the board of zoning appeals). In drafting the ordinance, CCCL provided for numerous optional add-on provisions as well as procedural options if any actual inconsistencies are found between the LEED or Energy Star requirements, on the one hand, and the preemptive federal or state codes on the other.

Model Commercial Wind Siting Ordinance

CCCL's model commercial wind siting ordinance is designed to help municipalities properly regulate the siting and operation of wind energy facilities so that wind energy is promoted while potential problems are mitigated. The ordinance covers both large/commercial (a single turbine with a rated capacity of 150 kilowatts) and small wind energy conversion systems (WECSs) (a single turbine with a rated capacity of not more than 150 kilowatts and a total height of less than 125 feet) as well as residential wind energy conversion systems (a single turbine with a rated capacity of not more than 10 kilowatts and a total height of less than 50 feet). In arriving at the kilowatt production values and height limitations for large/commercial, small and residential WECSs, CCCL chose the higher end values adopted by local municipalities so as to bring more WECSs within the less onerous siting requirements of the small WECS and to thereby encourage wind energy.

The model wind ordinance sets out a permitting and site plan approval process for the different WECSs. The ordinance recommends that municipalities allow small wind energy facilities in all districts other than residential, and that large wind energy facilities, while more suited to rural districts, should be permitted in any district deemed appropriate by the municipality.

In order to assure the safety of the proposed WECS, a number of requirements must be met before an applicant can obtain a special use permit for construction. The applicant must, among other things, provide assessments regarding the nature of the proposed site location and its surrounding area. A full Environmental Assessment Form (EAF) under the State Environmental Quality Review Act (SEQRA) is required as well as a detailed construction and installation plan. Applicants must make plans for the operation and maintenance of the facility including provisions for emergency response and fire control plans. Optional provisions provide additional considerations when a WECS is proposed on a historic site or near a wetland or important avian area.

In addition to safety, an applicant for a special use permit is required to provide analysis of potential negative externalities that may arise from the construction of the wind turbine. The applicant must analyze the visual impact of the proposed WECS and provide ways in which that impact can be lessened. The applicant must also consider potential electromagnetic interference with communication systems as well as possible geothermal impact from tower installation.

Two important areas which have generated the most controversy in siting wind energy facilities are noise and avian impacts. Applicants under the CCCL ordinance must describe the proposed project's noise impacts and its noise control features. Applicants must additionally analyze bird and bat populations whose migration, nesting, or habitat might be affected by the proposed WECS. In order to assure mitigation efforts, the CCCL ordinance then requires the applicant to solicit input from the New York State Department of Environmental Conservation on those studies and follow any protocols established by DEC.

Additional factors that require consideration for a special use permit to be granted relate to the potential for ice throw, blade throw, and catastrophic tower failure. An engineer must certify that the proposed wind facility can withstand wind-loading requirements set out under New York State's Uniform Construction Code. Optional provisions also would require the engineer's report to include analysis of shadow flicker, potential fiscal and economic impacts of the proposed project as well as potential land use and water impacts.

Once a special use permit application is completed, the ordinance lays out a procedure for its review. Applications are submitted to the municipal clerk for processing, and the municipal planning board is required to conduct at least one public hearing prior to reaching its decision as to whether to grant the special use permit, grant the special use permit with conditions or deny it. The municipal planning board is charged with conducting a review under SEQRA.

In reaching its conclusion on whether to allow a WECS to go forward, the planning board is provided with a number of standards. A WECS must meet certain safety standards which place limits on the system's height, blade placement, rotational speed and override controls. A WECS must have safety provisions such as anti-climbing features, protection of electrical equipment from attractive nuisance and warning lights for aircraft where certain tower heights are reached. The ordinance requires evidence of a signed interconnection agreement with the local electric utility prior to construction of the WECS.

WECSs must be properly set back from surrounding properties. The ordinance offers a range of setback requirements which are tied to the size of the conversion system, its proximity to property lines, overhead transmission lines or public roads, and the distance from residences, schools, hospitals, churches or public libraries. The wind ordinance allows for a waiver of setback requirements where there is written consent from an affected property owner at the beginning of construction.

In order to appropriately address the issue of nuisance, prior to planning board approval of the wind turbine project, an applicant for a WECS would be required to ensure that the noise level generated by the WECS will not exceed 45 A-weighted decibels (dBA) measured at the site property line. The noise level generated by the WECS must not increase ambient sound levels within 2,500 feet of the site property line by more than 3 dBA at any sensitive noise receptors including residences, hospitals, libraries, schools, and places of worship.

Further provisions involve avoiding interference with electromagnetic communications, and minimizing visual impacts of the tower through a prohibition on advertising on the tower, the standardization of color requirements for the tower and blade components, and the provision for landscape screening where possible. An optional provision would also require the minimization of shadow flicker.

Once a WECS has been approved, it must remain in compliance with the ordinance. The WECS must be maintained in operational condition. The ordinance affords an owner 90 days to remedy a situation where the wind energy conversion system becomes inoperative, damaged, unsafe, or violates a permit condition or standard. If the WECS is not repaired or brought into permit compliance within the allocated time frame, the municipality may, after public hearing, order remedial action or revoke the special use permit of the system. All wind energy facilities are required to be inspected annually for structural and operational integrity by a New York State licensed professional approved by the municipality.

Other sections of the model ordinance deal with issues relating to site abatement and decommissioning, liability insurance, provisions for the transfer and replacement of a WECS or of ownership rights, as well as the installation of wind measurement towers prior to the construction of a WECS.

The model ordinance directs the municipality to appoint a staff member or outside consultant to enforce the provisions of the ordinance. That code enforcement officer may issue a stop work order at any time for violations of the ordinance, the special use permit, the building permit or the site plan approval. The ordinance further affords the municipality authority to take any action necessary to prevent, correct or abate any unlawful erection, structural alteration, reconstruction or use. Anyone who is found to be in violation of the ordinance would be subject to monetary penalties.

Model Residential Solar Siting Ordinance

CCCL's forthcoming model solar ordinance is designed to promote the accommodation of small scale solar energy systems and to protect access to sunlight to assure the most efficient use of those systems. The ordinance regulates all solar energy systems of up to ten kilowatts which are installed in residential or commercial districts. The goal of the ordinance is to strip away as many of the procedural barriers to solar installation while insuring that safety concerns are adequately accounted for.

In order to maximize opportunities for solar installation, the model solar ordinance permits outright, as an accessory use, the installation of passive and building integrated photovoltaic systems. Rooftop and building mounted solar collectors are also allowed as an accessory use in all districts but require building permits prior to installation. The ordinance does not impose a height limitation on building mounted solar collectors so long as those collectors are erected only to such height as is reasonably necessary to accomplish the purpose they are intended to serve. Ground mounted and free standing solar collectors are allowed as accessory structures in all zoning districts subject to building permit and applicable setback requirements.

In order to ensure the proper siting of solar installations, solar energy systems will only be granted a building permit if they are determined by the municipality not to present any unreasonable safety risks relating to weight load, wind resistance and access in the event of a fire. All solar installations are required to be performed by a qualified solar installer as defined in the ordinance. All electrical connections must be inspected by a municipal code enforcement officer.

The ordinance allows for net-metering arrangements which can reduce load on the public utility grid. Any connection to the grid must be inspected by the appropriate public utility. The ordinance has several provisions which deal with appeals from the denial of a building permit. If a municipality wants to further encourage solar installation, an optional provision allows municipalities to afford all building permit applications expedited review and waiver of building permit application fees.

CCCL's model solar ordinance has an optional section on ways municipalities can make planning decisions that take full advantage of potential solar power generation. This includes setting the orientation of buildings and streets with respect to sun angles so as to provide maximum southern exposure for solar collectors. It also allows for the consideration of the type and placement of shade trees along streets so as not to block access to existing solar collectors, and the platting of subdivisions so as to allow for solar access by all future residents. Finally, there is an option to regulate a property owner's planting of shade trees which would have the effect of casting a shadow of ten percent or greater on a neighbor's existing solar collector during the hours of 9:00 a.m. to 3:00 p.m. The model solar ordinance will be available on CCCL's website in the upcoming weeks.

CCCL welcomes comments on any of the model ordinances. The model ordinances and the supporting databases are available at http://www.law.columbia.edu/centers/climatechange/resources/municipal. Comments on the green building ordinance can be directed to Michael Gerrard at Michael.gerrard@law.columbia.edu. Comments on the wind and solar ordinance can be directed to Danielle Sugarman at dsugar1@law.columbia.edu.

Endnotes

1. International Energy Agency, *Energy Technology Perspectives 2010—Scenarios & Strategies to 2050,* (2010) at 49.
2. U.S. Energy Information Administration, *Renewable Trends in Consumption and Electricity*, (2008). Available at: http://www.eia.doe.gov/cneaf/solar.renewables/page/trends/rentrends.html.
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New York City: Making the Most of Every Lot

By Jay Duffy

Some New Yorkers may forget amidst the taxis, skyscrapers, and concrete, that city living is eco-living. Cities use land and resources very efficiently. New Yorkers crowd onto the subway and engage in carpooling en masse. Many buildings take up merely an acre of land and house hundreds of people, thereby preventing urban sprawl and the destruction of green space.

The problem is that the City's rich industrial history has contaminated a great deal of land and developers fear CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act) liability.[1] CERCLA, also known as Superfund, imposes strict liability for remediation to, among others, current site owners.[2] Liability became so great in some instances that owners abandoned their property altogether, leaving open, and many times seeping, sores throughout the City.[3]

These sores, better known as brownfields, are defined under New York's Environmental Conservation Law as: "any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant."[4] To encourage the development of brownfields, the New York State Legislature enacted the Brownfield Cleanup Program Act in 2003, and authorized the Department of Environmental Conservation (DEC) to administer the program.[5] The Program limits liability for participants in addition to providing tax credits.[6] The Program, however, is not perfect. Its procedures can be cumbersome; the tax credits often accumulate faster than the State budget can handle; and the prerequisites for entering the program are very stringent.[7]

By 2030, New York City expects to add nearly one million people and, according to Mayor Bloomberg's sustainability plan, PlaNYC, the City may currently have 7,600 acres of brownfields.[8] Most of New York City's brownfields, however, do not rise to the level necessary to enroll in the State Program.[9] These City brownfields generally have had historic petroleum spills, e-designations (notice of the presence of an environmental requirement pertaining to potentially hazardous materials, contamination, or noise or air quality impacts on a particular tax lot), and other forms of moderate contamination that do not rise to the level necessary to enroll in the State Program.[10]

Land values are so high in New York City that tax incentives may not be necessary to induce developers. Release from liability under the State Superfund Program may suffice. To that end, the City Council passed the New York City Brownfield and Community Revitalization Act (NYC BCP), which created the Mayor's Office of Environmental Remediation (OER) in 2009.[11] In October 2009, the OER adopted the Local Brownfield Cleanup Program Requirements.[12]

NYC BCP is open to all real property in the City except for those already enrolled in the State Program, those on the DEC's Registry of Inactive Hazardous Waste Disposal Sites, and those subject to other governmental enforcement.[13] OER may also reject an application upon a determination that the public interest would not be served. Applicants must schedule a pre-application meeting with OER and bring with them a pre-application worksheet summarizing development plans and any known environmental information for the site. After discussing the suitability of the site for the NYC BCP, the OER may issue a pre-enrollment letter of intent to work with the developer.[14] The applicant must then prepare a Local Brownfield Clean Up Agreement, Remedial Investigation Report, Remedial Action Plan, a Citizen Participation Plan, a proposed document repository, and a draft fact sheet. The Clean Up Agreement describes the site boundaries and provides the City with access to the site along with any environmental reports or tests and includes a $1,000 enrollment fee.[15] The fee may be waived in certain circumstances, such as when the site is used for affordable housing or community buildings. A Remedial Investigation Report defines the extent and type of contamination and is used to select an appropriate remedy. The Report must identify all sources of potential contamination based on a review of past use, define the contamination vertically and laterally, contain a human health exposure assessment, define the contaminants' effect on surrounding media, and contain sufficient data to support the Report's conclusions. The Remedial Action Work Plan (RAWP) describes all actions necessary to render the site safe for its intended use. The Plan is subject to a 30-day public comment period and must be approved by OER. The Plan may also include a Sustainability Statement; however, it is not required. The Citizen Participant Plan includes providing a public document repository with all site documents as well as the creation of a Site Contact List, which includes all owners and occupants of property adjacent to the site, administrators of nearby schools, hospitals, day care centers, local community boards, and elected officials.[16] Individuals can also request to be placed on the list. A fact sheet is provided to everyone on the list before the RAWP 30-day comment period, at the beginning of remedial action, and at the completion of remedial action.

If OER approves the application, the enrollee remains responsible for obtaining all necessary permits.[17] The NYC Green Team has been created within OER to assist enrollees in obtaining all necessary permits. When

remedial action is complete the enrollee must submit a Remedial Action Report. This Report includes any engineering controls and institutional controls used to protect the area surrounding the site from residual contamination along with the mechanisms that will be implemented to monitor, maintain, and report on these controls. The Report must also include a Site Management Plan, which will provide for periodic inspections to protect the public and environment. The enrollee must also file an OER-approved Declaration of Covenants and Restrictions with the local recording office, which will run with the property and allow OER access to the site for inspection purposes. At this point, the OER will issue a Notice of Completion that acknowledges that the enrollee has no further environmental liability with the City and is assignable to the enrollee's successors and assigns, which take title to the site.[18]

The issue remains as to whether there will be any state liability. OER is working closely with the DEC to ensure that compliance with NYC BCP will eliminate all brownfield liability for developers. A Memorandum of Agreement between DEC and OER dated August 5, 2010, states that the DEC "[g]enerally…agrees that a site is of no further interest and it does not plan or anticipate taking administrative or judicial enforcement action seeking to require a removal or remedial action under CERCLA… or the ECL" while a site is in compliance with NYC BCP.[19] The DEC, however, goes on to state that it is not granting liability releases under BCP and it can take action where it deems appropriate.[20] The City is the first in the nation to partner with the State of New York on a regulatory framework to clean up brownfields. The first site is already enrolled: the MJM Construction is slated to open the Pelham Parkway Towers, an affordable housing complex in the Bronx, this year.[21]

Endnotes

1. 42 U.S.C. §§ 9601-9675 (2010).
2. *Id.* § 9607.
3. Daniel Schlesinger, *Revisiting New York's Brownfield Cleanup Program: An Analysis of a Voluntary Cleanup Program that Lost Its Way*, 3 Alb. Gov't. L. Rev. 403 (2010).
4. N.Y. Environmental Conservation Law § 27-1405(2) (2010) (ECL); *see also* Center for New York City Law, City Regs Update Office of Env. Rem./Brownfields, 16 City L. 75 (2010).
5. N.Y.. ECL §27-1407.
6. *Id.* §§ 27-1421, 27-1423.
7. Schlesinger, *supra* note 3.
8. Mark McIntyre, *How PlaNYC Will Facilitate Brownfield Redevelopment*, 54 N.Y.L. Sch. L. Rev. 431 (2009/2010); *and* NYC Mayor's Office of Environmental Remediation, PlaNYC, New York City Brownfield Cleanup Program: Information for Brownfield Site Owners & Developers (2010), *available at* http://www.nyc.gov/html/oer/downloads/pdf/NYCBCP/NYC_BCP_Report.pdf.
9. McIntyre, *supra* note 8.
10. *Id.*
11. Memorandum of Agreement Between the New York State Department of Environmental Conservation and the New York Office of Environmental Remediation, at 1, Aug 5, 2010, *available at* http://www.nyc.gov/html/oer/downloads/pdf/MOA.pdf.
12. Local Brownfield Cleanup Program Requirements, New York City, N.Y., Rules, tit. 43, §43-1401, *available at* http://www.nyc.gov/html/oer/downloads/pdf/NYCBCP/NYC_BCP_Final_Reg.pdf.
13. NYC Mayor's Office of Environmental Remediation, *supra* note 8, at 3.
14. *Id.*
15. *Id.* at 6.
16. *Id.* at 9-10.
17. *Id.* at 10.
18. *Id.* at 12.
19. Memorandum of Agreement Between the New York State Department of Environmental Conservation and the New York Office of Environmental Remediation, *supra* note 11, at 4.
20. *Id.*
21. Mireya Navarro, *New York Tackles 'Brownfields' Cleanup*, N.Y. Times, Aug. 5, 2010, http://green.blogs.nytimes.com/2010/08/05/new-york-tackles-brownfields-cleanup/.

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Cap and Trade Legislation and Its Tax Consequences

By Philip A. Baumgarten, CPA, JD

I. Introduction

When Climate Change is addressed by the United States legislature, it will likely be in the form of a Cap and Trade bill. In 2009, the United States House of Representatives determined, by a narrow majority, that the most equitable and effective method to reduce carbon emissions is through a national Cap and Trade regime,[1] which by operation would produce a trading market for United States source carbon emission permits. Ideally, such a market would place a price on emitting carbon, such that the laws of supply and demand would operate to provide economic incentives to reduce carbon emissions to acceptable levels.

The Cap and Trade regime is seen as politically preferable to a Carbon Tax.[2] It is also seen as more effective in solving a widespread environmental problem, covering a large geographical area, than traditional command and control approaches.[3] To illustrate the effectiveness of a Cap and Trade approach covering a widespread area, one should consider the current carbon emission trading program in Europe, which was mandated by the Kyoto Protocol.[4] This program is widely considered as successful in curbing carbon emissions.[5] The European Union as a group is projected to produce carbon emission reductions of 13% below 1990 levels by 2012, exceeding expectations.[6] The effectiveness of the European carbon market bodes well for the future success of a potential United States Cap and Trade regime for reducing carbon emissions.

Among the legal issues to result from Cap and Trade legislation is the narrow concern of taxation. It is anticipated that a future United States Cap and Trade program for carbon emissions would be more ambitious in scope and cover more emitters in number and industry diversity than the previous Cap and Trade programs attempted on a national scale. Thus, tax regulations must be directed towards the complexities that would result from a varied universe of taxpayers subject to Cap and Trade, as well as ensure that tax outcomes do not distort a properly functioning carbon emission trading market.

This article will briefly describe previous use of Cap and Trade programs on a federal level in the United States. In addition, it will outline the components of a successful Cap and Trade system. For purposes of guidance, the relevant provisions of two carbon emission Cap and Trade bills, which have been introduced in Congress—ACES, which passed the House of the Representatives, and Kerry-Boxer,[7] which has passed through Senate Committee, but was not voted upon by the Senate—will also be briefly discussed. The aforementioned will set the context for the main focus of the article; namely, the taxation issues that may arise under future Cap and Trade legislation. The taxation issues will be examined in detail. Proposed solutions for the tax uncertainty created by potential Cap and Trade legislation will also be addressed.

II. Previous Federal Cap and Trade Regimes in the United States

Phaseout of Leaded Fuels—In the early 1980s, Cap and Trade practices were utilized by the EPA to attempt to reduce or eliminate the use of leaded fuels in automobiles. A tradable-permit system was used to accomplish the phasedown of lead in gasoline to facilitate the phaseout of ozone-depleting chlorofluorocarbons (CFCs).[8] EPA put an overall cap on the production of leaded fuels but allowed refiners to buy or sell permits among themselves, so long as they did not exceed the overall cap. The program allowed refiners that utilized unleaded fuel processes to sell their unused permits to leaded fuel refiners.[9] The trading of the permits resulted in a transfer of economic capital from leaded fuel refiners to unleaded fuel refiners. This transfer of capital resulted in an increased incentive to invest in innovative technologies by unleaded fuel producers, and assessment of an economic penalty on leaded fuel producers.[10] The program achieved its purpose; by 1987 the production of leaded gasoline had been nearly eliminated.[11] The process was completed effective January 1, 1996, as an amendment to the Clean Air Act banned the sale of all leaded gasoline.[12]

Acid Rain Reduction Program—Title IV of the 1990 Clean Air Act established the allowance market system known today as the Acid Rain Program. The program enabled the EPA to place a cap on total sulfur dioxide (SO2) and nitrous oxide (NOx) emissions, while allowing polluters to trade permits among themselves.[13] The allowance trading system capitalizes on the power of the marketplace to reduce SO2 emissions in the most cost-effective manner possible. The permitting program allows sources the flexibility to tailor and update their compliance strategy based on their individual circumstances.[14]

Title IV of the Clean Air Act sets a goal of reducing annual SO2 emissions by 10 million tons below 1980 levels. To achieve these reductions, the law required a two-phase tightening of the restrictions placed on fossil fuel-fired power plants. Phase I began in 1995 and affected 263 units at 110 mostly coal-burning electric utility plants located in 21 eastern and midwestern states. An additional 182 units joined Phase I of the program as substitution or compensating units, bringing the total of Phase I affected units to 445. Emissions data indicate that 1995 SO2 emis-

sions at these units nationwide were reduced by almost 40 percent below their required level. Phase II, which began in the year 2000, tightened the annual emissions limits imposed on these large, higher emitting plants and also set restrictions on smaller, cleaner plants fired by coal, oil, and gas, encompassing over 2,000 units in all. The program affects existing utility units serving generators with an output capacity of greater than 25 megawatts and all new utility units. The Act also called for a 2 million ton reduction in NOx emissions by the year 2000.[15]

The program has proved successful: Sulfur-dioxide emissions from power plants in 2001 were 10.6 million tons, a full one-third reduction from 1990 emissions, a five percent reduction from 2000 emissions and down from 17.3 million tons in 1980. Nitrogen-oxide emissions from power plants also continued a downward trend of 4.1 million tons in 2001, a 25 percent decline from 1990 emissions levels and an eight percent reduction from 2000 emissions. These emissions reductions have contributed to measurable improvements in air quality, reductions in deposition, and recovery of acid-sensitive waters. The trading component of the SO2 program has significantly lowered the costs of compliance and has not resulted in any significant geographic shifts in emissions.[16] EPA's then-Administrator Christie Whitman stated, "The Acid Rain Program has been an enormous success story in America's efforts to ensure that emissions reductions go hand-in-hand with economic well being. This program has delivered cleaner air faster and with less expense than anybody anticipated."[17] The market-based approach utilized in the U.S. Acid Rain program has demonstrated that environmental protections need not compete with the economic viability of emitters.[18]

III. Components of a Successful Cap and Trade Program

The preceding section sets forth an overview of two successful Cap and Trade programs that took place in the United States. This section addresses the legal components which are inherent in a successful Cap and Trade program. Discussion of these components is necessary to properly understand the context in which taxation issues arise.

A successful Cap and Trade program can be reduced to six basic elements:[19]

1. ***Baseline***—there must be firm long-term emission caps that place an unambiguous limit on amount of emissions permitted to be released into the atmosphere by an emitting source.

2. ***Allocation of Permits***—initial permits or allowances may be allocated for free so that proceeds from trading the permits go directly to emitters that invested in technology that reduce emissions. Alternatively, or in conjunction with allocating free permits, the government may auction permits. So long as the government correctly allocated the correct number of permits based on the cap, the market should set an efficient price such that emission-reducing behavior results.

3. ***Offset Provisions***—these provisions provide emitters who invest in alternative projects that remove carbon emissions from the atmosphere with credits to be used in meeting the cap. For example, financing a reforestation project is an offset project.

4. ***Banking***—such a provision allows emitters to bank, or carry over, their permits for future use in a year subsequent to the year of issuance, resulting in greater flexibility in achieving long-term pollution reduction goals.

5. ***Verification and Monitoring***—all emission activities should be verified to ensure that emission standards are met, and that offset projects achieve their intended purpose. Verification and monitoring can be done by government agencies or by third party consulting firms.

6. ***Price Ceiling or Floor***—government regulators must refrain from setting a maximum or minimum price for a trading allowance. Such price manipulation may adversely affect the efficiency of a trading market from performing its function in reducing emissions.

IV. ACES and Kerry-Boxer

ACES[20] and Kerry-Boxer[21] are illustrative of Cap and Trade legislation that may result through the political negotiation process. Any future Cap and Trade legislation will likely resemble one of the two bills or contain some combination of provisions of both. The following is a discussion of the provisions of each bill,[22] which are relevant to the taxation issues to be addressed herein.

ACES—The bill covers emitters of more than 25,000 tons of Greenhouse Gases ("GHG") on an annual basis, producers and refiners of petroleum fuels, distributors of natural gas, and other specified sources. The emissions cap for covered emitters is 3% below their 2005 levels by 2012, 17% below 2005 levels by 2020, 42% below 2005 levels by 2030, and 83% below 2005 levels by 2050.[23] Approximately 80% of allowances are distributed free of charge in the early years of the program, with the remainder of the allowances being auctioned. Of the free allowances, approximately 29% would go to the electricity and natural gas sectors.[24] The granting of free allowances begins to phase out in 2025. By 2031, 70% of allowances are to be auctioned.[25] Offset credits of 2 billion tons would be allowed system wide; 1 billion tons would be from domestic sources and 1 billion tons from international sources.

The international offset amount can be raised to 1.5 billion tons, if the program administrator determines it is necessary. Beginning in 2018, international offsets of 1.25 tons would be required to receive a 1 ton emission compliance credit.[26] The program provides for unlimited banking of allowances, financial penalties for noncompliance, and pre-emption of state trading initiatives.[27]

Kerry-Boxer—As in ACES, the entities regulated by Kerry-Boxer are large domestic emissions sources of GHG emissions that are presumed to or actually emit more than 25,000 tons of CO2 equivalent GHGs each year.[28] The emissions cap for covered emitters is 3% below their 2005 levels by 2012, 20% below 2005 levels by 2020, 42% below 2005 levels by 2030, and 83% below 2005 levels by 2050.[29] Through 2016, 85% of allowances are distributed free of charge, with the remainder of the allowances being auctioned. In 2017 and thereafter, 75% of the allowances would be distributed free, and 25% would be auctioned.[30] Of the free allowances, approximately 35% would go to the electricity and natural gas sectors. Offset credits of 2 billion tons would be allowed system wide; 1.5 billion tons would be from domestic sources and .5 billion tons from international sources. The international offset amount can be raised to 1.25 billion tons, if determined to be necessary. Beginning in 2018, international offsets of 1.25 tons would be required to receive a 1 ton emission compliance credit.[31] The program provides for unlimited banking of allowances, financial penalties for noncompliance, and pre-emption of state trading initiatives.[32]

V. Taxation and Cap and Trade

In anticipation of the vote on the ACES bill, the Senate Committee on Finance held a public hearing on the taxation issues resulting therefrom.[33] In this connection the Joint Committee on Taxation (hereafter "JCT") prepared a report entitled: Climate Change Legislation: Tax Considerations.[34] In this section, the JCT report will be used as a guide in enumerating and analyzing the tax issues that manifest from a federal Cap and Trade program.[35]

Carbon emission allowances in the form of permits created by the proposed Cap and Trade legislation may be a new creation of law, however, close analogies under existing law may provide guidance as to the tax consequences of transactions concerning these allowances.[36] Applying existing law may provide simplicity and reduce uncertainty regarding Cap and Trade transactions.[37] Emissions allowances will be almost "cash-like" as a market will be developed to readily trade such allowances, and as such may be considered an intangible asset. On the other hand, emission allowances can be said to be commodities, such as gold or corn, having the characteristics of a tangible asset.[38] The resulting distinction may determine the tax outcomes for transactions involving such emission allowances. Following are the fundamental taxation issues likely to be raised by a Cap and Trade program.

Receipt of Allocated Allowances—Under ACES, Kerry-Boxer, and presumably a future Cap and Trade bill, a large percentage of carbon emission allowances will be allocated to emitters for free. Emitters may use the allowances to meet their carbon emission cap, sell the allowances, or bank them. The essential question is, "at what point in time is there a taxable event, so that the emitter must recognize income?" The three alternatives are: 1) income recognized upon receipt of the allowance; 2) income recognized when the allowances become available for use to offset emissions; 3) excluded from income until the time the allowance is sold and cash realized.

Alternative 1—recognition of income upon receipt of the allowance would be consistent with the longstanding general principle that gross income includes income from whatever source derived.[39] The underlying concept is that receipt of property is an economic benefit inuring to the taxpayer.[40] An administrative problem with taxing the receipt of property (i.e., non-cash items) may be the lack of an arm's-length third-party valuation. Valuing emissions consistently at an arm's-length price may prove difficult unless a market for the allowances develops quickly.

If the value of the emission allowance is recognized in income upon receipt, this would create a cost or tax basis in the allowance equal to its fair market value. Such basis can be recovered as a deduction upon use against the cap, or reduce the amount of gain realized upon subsequent sale. If these events occur in years subsequent to the year of receipt, a mismatching of recognizing income and recovery of cost would occur, thereby resulting in a potential cash-flow problem of tax expenditures for the emitter.

Alternative 2—under this alternative, the value of the allowance would be first includible in income when it is available for use in being applied against the cap. The tax consequences are generally the same as alternative 1, except that those allowances that are banked for future use, or by the terms are not currently available for use, would not be includible in income until the year they are used. A deduction would be allowed for the value of the allowance when used, so essentially the recognition of income and corresponding allowable deduction would result in a wash for the year the allowance is utilized.[41] Thus, there would be no tax liability to the emitter, unless, of course, the allowances were sold prior to use. The approach under this alternative is generally incompatible with the accepted theory of income recognition as discussed under alternative 1.

Alternative 3—a third approach would be to exclude the allowances from income recognition upon receipt thereof. As there is no income recognition, the taxpayer would have a tax cost, or basis of zero in the allowance. On a subsequent sale, the taxable gain would equal to the sales proceeds as there would be no tax basis in the allowance. Also, as the taxpayer would have no basis in the allowance, subsequent use thereof would not result in a

deduction.[42] This approach would be consistent with the conclusion reached in Revenue Ruling of 92-16,[43] which held that allocated sulfur dioxide and nitrogen oxide allowances issued under the EPA Acid Rain trading program were not includible in income. In the ruling, the IRS did not offer an explanation for its conclusion, but may have determined that this was the best practical and most administrable approach,[44] as it may not have been able to anticipate a readily tradable market in these types of allowances. In such as a case, valuations would be difficult and subjective and would lead to tax disputes. Another theory for the conclusion of Revenue Ruling 92-16 is that in the context of the Acid Rain program "the grant of limited rights by a governmental agency to a taxpayer as a mechanism to ration previously unrestricted rights held by the taxpayer does not produce an accession to wealth."[45] Another possible determination of whether receipt of the allowance is includible in income is whether the granting of the allowances is considered a rebate of increased compliance costs, which are includible in income[46] or a grant by a government agency, which is excludable from income.[47] In any event, exclusion of receipt of the allowance from income may result in hoarding of allowances by encouraging delay of a recognition event, such as a sale. However, a Congressional study of the Acid Rain program found that an increase in supply of allowances, influenced by an incentive to defer sale, will not overly distort the market.[48] As the proposed carbon emissions market will be of a far wider scale than the SO2 market, there is less risk that a policy of excluding receipt of allowances from income recognition will have an adverse effect on the functioning of a properly designed Cap and Trade program.

Basis Recovery—as stated previously if income is recognized upon receipt of an allowance, the basis of such allowance will be its fair market value, as that is the amount which is included in income. Allowances that are purchased have basis that are equal to their purchase price, plus any transaction costs, such as broker commissions.[49] Basis can be recovered through deductions or as a reduction to gain realized upon sale or other disposition of the asset. Generally, basis recovery depends on characterization of the allowance by the holder. The allowance may be characterized as: 1) inventory; 2) materials or supplies (other than inventory); 3) ordinary and necessary business expenses; or 4) amortizable intangible property.[50]

Inventory treatment is appropriate where the allowance holder is a dealer in allowances, such that the taxpayer is a market maker or otherwise a broker-dealer. In such a case, basis would be recovered as a cost of sales which would require consideration of beginning and ending inventories.[51] Also, inventory treatment is appropriate if the allowance is considered a production cost or the cost of a self-constructed asset.[52]

If an allowance is considered a material or supply, basis is recovered through a deduction as the material is consumed, or, in this case, surrendered. However, the Internal Revenue Service has held in the case of SO2 allowances, such allowances are capital assets and cannot be treated as material or supplies because they are an intangible asset and not a tangible asset.[53]

Recovery of basis through deduction may be achieved by treating the surrender of the allowance as an "ordinary or necessary" business expense.[54] The timing of the deduction as to taxable year will be determined by whether the taxpayer is on the cash or accrual basis of tax accounting. To claim a deduction, an accrual-basis taxpayer must meet an "all events" test, which generally requires a matching of income and expenses, which would require the deduction takes place in the year the taxpayer uses the allowance to meets its emission obligation.[55] A cash-basis taxpayer would take the deduction in the year the allowance is surrendered.

Assuming an allowance is an intangible asset, the cost of the asset would be capitalized and basis recovered when the allowance is sold or surrendered or through amortization deductions. Such amortization would be allowable only if the asset were a Section 197 intangible asset.[56] Section 197 intangibles include any license, permit, or other right granted by a governmental unit or agency, even if the right is granted for an indefinite period, or is reasonably expected to be renewed indefinitely.[57] However, the legislative history of Section 197, which was enacted after the Acid Rain trading program was introduced, states that an SO2 allowance fixes a right as to amount of emissions.[58] As such, amortization would not be allowed unless the allowance was acquired as part of an acquisition of a trade or business.[59]

Offset Production—offset provisions of a Cap and Trade program enable emitters to receive credits in the form of emission allowances for investment in projects that reduce Greenhouse Gas emissions. Investment in a reforestation project or renewable energy sources, such as a solar energy system or a wind farm are examples of this.[60] These types of projects may incur substantial capital cost for land or equipment. As stated above, both ACES and Kerry-Boxer allow for emission offsets to be obtained from investment in international and/or domestic projects. Offset projects typically require investigation, monitoring, and independent verification, the cost of which is borne by the party seeking the offset allowance.[61]

Taxpayers seeking to undertake an offset project will consider tax costs and benefits, as well as the value of allowances to be obtained in determining the economic viability of such project. The tax treatment of the project will likely depend on the intent of the taxpayer in pursuing the project. For example, the primary purpose may be to produce allowances to sell in the open market or, on the other hand, a desire to generate allowances to be used to offset emissions produced by the taxpayer's business.[62] Among the tax issues that will turn on the taxpayer's

intent are: 1) how basis of the offset allowance is determined; 2) how costs are allocated to the offset allowance; 3) whether such costs are expensed as incurred, or recovered as the allowance is sold; and 4) whether continued maintenance costs are expensed as incurred.[63]

If the primary purpose of the offset project is to generate allowances to sell on the open market, then inventory tax rules should apply. The direct and indirect costs of generating the offset allowances, including maintenance costs, would be capitalized, allocated to each allowance produced, and recovered as the allowance is sold.[64]

If the project was undertaken for the purpose of generating allowances to be used in the taxpayer's trade or business, the direct and indirect costs would be capitalized and recovered through depreciation deductions.[65] However, no depreciation would be allowed for the cost of land. The cost of verification would be allocated to the allowances generated and included in their basis.[66] Maintenance costs would be expensed as incurred.[67]

The rules regarding the taxation of allowances generated by offset activities would have to be reconciled with the rules regarding inclusion or exclusion upon receipt of an allowance.[68] For example, under an inventory cost method, if income were recognized upon receipt of an allowance, such amount would be reduced by allocated cost. If an exclusionary rule applied, so that no income would be recognized, the basis of the allowance would be the allocated cost.[69]

Sale of Emission Allowances—by definition a Cap and Trade program foresees a market whereby emission allowances can be bought or sold. A properly functioning market will benefit emitters who reduce emissions by allowing their unneeded allowances to be sold, while on the other hand, taxpayers who do not reduce emissions will suffer an economic detriment by having to buy allowances to meet their emission obligations. The computation of gain or loss is accomplished by comparing the amount realized upon sale or other disposition to the basis of the property sold.[70]

Whether a gain or loss is capital or ordinary depends on the character of the taxpayer's interest in the property sold. Individual or trust taxpayers, but not corporate taxpayers, may be eligible for application of a reduced tax rate on net long-term capital gains.[71] Many businesses are conducted for tax purposes in partnership form. Such entities pay no tax, but pass through items of taxable income or loss to the individual partners,[72] who can then benefit from the reduced long-term capital gains rate. Net losses from capital assets are subject to limitation, while ordinary losses are fully deductible.[73]

If the character of the allowance is that of inventory held by a dealer, any gain or loss on sale of an allowance will be ordinary. If the allowance is considered nonamortizable, or is held for investment, the character of the asset will be that of a capital asset.[74] Any gain or loss of sale of that allowance will be capital in nature. If the allowance is of a type that is considered amortizable or depreciable property used in a trade or business, sale thereof will be subject to the recapture rules.[75] These rules require that gain will be ordinary to the extent there is a recapture of past amortization or depreciation deductions.[76] Gain in excess of the recapture amount will be considered a net long-term capital gain, provided the allowance is held for more than one year.[77] A loss on sale of a depreciable or amortizable allowance used in a trade or business will be allowed as an ordinary loss.[78]

The IRS has taken the approach with the SO2 allowances and the European Union allowances issued under Kyoto, that such allowances are nonamortizable and are capital assets in the hands of all taxpayers other than dealers.[79] A similar approach to a future Cap and Trade program may create inconsistent tax outcomes between taxpayers who sell their allowances, and as such, may be subject to capital loss limitations, and those who surrender the allowance and receive an ordinary tax deduction.[80]

Sales of Allowances by Tax Exempt Organizations—in some cases, environmentally focused tax-exempt organizations[81] may desire to engage in activities that operate to sequester carbon or reduce emissions, such as purchasing a conservation easement through a forest.[82] Under a Cap and Trade program, such offset projects will produce offset allowances. The tax-exempt organization may sell the allowances on the open market to partially recover its costs, or may retire the allowance as an act of preventing further carbon emissions by a hypothetical purchaser. The sale of such offset allowances may result in such profits being subject to taxation.

Tax-exempt organizations, as the term suggests, generally pay no federal income tax. However, such organizations may be subject to tax if they engage in an income-producing activity that generates "unrelated business taxable income."[83] The rationale for this tax is that tax-exempt organizations should not obtain an unfair competitive advantage over taxpaying entities for business activities unrelated to their tax-exempt purpose.[84] In order to determine if an activity produces UBTI, Treasury Regulations provide for a three-part test: 1) the activity constitutes a trade or business; 2) the activity carries on a regular basis; and 3) the activity is not substantially related to an organization's tax-exempt purpose.[85] The UBTI provisions, however, provide exclusion for all gains from the sale, exchange or other disposition of property, other than: 1) stock in trade or other property of a kind that would ordinarily be included in inventory; or 2) property held primarily for sale to customers in ordinary course of the trade or business.[86] This rule seems to exclude all gain on the sale of property other than sales by a dealer.

Even if the tax-exempt organization's offset allowance activity would rise to the level of dealer, the activity must still be regularly carried on and not substantially related to an organization's tax-exempt purpose.[87] One-time or infrequent sales of allowances would certainly not constitute "regularly carrying on" a business, as this term requires continuous and frequent activity.[88] The question of whether obtaining the allowances are substantially related to the organization's tax-exempt function will turn on whether operating an offset project related to the organization's tax-exempt function requires that the project be exploited in a manner beyond that necessary to fulfill that function.[89] For example, conducting the activities necessary to produce the allowances, such as monitoring and verification, may be considered exploitation of a product that is beyond the organization's tax-exempt function. On the hand, such activities may be viewed as those necessary for the sales of a product related to the tax-exempt function.[90]

Penalties—under the proposed Cap and Trade legislation, penalties are imposed on non-complying emitters who have emission activities that exceed the cap and fail to obtain the necessary amount of allowances.[91] In making the economic decision of whether to incur the expenses to comply with an emission cap, one must consider the cost to be incurred for penalties assessed for noncompliance. If the penalties were to be deductible for tax purposes, the cost of noncompliance would be reduced by the effective tax rate. A reduced cost may make it economically feasible to not comply, and would discourage investment in emission-reduction technology, or the purchase of allowances. Such behavior could defeat the intention of a Cap and Trade program.

A deduction is generally not allowed for any fine or similar penalty paid to a government for the violation of any law.[92] The prohibition on deduction applies to civil as well as criminal penalties.[93] Taxpayer arguments that payments of penalties should be deductible if they are compensatory in nature or non-punitive have been rejected in the environmental area.[94] With respect to penalties assessed under the S02 emission program, the position of the IRS is that payment of such penalties is punitive and, therefore, nondeductible.[95] It remains to be seen if the IRS will make a similar ruling for penalties imposed under the proposed Cap and Trade legislation for carbon emissions. The IRS has also ruled in the environmental area that settlements for potential liability are not deductible and also cannot be capitalized.[96] However, uncertainty of deductibility does exist for settlements that require taxpayers to incur costs in taking a course of action to avoid noncompliance penalties.[97]

VI. Conclusion

The success of a carbon emission Cap and Trade program may very well hinge on the tax consequences of transactions underlying the program, such as receipt of allowances, undertaking an offset project, the sale of allowances, and penalties for noncompliance. The tax consequences of these transactions can have an effect on the fluidity of the market, as the supply of the side equation will be affected by decisions based in whole, or in part, on tax outcomes of holding or selling allowances. Tax outcomes, therefore, could distort the trading market, the very function of which underlies the effectiveness of Cap and Trade legislation. To avoid this distortion, Congress or the Treasury must produce tax rules and regulations that encourage emission reduction and compliance with the program. It is recommended that tax amendments to existing rules be included in any future legislation, rather than left to the determination of the Treasury through regulation. Tax regulation will likely be designed for the goal of effective administration of achieving tax revenue rather than that of achieving a proper functioning carbon emissions market, so that carbon emissions are reduced.

Of particular concern is whether to tax the receipt of "free" allowances to be allocated to emitters. Taxation of these allowances will place an economic cost on their receipt such that they cannot be considered "free." Politically, such a result will likely produce an outcry from industry, and may result in attacks on the present administration regarding the propriety of addressing global warming though Cap and Trade. Since the Treasury has already established the precedent that receipt of SO2 allowances are excluded from income, it may very well apply the same rule to carbon emission allowances. Such a ruling not only avoids political tension, but is probably more equitable, as the proposed legislation is already seen in some circles as inflicting additional costs on industry and consumers. Consistent with prior rulings, a ruling characterizing an allowance as a nonamortizable capital asset, except for those held by dealers, will likely produce the most similar tax outcomes among taxpayers in different industries and with different intents. The issue regarding the offset project activity can be equitably resolved by applying existing law. Finally, to encourage compliance, it should be made clear that payment of penalties or equivalent settlements should not be deductible.

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29. JOHN LARSEN ET AL., WORLD RES. INST., WRI SUMMARY OF S.1733, THE CLEAN ENERGY JOBS AND AMERICAN POWER ACT (KERRY-BOXER) (2009), at 3, http://pdf.wri.org/wri_summary_cejapa_2009-10-30.pdf.
30. *Id.* at 5.
31. *Id.* at 6.
32. *Id.* at 5, 9.
33. *See Climate Change Legislation: Tax Considerations*, U.S. SENATE COMM. ON FINANCE, http://finance.senate.gov/hearings/hearing/?id=d85dcf69-dc79-9011-1a41-3092e861b791.
34. JOINT COMM. ON TAXATION, CLIMATE CHANGE LEGISLATION: TAX CONSIDERATIONS (June 12, 2009), http://www.jct.gov/publications.html?func=startdown&id=3559 [hereinafter "JCT Report"].
35. Committee reports are often regarded as the most credible evidence of legislative intent. As stated by Supreme Court Justice John Harlan, Committee reports represent the "considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *See* Zuber v. Allen, 396 U.S. 168, 186 (1969).
36. JCT Report, *supra* note 34, at 7.
37. *Id.*
38. *See* JCT Report, *supra* note 34, at 7, 8.
39. *See* JCT Report, *supra* note 34, at 9 (citing IRC Sec. 61; *Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426 (1955)).
40. *See Estate of Bell. v. Comm'r of Internal Revenue*, 60 T.C. 469 (1973) (secured private annuities are property taxable as amount realized under IRC Sec. 1001).
41. JCT Report, *supra* note 34, at 10.
42. JCT Report, *supra* note 34, at 9.
43. 1992-1 C.B 15. *See also* Rev. Proc. 92-91, 1992-2 C.B. 503 (providing a detailed explanation of the tax issues arising under the allocation of allowances under the Acid Rain program).
44. JCT Report, *supra* note 34, at 9.
45. JCT Report, *supra* note 34, at 9, n.19.
46. *Dubay v. Comm'r of Internal Revenue*, 39 T.C.M. 309 (1979) (subsidy payments under the rural environmental assistance program administered by the Department of Agriculture were includible in income).
47. See I.R.S. Priv. Ltr. Rul. 200901018 (Jan. 2, 2009) (holding that a grant received from a State agency under an economic development program was excluded from income as a nonshareholder contribution to capital under IRC Sec. 118).
48. Larry B. Parker & Donald W. Kiefer, *Implementing SO2 Allowance Trading: Implication of Transaction Costs and Taxes*, CRS REPORT FOR CONGRESS (Mar. 12, 1993), http://ncseonline.org/nle/crsreports/air/air-11.cfm.
49. *See* I.R.C. § 1012 (West 2011) (the section provides in part "The basis of property shall be the cost of such property, except as otherwise provided…").
50. JCT Report, *supra* note 34, at 12.
51. *See* I.R.C. § 471(a) (which provides in part: "…inventories shall be taken by such taxpayer on such basis as the Secretary may prescribe as conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting the income.").
52. *See* I.R.C. § 263A.
53. I.R.S. Tech. Adv. Mem. 200728032 (July 13, 2007). *See also* JCT Report, *supra* note 34 at 12, n. 26, 28.
54. *See* I.R.C. § 162(a) (the section allows a deduction "for all ordinary and necessary expenses incurred or paid…in carrying on a trade or business"). For a definition of "ordinary" *see* Lilly v. Comm'r of Internal Revenue, 343 U.S. 90 (1952). For a definition of "necessary" *see* Welch v. Helvering, 290 U.S. 111 (1933) *Cf.,* I.R.C. §§ 263(a), 263A (requiring the capitalization of expenses that represent the acquisition of assets having a useful life of more than one year).

55. *See* JCT Report, *supra* note 34, at 12.
56. *See* I.R.C. § 197 (a) (such assets are amortized over a 15-year period).
57. Treas. Reg. § 1.197-2(b)(8) (2011).
58. *See* JCT Report, *supra* note 34, at 13, n.34.
59. See *id.*; Treas. Reg. § 1.197-2(b)(11).
60. JCT Report, *supra* note 34, at 15.
61. JCT Report, *supra* note 34, at 15, 16.
62. JCT Report, *supra* note 34, at 16.
63. *Id.*
64. I.R.C. §§ 471, 263A (examples of inventory methods include; first-in, first-out ("FIFO"), last-in, first out ("LIFO"), or specific identification).
65. *See* I.R.C. § 263(a) (requiring capitalization of costs), and see IRC Sec.168 (which provides for depreciable class lives and methods).
66. JCT Report, *supra* note 34, at 17.
67. See *supra* note 54.
68. *See* discussion above.
69. JCT Report, *supra* note 34, at 17.
70. I.R.C. § 1001(a). *See* discussion of basis above.
71. For individual taxpayers, net capital gains from property held for more than one year ("net long-term gains") are taxed at a maximum 15% rate, rather than the ordinary income maximum rate of 35%. I.R.C. § 1. For corporations, gains from capital and ordinary income assets are taxed at the same rate. I.R.C. § 11.
72. I.R.C. §§ 701, 702.
73. Individual taxpayers can use capital losses to offset capital gains, and any excess loss may be used in a taxable year up to $3,000. Corporations may also use capital losses to offset capital gains, but no part of the excess loss is allowed. I.R.C. § 1211. Both individuals and corporations may carryforward net capital loss for use in future years. Corporations may also carryback the capital loss for three years. I.R.C. § 1212.
74. I.R.C. § 1221 (the section defines all assets as capital unless it is one of the following: 1) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer (2) property, used in his trade or business, which is subject to the allowance for depreciation, or real property used in his trade or business; 3) certain copyrights, or a literary, musical, or artistic composition, (4) accounts or notes receivable acquired in the ordinary course of trade or business, (5) certain U.S. publications, (6) certain commodities derivative financial instruments (7) any hedging transaction (8) supplies regularly used or consumed by the taxpayer in the ordinary course of a trade or business).
75. I.R.C. § 1245.
76. *Id.*
77. *See* I.R.C. § 1231.
78. *Id.*
79. *See* Rev. Proc. 92-91, 1992-2 C.B. 503; I.R.S. Priv. Ltr. Rul. 200825009 (June 20, 2008).
80. JCT Report, *supra* note 34, at 19.
81. Such organizations generally obtain their tax exempt status under the provisions of IRC Sec. 501(c)(3).
82. JCT Report, *supra* note 34, at 32.
83. Hereinafter referred to as ("UBTI").
84. Joint Comm. on Taxation, General Explanation of the Tax Reform Act of 1969, 66–67 (1969), *available at* http://ia700302.us.archive.org/26/items/generalexplanati00jcs1670/generalexplanati00jcs1670_bw.pdf.
85. JCT Report, *supra* note 34, at 32 n.93 (citing Treas. Reg. § 1.513-1(a)).
86. I.R.C. § 512(b)(5).
87. JCT Report, *supra* note 34, at 32 n.93 (citing Treas. Reg. § 1.513-1(a)).
88. JCT Report, *supra* note 34, at 33, n.96 (citing Treas. Reg. § 1.513-1(c)).
89. JCT Report, *supra* note 34, at 33 n.97-99 (citing Treas. Reg. § 1.513-1(d)(4)(ii)).
90. JCT Report, *supra* note 34, at 33, 34.
91. *See supra* note 27.
92. I.R.C. § 162(f).
93. S. Rep. No. 92- 437, at 73-74 (1971).
94. *Colt Industries, Inc. v. U.S.*, 880 F.2d 1311 (Fed. Cir. 1989) (penalties under Clean Water Act and Clean Air Act held to be nondeductible). *Cf.* Treas. Reg. § 1.162-21(b).
95. Rev. Proc. 92-91, 1992-2 C.B. 503, Q&A 7 (the IRS stated, however, the reduction of allowances pursuant to the Act for excess emissions does not preclude a deduction to the extent the taxpayer has basis in those allowances).
96. I.R.S. Tech. Adv. Mem. 200629030 (2006) (deduction denied for a certain portion of a "beneficial environmental project" ("BEP") made in settlement of a state enforcement action for violations of the Clean Air Act).
97. JCT Report, *supra* note 34, at 36.

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Climate Change and the Coastal Zone Management Act: Are the Proposed Amendments Enough?

By Nicole Bishop

I. Abstract

There are many anticipated effects of climate change, but coastal areas are expected to suffer some of the most obvious. Sea level rise and increased storm frequency will have drastic consequences for coastal development and coastal ecosystems alike, and steps will need to be taken to mitigate and adapt. Currently, the Coastal Zone Management Act ("CZMA") is the primary federal legislation for managing the nation's coasts, which operates by encouraging states and localities to adopt coastal management plans. This article examines whether the CZMA and recently proposed amendments are sufficient to address pressing climate change concerns.

II. Introduction

Climate change is now accepted to a high degree of scientific certainty,[1] and regulators at every level of government are taking action to mitigate and adapt.[2] The United States' coasts are particularly sensitive to many of the expected changes, including sea level rise, ocean acidification, and increasingly severe storms.[3] The issues facing the delicate ecosystems themselves are compounded by highly impacted developments that coastal communities have attracted.[4] As a result, there are a wide variety of stakeholders—property owners, developers, fishermen, tourists, and environmentalists, to name a few.

Among the most direct risks that climate change poses to coastal developments are the negative impacts from flooding. While flooding could be solved through construction of bulkheads and other measures to prevent the tide line from drifting inland, coastal wetlands would effectively be eradicated.[5] Wetlands provide many important ecological functions, and also sequester carbon.[6] Not only would wetland destruction put local ecosystems at peril, it would likely exacerbate global warming by releasing stored carbon into the atmosphere and preventing further carbon sequestration.[7]

Coastal wetlands are created and rely on periodic flooding from the ocean for their existence.[8] If given the space, wetlands tend to migrate inland along with the sea level, but new developments in the path of expected wetland migration will likely lead to flood prevention measures by local governments seeking to protect those developments.[9] It has been suggested that there are three possible solutions that are protective of coastal wetlands: (1) prevent development; (2) do nothing now and abandon development later; or (3) condition development on having no protection later.[10] There are costs and risks with each strategy, and each community should weigh those as soon as possible to create the best plan for its unique coastal area.

Land use has typically been the province of state and local governments.[11] However, coastal wetlands present special problems because of their interstate nature and national importance.[12] As a result, when Congress enacted the Coastal Zone Management Act of 1972 (the "CZMA"), it carefully balanced federalism concerns with the national goals of protecting the coasts.[13] The product was legislation that encouraged, but did not mandate, states to take action by creating coastal management plans. The CZMA provides incentives to states in the form of federal funding for adopting conforming coastal management plans. The plans must be consistent with approved plans to the "maximum extent practicable."[14] "Thirty-four coastal and Great Lakes states, territories and commonwealths have approved coastal management programs," protecting more than ninety-nine percent of the nation's coasts.[15]

However, as successful as the CZMA has been in encouraging states to take some action, it has done relatively little to protect against the risks posed by climate change.[16] Despite its limited prior usage in this arena, the CZMA provides a good overall framework to begin addressing coastal climate change concerns. After identifying the key provisions of the CZMA and the areas for improvement, this article will examine recent proposed amendments to determine whether Congress is sufficiently addressing the coastal concerns raised by climate change.

III. Coastal Zone Management Act of 1972

A. Key Provisions

The CZMA's strong declarations of findings and policy aim to balance the protection of coastal ecological functions with development interests.[17] It encourages states to develop management plans to protect the coasts' natural resources, manage hazards, protect existing uses, improve public access, redevelop old sites, provide public notice of planning actions, and research the effects of sea level rise.[18] Importantly, the CZMA encourages cooperation on all levels of government—which is the key to its structure and success.[19] One of the most important provisions is the Coordination and Cooperation Section, which requires that federal agencies acting in coastal zones proceed consistently with state plans to the "maximum extent practicable."[20] This both fosters cooperation and addresses state federalism concerns.

The bulk of the CZMA focuses on the development of state plans and grants. States must obtain federal approval for their plans,[21] but grants are available pre-approval for plan development.[22] In order for a plan to be approved, it must include identification of (1) coastal zone boundaries, (2) permissible uses in the zone, (3) "areas of particular concern," (4) the state's control mechanism and relevant laws, (5) priority of uses, (6) organizational structure (i.e., which governmental bodies have what authority), (7) a planning process for protection of public coastal areas of value, (8) a process for siting energy facilities and managing their impacts, and (9) a process for studying and managing shoreline erosion.[23] An applying state must also establish a coordination mechanism to involve all levels of government.[24] The CZMA specifically recognizes the state's authority to obtain an interest in coastal land to further these goals, to enact land or water use regulations, and to delegate authority as it sees fit.[25] However, the state may not "unreasonably restrict or exclude land uses and water uses of regional benefit."[26]

Once a state has created an eligible management plan, there are two main types of grants available: coastal resource improvement grants[27] and coastal zone enhancement grants.[28] Coastal resource improvement grants are available for the preservation of nationally significant coastal resources, improvement of urban waterfronts and public access, development of agency coordination, rehabilitation of piers, stabilization of shorelines, and replacement of pilings.[29] Coastal zone enhancement grants are available for protection, restoration, or enhancement of existing coastal wetlands; eliminating development/redevelopment in high-hazard areas; improving public access; reducing marine debris; controlling coastal growth; preparing special area management plans; planning for use of ocean resources; siting energy projects; and siting aquaculture.[30]

Having a management plan triggers other obligations under the CZMA. Within thirty months of guidance publication, a state must create a program for managing nonpoint source pollution, identify land uses that negatively affect water quality, and classify coastal areas that need to be managed.[31] For states that do not comply with this provision, coastal management assistance will be cut in increasing increments for each year that the state fails to propose an approvable program.[32] However, technical and financial assistance, as well as guidance, are available to create a program.[33]

The CZMA also provides for oversight. One section requires continuing review of a state's coastal management performance.[34] If the state is not performing in accordance with the terms of its grant, its funding may be suspended or withdrawn completely.[35] Another section requires the Secretary of Commerce (the "Secretary") to provide biennial reports and recommendations for new legislation based on those reports.[36] In keeping with the themes of consistency, the Secretary is required to review other federal laws to make sure that there are no conflicts in coastal policy.[37]

There are two other provisions of note. First, a fund was created for emergencies, for projects with high potential for improving coastal zones, and for investigating and applying the public trust doctrine.[38] Second, there was a national estuarine research reserve system created to provide financial assistance for states wishing to purchase land for long term management for national estuarine research.[39] These provisions are interesting because, as discussed in Part III.B below, the application of the public trust doctrine and governmental purchase of land are often cited as ways to improve the CZMA, despite their presence in the act itself.

B. Framework for Evaluation

In 2006, the National Oceanic and Atmospheric Administration ("NOAA") and Coastal States Organization ("CSO") conducted a study to evaluate the CZMA, which culminated as a report in 2007 (the "Report").[40] As a part of that effort, the agencies held stakeholder meetings across the country to determine how the CZMA could most effectively be amended.[41] The result was a list of "cornerstones" for improving the CZMA and "core principles" for better managing the coasts.[42]

The cornerstones include (1) "ensur[ing] the long term sustainability of coastal resources and communities"; (2) "be[ing] goal-driven and results-oriented"; (3) "coordinat[ing] and align[ing] federal, state, and local governments to address issues of national importance"; and (4) "remain[ing] a voluntary partnership between federal government and the states in which each bears responsibilities for achieving program goals."[43] In other words, the Report reflects a general approval of the CZMA's structure, with the mild suggestion of making goals more specific and refining communication between levels of government.

The Report's "Core Principles for Better Coastal Management" included more substantive suggestions. The principles were further broken down into categories. The first category, recommends "principles for better governance."[44] These include "establish[ing] national goals and priorities to sustain healthy ecosystems and coastal economies"; "establish[ing] a standard methodology for determining landward and seaward geographic boundaries of the coastal zone so that programs under the CZMA better align with ecosystem functions"; "retain[ing] states' rights through federal consistency"; and "improv[ing] use of public processes to increase the engagement of local communities, tribes, and others to inform planning and decision-making by NOAA, states, and the national estuarine research reserves."

Although the CZMA already has broad goals, it seems that stakeholders hope for a unifying direction and methodologies so that the program is more cohesive.

Further, although approval was expressed for the balance between federal and state interests, the mechanism for including the public has weakened over the years.[45]

The next grouping of principles is for strategic approaches.[46] The Report recommends "requir[ing] NOAA, states, and the national estuarine research reserves to establish measurable goals based on national priorities"; "empower[ing] NOAA to integrate and leverage governmental and other technical assistance, funding, applied science, capacity building, and outreach to advance national and state goals"; "ensur[ing] that CZMA funding is strategic and tied to results, and that NOAA and the states are accountable for progress"; "promot[ing] special area planning and management for resources of particular concern"; and "establish[ing] protected areas for resource protection, management, research, and/or education."

Similarly to the first grouping, these principles ask for more direction. It seems that stakeholders want more concrete goals from Congress, and even more specific goals from the state or municipality. The second goal of integrating assistance and knowledge also follows the theme of coordination that flows throughout the Report. The third goal of ensuring that funding is tied to results is perhaps a request for added oversight or a new oversight mechanism, such as requiring results before funding rather than allowing funds to be taken away in the absence of progress. The goal of focusing upon areas of special concern is self explanatory; an example of this type of area is a working waterfront.[47] The final "strategic approach" goal is a call for preservation through additional land acquisition.

The final grouping is "principles for improved coordination and engagement."[48] In this group, the Report recommends "support[ing] partnerships to address regional issues"; "improv[ing] coordination across and among all levels of government"; "strengthen[ing] mechanisms to engage local governments"; and "increas[ing] use of partnerships with non-governmental organizations, academia, the private sector, and others to promote stewardship." These goals are straightforward and underscore the overriding themes of coordination and cooperation.

The Report goes on to include concrete examples of ways to accomplish these goals.[49] However, the Report does not advocate implementation of any particular example, but instead is meant to begin a discussion of ways to improve the act.

The Report was the culmination of several smaller reports that summarized discussions on key issues. One such report addressed the risk of climate change (the "Climate Change Summary").[50] In addition to the themes of coordination and communication that permeated the overall recommendations, the climate change meeting document lists current barriers to effectively addressing climate change, including (1) lack of data, (2) insufficient incentives, (3) conflicting goals of development and environmental protection in the current CZMA, (4) fragmented coastal ownership, (5) insufficient mapping of projected impacts, (6) lack of consensus for solutions, (7) inconsistent enforcement, and (8) uncertainty.[51] Participating stakeholders suggested that funding be allocated to mapping, development of climate change action plans, land acquisition (particularly in post-hazard recovery settings), and education and outreach.[52] Other suggestions included mandating a lead federal agency, requiring states to have a consistency requirement, coordination of other federal acts (such as the Clean Water Act), establishing an information bank for data sharing, and using exactions to discourage building in coastal zones and using the money raised through exactions to purchase coastal properties.[53]

Underscoring the findings of the Climate Change Summary, Jaime Ethier of the New York Department of State has opined that education of policymakers is particularly important, because of the level of discretion accorded to local governments in developing plans for their communities.[54] However, education of the stakeholders themselves is arguably even more important because the policymakers are acting for them. Unless the stakeholders accord climate change the priority it deserves, policymakers will be reluctant to take action.[55]

Commentators have also critiqued the CZMA and suggested better ways to protect the coasts. For example, Sam Kalen attacks the CZMA for several reasons, including the failure to take into account cumulative impacts; finding a way to better adapt as science improves (which may require moving away from a focus on zoning); and the need for "more spirit."[56] He posits that the public trust doctrine might be the "spirit or mission that might invigorate the CZMA."[57] He points to the presence of public trust doctrines included in many state constitutions, which should be taken into consideration as a part of any CZMA consistency review.[58] Further, he notes that Congress specifically suggested that the states consider this possibility in the 1990 amendments.[59] Randolph Lowell advocates smart growth at the community level.[60] In particular he focuses on limiting development in areas likely to flood, governmental land acquisition, and manipulating infrastructure to redirect growth.[61] Finally, Robert Fischman has suggested that the solution to the wetland migration problem[62] may be for the government to buy future interests in coastal land (as opposed to focusing on outright acquisition) so that property owners can use the land now but do not have an expectation in protecting their land from flooding in the future.[63]

Together, these critiques will be used to assess the efficacy of the amendments that have been proposed to the CZMA. In particular, proposed amendments will be reviewed for (1) increased specificity of goals, particularly with respect to addressing climate change; (2) delineated

methodologies or funding to develop them, including mapping, valuation of resources, and data collection; (3) expanded communications and coordination among the various levels of government and stakeholders, including regional planning, national data sharing, consistency at all levels, and public participation; (4) added land or future interest acquisition, exaction, or easement provisions; (5) added climate change action plan requirement; (6) added climate change education and outreach provisions; and (7) amended enforcement provisions. Funding provisions will also be examined because of their importance in encouraging states to act in voluntary programs. Lower or flexible matching requirements will increase the likelihood of success of a particular grant program.

IV. Proposed Amendments

A. Current Proposals[64]

1. Climate Change Planning Proposal: Coastal State Climate Change Planning Act[65]

The Coastal State Climate Change Planning Act (the "Climate Change Act") is almost identical to its 2008 predecessor.[66] The purpose of the Climate Change Act is "to authorize assistance to coastal states to develop coastal climate change adaptation plans pursuant to approved management programs approved under section 306, to minimize contributions to climate change, and for other purposes." The Climate Change Act would add a section 320 to the CZMA, requiring the Secretary to establish an adaptation and response plan for climate change, including training, technical, and funding assistance to states voluntarily undertaking climate change preparations in the coastal zone.[67]

The Climate Change Act would set a concrete deadline of 180 days from enactment for the Secretary to develop guidelines for a grant program.[68] Section 320(c)(2) of the Climate Change Act gives specific guidance for what adaptation plans must include to be eligible for a grant:

> (A) Identification of public facilities and public services, coastal resources of national significance, coastal waters, energy facilities, or other water uses located in the coastal zone that are likely to be impacted by climate change.
>
> (B) Adaptive management strategies for land use to respond or adapt to changing environmental conditions, including strategies to protect biodiversity and establish habitat buffer zones, migration corridors, and climate refugia.
>
> (C) Requirements to initiate and maintain long-term monitoring of environmental change to assess coastal zone adaptation and to adjust when necessary adaptive management strategies and new planning guidelines to attain the policies under section 303.
>
> (D) Other information considered necessary by the Secretary to identify the full range of climate change impacts affecting coastal communities.

States must also consider their hazard mitigation plans in creating climate change plans.[69]

Grants are awarded, at least in part, based on merits (somewhere between thirty and fifty percent).[70] However, projects may also obtain funding by addressing climate change stress factors:

> (A) Activities to address physical disturbances within the coastal zone, especially activities related to public facilities and public services, tourism, sedimentation, and other factors negatively impacting coastal waters, and fisheries-associated habitat destruction or alteration.
>
> (B) Monitoring, control, or eradication of disease organisms and invasive species.
>
> (C) Activities to address the loss, degradation or fragmentation of wildlife habitat through projects to establish marine and terrestrial habitat buffers, wildlife refugia or networks thereof, and preservation of migratory wildlife corridors and other transition zones.
>
> (D) Implementation of projects to reduce, mitigate, or otherwise address likely impacts caused by natural hazards in the coastal zone, including sea level rise, coastal inundation, coastal erosion and subsidence, severe weather events such as cyclonic storms, tsunamis and other seismic threats, and fluctuating Great Lakes water levels.
>
> (E) Provide technical training and assistance to local coastal policy makers to increase awareness of science, management, and technology information related to climate change and adaptation strategies.[71]

Funding priority goes to those states that have approved plans to meet certain coastal zone enhancement objectives under section 309.[72]

Notably, there is a section devoted to making Congress's intent clear that the purpose of the act is not to extend management beyond the coastal zone or to require amendment of current plans.[73]

The Climate Change Act has significant strengths. Although creating new plans would be strictly voluntary, by creating a separate section in the CZMA, the Climate Change Act would send coastal states and local governments the message that the federal government considers climate change to be a major risk. That gentle encouragement may be sufficient to induce action, while at the same time maintaining the delicate federalism balance that has previously been struck. On the other hand, a stronger provision requiring that climate change plans be created within a certain time frame to obtain funding for coastal management plans would likely spur quicker, more decisive action.

However, while the goal is clear, not much guidance is provided for methodology or for specific action. It may be that Congress intended that the Secretary's promulgated guidelines would provide methodological guidance, but stronger guidance for the Secretary would likely be helpful. On the other hand, the hard deadline would ensure that at least some action would be taken.

The Climate Change Act could also be improved by increasing the education requirements to include stakeholders, rather than only policymakers. While it is paramount that the policymakers themselves understand the problem, it is unlikely that they will take action unless supported by their constituency, particularly where action is entirely voluntary. By including provisions for public outreach, the Climate Change Act could improve the base of support that the policymakers would need to develop plans for their communities.

Further, although there is clearly room for policymakers to use land or future interest acquisition as a part of their action plans, there is nothing to explicitly encourage such action. Finally, the focus is on planning for climate change, but this act could be strengthened with the addition of an enforcement provision that would take effect once climate change plans have been put into action.

2. Working Waterfront Proposals

i. Working Waterfront Preservation Act of 2009[74]

The Working Waterfront Preservation Act of 2009 (the "Commercial Fishing Act") is almost identical to both of the Working Waterfront Preservation Acts of 2007, one of which was introduced in the Senate to amend the Magnuson-Stevens Fishery Conservation and Management Act,[75] and one in the House to amend the CZMA.[76] The primary purpose of the Commercial Fishing Act is to support commercial fishing and aquaculture in coastal zones.[77] It provides money to states, local governments, or eligible nonprofits to purchase or restore land for this purpose.[78] The sole considerations for obtaining a grant for a project are economic considerations; community support; threat of conversion to incompatible uses; suitability of the site; consistency with business, harbor, and land use plans; and availability of alternatives.[79] The applicant need only provide twenty-five percent of the funding and may not exercise eminent domain.[80] If an easement is modified or is not being enforced, the interest reverts to the state.[81]

The Commercial Fishing Act is not well developed and could have negative impacts on climate change preparation. It focuses primarily on economic considerations, popular opinion, and only on two uses—commercial fishing and aquaculture. This is only tempered by consistency with current harbor and land use plans, which may be more protective of the coastal environment. Further, it requires half the contribution that most other CZMA provisions require, thereby making it an attractive grant to seek. Such a limited focus may encourage local governments to develop their coastal areas without considering the current and future ecological suitability of the sites.

ii. Keep America's Waterfronts Working Act of 2009[82]

As with many of the 2009 acts, Keep America's Waterfronts Working Act of 2009 (the "Working Waterfronts Act") is nearly identical to the 2007 act.[83] Unlike the Commercial Fishing Act that focuses solely on commercial fishermen and aquaculture, the purpose of the Working Waterfronts Act is to provide access to a broad range of coastal-dependent businesses. Factors that are considered in granting applications for funding are "the economic and cultural significance"; the state's needs "as outlined by a working waterfront plan"; the value of the project for meeting the state's needs; the ability to obtain other funding (as a positive); the potential for obtaining ownership of coastal land; and "the impact of the proposed project on the coastal ecosystem."[84] The 2009 act adds an additional consideration for obtaining a grant—whether there is a contingency plan for properties that revert to the coastal state because of a violation of a covenant.[85]

To qualify for a grant, the state must have a working waterfront plan, which must include an assessment of the value of a working waterfront; a description of state and local laws that would affect the plan; identification of working waterfront areas that are threatened by incompatible uses or that need improvements; areas for new development, and environmental impact assessments where applicable; a strategic plan for preserving these areas and improving public access; and a description of the level of community support.[86] The 2009 act adds a provision limiting the effectiveness of such plans to five years, at which point they must be reapproved.[87]

If a grant is awarded, the money may only be used to purchase land, purchase an interest in land, or to improve already owned land, but not for eminent domain; public access must be improved, unless it would be unsafe; and the federal government may impose other terms and conditions.[88] The land or easement may be held by a local government or by a non-profit organization, in the state's discretion.[89] If the holder violates any of the covenants

attached to the land, the interest will revert back to the state.[90] Note, however, that there is no penalty if the state is the holder that violates a covenant. Also, the Secretary must submit biennial progress reports.[91]

The matching requirements only require a twenty-five percent contribution, and may waive that if the holding entity is underserved, has a small or low income population, or for any other reason considered appropriate by the Secretary.[92] If the entity already held working waterfront interests and associated costs from no more than three years prior to the application, those costs may also be used to offset the matching requirement.[93] Further, under the 2009 act, non-governmental partner contributions may be used to meet the match requirements.[94]

This act is both better and worse than the Commercial Fishing Act. This Working Waterfronts Act is significantly better developed and does require consideration of the coastal ecosystem. However, it allows for significantly more development, as it encourages almost any coastal-dependent use. It also has the twenty-five percent contribution requirement, which would make these grants attractive, but it goes even farther by allowing more flexible matching and waivers. As with the Land Protection Act,[95] this act limits how a state can obtain property, and prohibits the use of eminent domain.

Interestingly, the plans must provide for increased public access unless there are safety concerns, which could lead to positive and negative consequences. Some of the positive consequences of accessing the coastal zone are the increased aesthetic and recreational opportunities for the public, but negative consequences could include increased development to accommodate that access or further erosion problems from increased traffic. The negative consequences could be alleviated by requiring the state to consider consequences aside from safety, such as ecological degradation. Regardless, the plans are only valid for five years, and there is biennial review. These monitoring provisions could provide a stopgap that would allow for a change of course if it appears that the plans are detrimental in some way.

iii. Coastal Jobs Creation Act of 2010[96]

The stated purpose of the Coastal Jobs Creation Act of 2010 is "[t]o promote coastal jobs creation, promote sustainable fisheries and fishing communities, revitalize waterfronts, and for other purposes." Similarly to the other working waterfront acts, the Coastal Jobs Creation Act would require (1) "greatest employment opportunities for coastal communities and benefits commercial and recreational fishing industries; (2) replicates or builds upon a successful local, State, Federal, or tribal project; (3) utilizes existing fishing community infrastructure, including idled fishing vessels; (4) supports research and monitoring that improves science-based management decisions; or (5) contributes to restoring, protecting, or preserving coastal and ocean ecosystems."[97]

This act does not amend the CZMA so much as it directs funding to be available through the CZMA (and other acts) for limited purposes. Although this act acknowledges the importance of protecting coastal ecosystems, that is only one of five possible permissible goals, any one of which is sufficient in and of itself. Like the other working waterfront acts, this one would benefit considerably by requiring, at a minimum, consistency with coastal management plans, or, ideally, by permitting only sustainable development. Moreover, like the Commercial Fishing Act, the act is undeveloped and would benefit from more specific guidelines.

3. Conservation Proposals

i. Coastal and Estuarine Land Conservation Program Act[98]

The Coastal Estuarine Land Conservation Program Act (the "Conservation Act") would amend the CZMA to add a section 307A. The purpose would be to protect coastal areas of value (whether because of their conservation or ecological values, or because of their social or historical importance) through effective ecosystem management. This proposal is essentially identical to the previous Coastal and Estuarine Land Protection Act, which was introduced in the House of Representatives in 2008,[99] and as a companion bill to the Conservation Act in the Senate in 2009.[100]

The Conservation Act provides funding to states that wish to acquire coastal property to further their CZMA plan, an estuarine research reserve plan, a watershed protection plan, or a coastal land acquisition plan.[101] Specific criteria are delineated for grant approval: coordination and consistency with the coastal zone management plan, prioritization of conservation needs and values, whether the plan complements working waterfront needs, effect of management on identified values, inclusion of information about the individual land parcel, need for protection, ability to leverage other funding (where ability to obtain other funding is a positive), ability to effectively manage and protect the land, imminence of degradation threat, and potential to mitigate adverse impacts of coastal population growth. The Secretary would be required to create guidelines based on these criteria, consulting with states, agencies, and stakeholders that are experts in land acquisition and conservation.[102] However, no time period is specified for promulgating the guidance.

There are several explicit caveats in the Conservation Act. Grants cannot be used to exercise eminent domain,[103] they do not create new liability for property owners,[104] and they do not create a right for the Government to enter land without property owner permission.[105] Further, the Conservation Act specifies that it is not intended to modify government land use regulation rights.[106]

As with most funding provisions under the CZMA, grants under the Conservation Act would require a one-

to-one funding match from the state or local governmental body, but the Conservation Act would allow for waivers for underserved, small, or low income communities.[107] These grants can be combined with other federal funding, but a one-to-one match applies to that funding as well.[108] As a part of a state's match, it can use the property value of certain prior non-governmental land holdings, if acquired within three years of the grant application for conservation in perpetuity, and the land is connected (either physically or for planning purposes) to the proposed acquisition.[109] In addition to the property value, the costs of acquiring, managing, remediating, restoring, and enhancing the land may be included for cost matching purposes.[110]

The Conservation Act also provides grants for research reserve sites. To obtain a grant for such a site, assurances must be made of title and management in perpetuity.[111] These provisions are undercut, however, by a provision for return of grant money, without penalty, if at any time the property is sold.[112]

Although it does not explicitly address climate change, the Conservation Act would be a step in the right direction. It provides a specific goal—preserving coastal land through land acquisition—and would eventually set forth guidance for doing so. It also encourages valuing resources and has a self-executing enforcement clause. Further, the funding provisions are flexible and avoid penalizing those communities that have already taken action while maximizing funding opportunities for those communities that are especially in need.

However, the Conservation Act could be significantly improved in a future draft. Beyond the stated purpose, the act perpetuates the same conflicting goals of the CZMA itself, as it requires consistency with current development plans. Further, although it seeks to mitigate impacts of population growth along the coasts, it does nothing to encourage mitigation of the growth itself. Local governments are also limited in how they can obtain coastal land, as they are prevented from exercising eminent domain. That provision would likely severely curtail the use of this important land use mechanism, as municipalities would be reluctant to create a plan that could jeopardize obtaining grant money. Finally, although the enforcement clause is automatic, there is no penalty for abandoning projects. A penalty should be added to discourage the sale of protected land. Further, as written, although the grantee must make assurances, there appear to be no repercussions for improper management. Addition of a penalty for mismanagement or requiring the grantee to establish a sufficiently funded trust could address this apparent deficiency.

ii. Omnibus Public Land Management Act of 2009[113]

The Omnibus Public Land Management Act of 2009 (the "Omnibus Act") contains many acts, one of which would amend the CZMA to add a new section 307(A) with essentially the same provisions as the Conservation Act, as discussed above.[114] There are several notable differences in this version of the Conservation Act. First, to obtain a grant, there must already be an approved coastal management plan or National Estuarine Research Reserve unit, and the grant must be used to acquire property in accordance with the coastal management plan, research unit, watershed protection plan, watershed management plan, or state coastal land acquisition plan.[115] The Omnibus version would also give priority to lands that "(i) are under an imminent threat of conversion to a use that will degrade or otherwise diminish their natural, undeveloped, or recreational state; and (ii) serve to mitigate the adverse impacts caused by coastal population growth in the coastal environment."[116] The Omnibus version also contains slightly different matching requirements: it also requires a 100% federal match, but allows the Secretary to waive the requirement for any reason deemed appropriate.[117]

The consistency requirements of the Omnibus version are clearly more stringent and would better serve the federalism concerns of the CZMA. Further, giving preference to lands that have immediate needs or are at greater risk based on high population would better address climate change concerns. Further, allowing for waiver for any reason deemed appropriate may better allow communities that are not underserved but have special climate change risks to obtain sufficient grant money, depending on the priorities of the Secretary.

Notably, the Omnibus Act contained at least one other potentially beneficial act. The Ocean and Coastal Mapping Integration Act,[118] which was nearly identical to its 2007 predecessor,[119] sought to take advantage of mapping already in progress by compiling the data and fostering cooperation between all levels of government—federal, state, and local. The goals were to "enhance[] ecosystem approaches in decision-making for conservation and management of marine resources and habitats, establish[] research and mapping priorities, support[] the siting of research and other platforms, and advance[] ocean and coastal science."[120] The bill also provides for tracking of coastal data, which presumably, would aid in tracking rising ocean levels.[121]

This act was obviously not meant to be comprehensive, but it would help to address concerns about availability of data and may help in developing a unitary methodology, by comparing the best data compilation methods.

iii. Natural Resources Climate Adaptation Act[122]

The stated purpose of the Natural Resources Climate Adaptation Act (the "Natural Resources Act") is "[t]o establish an integrated Federal program that protects, restores, and conserves natural resources by responding

to the threats and effects of climate change, and for other purposes."[123] The Natural Resources Act would require the Secretary, through NOAA, to establish procedures for coordination among federal agencies for sharing climate change related information.[124] It would also require new research and technical assistance for agencies, other interested governmental entities, and nongovernmental entities, as well as assistance for federal agencies to develop natural resource adaptation plans.[125] Further, after the first year and every five years thereafter, NOAA would have to conduct a climate change impact survey.[126] It would also create a climate change adaptation panel which would be required to develop a Natural Resources Climate Change Adaptation strategy.[127] Once that strategy was completed, all federal agencies would then be required to develop natural resource adaptation plans within a year.[128]

Finally, the Natural Resources Act would create the "Natural Resources Climate Change Adaptation Fund."[129] Allocations include 32.5% to state wildlife agencies, 6% to state coastal agencies, 2% to states for land acquisition, and the remainder for various specific federal uses, 7% of which would be dedicated to projects created by previous, specifically delineated acts, including CZMA climate change adaptation programs.[130] Although a relatively small percentage is allocated explicitly for state use, states are allowed to use up to 90% federal funds,[131] and some of the federal funding may be reallocated, depending upon the provisions of the referenced acts (such as the CZMA).

For a state to be eligible to receive funds, it must have a natural resources adaptation plan designed "to address ongoing and expected impacts of climate change on natural resources within the State." The contents must be consistent with other state plans, including the state's coastal management plan, if applicable.[132]

This act provides a good starting point from a natural resources perspective, although not amending the CZMA itself. The consistency provisions, requiring both development of an overarching strategy and plans for all federal agencies, as well as requirements for sharing climate change information, are all positive steps. However, as with most of the acts, this one would benefit from more guidance, such as specific requirements and methodology. Further, although the matching requirements are generous, it would benefit from allowing a greater percentage of the overall funding to be available to state and local governments.

4. Energy Proposal: Coastal State Renewable Energy Promotion Act[133]

The Coastal State Renewable Energy Promotion Act (the "Energy Act") is essentially identical to the Coastal State Renewable Energy Promotion Act of 2008.[134] The Energy Act authorizes grants for surveys of the coast in order to distinguish between areas that are suitable and unsuitable for exploration, development, and generating renewable energy consistent with coastal management plans.[135] The Energy Act gives specific guidance for what surveys must consider: "(1) hydrographic and bathymetric surveys; (2) oceanographic observations and measurements of the physical ocean environment, especially seismically active areas; (3) identification and characterization of significant or sensitive marine ecosystems or other areas possessing important conservation, recreational, ecological, historic, or aesthetic values; (4) surveys of existing marine uses in the outer Continental Shelf and identification of potential conflicts; (5) inventories and surveys of shore locations and infrastructure capable of supporting renewable energy development; (6) inventories and surveys of offshore locations and infrastructure capable of supporting renewable energy development; and (7) other matters as may be necessary."[136]

The Energy Act contains a more complicated matching scheme than most of the other CZMA amendments, requiring no matching until 2012, a two-to-one matching scheme in 2012, then a one-to-one scheme thereafter.[137] Non-governmental partners may contribute to the matching.[138] However, a state may only receive three grants total, never more than $1,000,000 per year, and only one grant until the state shows satisfactory progress toward completion of a survey.[139] Priority is given to states with sites identified as suitable for renewable energy development.[140]

Although the Energy Act has a narrow focus, research for renewable energy purposes, it could have beneficial results for climate change considerations. First, much of the research could potentially overlap with desirable climate change research. Second, the development of renewable energy could help mitigate the effects of climate change, thereby decreasing the amount of adaptation that will need to occur on coasts. However, this act could be improved by requiring that the research take climate change considerations into account, particularly because rising sea levels and increased storm activity would likely affect the suitability of renewable energy sites.

B. Past Suggestions

1. Reauthorization Acts

There have only been two reauthorizations suggested in recent years. Most recently, the House drafted the Coastal Zone Reauthorization Act of 2008.[141] However, aside from extending grants through later years, the act offered no substantive changes. In 2007, the Senate proposed a more substantive reauthorization (the "Senate Reauthorization").[142]

The Senate Reauthorization would have addressed many of the issues raised by NOAA's Report. It recognized a need for more cooperation and coordination at

all levels of government, sustainable growth through analysis of infrastructure and open space, and a new body to maintain research reserves.[143] It would also have amended the policy section to include local governments in addition to states, to create a research reserve system, and to improve technical assistance and training.[144]

Two new sections would also have been added; one for coastal community grants and one to address climate change. The Coastal Community Program would have retained the one-to-one grant structure of the other parts of the act, but would have had the goal of funding assessment and management of "growth, public infrastructure, and open space needs in order to provide for sustainable growth, resource protection and community revitalization."[145] The new section would have encouraged local communities to be involved and would have allowed them to obtain funding with state supervision.[146] Funding would also be available to reduce runoff through new local strategies and

> to assist in the adoption of plans, strategies, policies, or procedures to support local community-based environmentally-protective solutions to the impacts and pressures on coastal uses and resources caused by development and sprawl that will—
>
> > (A) revitalize previously developed areas;
> >
> > (B) undertake conservation activities and projects in undeveloped and environmentally sensitive areas;
> >
> > (C) emphasize water-dependent uses; and
> >
> > (D) protect coastal waters and habitats.[147]

Another less developed section would have been devoted to the effects of climate change.[148] It would have encouraged (but not required) states to conduct research on the effects of climate change on their coastal zones, develop mitigation and adaptation strategies, and create public awareness campaigns.[149]

The Senate Reauthorization would have provided clear and attainable goals that would go a long way toward protecting the coasts from climate change consequences. Although the provisions were entirely voluntary, they would direct communities toward smart growth while assessing the projected effects of climate change for their communities. Further, although the direction was vague, the climate change section would have encouraged state and local governments to reach out to the public. The act also recognized a need for added cooperation and coordination among the all of the governmental levels, from local to federal. The only suggestions from NOAA's Report that appear to be omitted in their entirety are a land acquisition provision and strengthened enforcement provisions. However, the Senate Reauthorization could be further strengthened with addition of specific guidelines, by creating deadlines, with a more aggressive climate change section (such as encouraging climate change action plans), and by creating a data sharing system.

2. Global Warming and Acidification Coastal and Ocean Resiliency Act[150]

The Global Warming and Acidification Coastal and Ocean Resiliency Act (the "Global Warming Act") would have announced a policy of planning for and mitigating the effects of climate change on coastal resources, particularly acidification and sea level rise.[151] It would also have recognized potential impacts of other related activities—carbon sequestration and identification of renewable energy sources—and required planning and mitigation of those effects as well.[152] The Global Warming Act would have set a two-year deadline for developing coastal resiliency plans to deal with added stressors from climate change.[153] Plan development was to be based on practical research and design measures "to avoid, alleviate, or mitigate the impacts of global warming" and "to ensure the recovery, resiliency, and health" of coastal and marine ecosystems, and on the "best available science."[154]

The Global Warming Act would also have required a global warming plan (along with a time frame for implementation) to incorporate adaptation strategies into federal coastal decisions; to predict sea level rise; to protect, restore, and maintain coastal ecosystems and species; to incorporate these procedures into coastal zone planning; to purchase coastal land; and to promote community planning.[155] The Global Warming Act also delineated specific sources to take into account, including federal agency reports, the Pew Center, and regional plans,[156] and provided for revisions of plans between five and ten years from enactment.[157]

The Global Warming Act would have strengthened the consistency requirement, requiring all federal agencies to implement conservation measures in their jurisdictions following the policies created by the act.[158] Further, it would have created a ten to twenty person advisory board to provide scientific and technical advice to the Secretary in creating the guidance required under the act, including what the guidance should be and what the priorities should be.[159]

Funding would have been allocated as forty percent to implementation and sixty percent to grants, which could go to agencies, states, regions, tribes, educational institutions, or nongovernmental organizations.[160] Priority would have gone to proposals that would enhance

coastal ecosystems in a systematic, geographically cooperative, and cost-effective way.[161] The grant evaluation results would have been accessible to the public, but the act would not have required public comment, leaving discretion to the Secretary as to the grant approval process.[162] The Global Warming Act would also have required the National Academy of Sciences to submit a report on projected global warming impact and the Secretary to submit a report on the implementation plan.[163]

The Global Warming Act would also have amended the CZMA to add a section 320 to provide guidelines for a coastal climate change resiliency planning and response plan and grants to states for implementation. To obtain a grant, the state would be required to have adaptation measures for fish and wildlife, habitat, and associated ecological processes.[164] More specifically, the state would be required to have land and water strategies for "biodiversity, habitat buffer zones, migration corridors, and climate refugia," as well as long-term monitoring of coastal zone changes and flexibility.[165] To be eligible for funding, states would have to have both a coastal management plan and a global warming plan, and priority would go to states that had already received other funding under the CZMA.[166]

The Global Warming Act contains most of the things that the Senate Reauthorization Act was missing—primarily specific goals and methodologies. The act also strengthens enforcement through periodic reviews of the state or local government's global warming plan, every five to ten years. However, the enforcement provision could be improved by requiring more frequent review. This act touches on almost everything that NOAA recommended, with the exception, again, of a land acquisition provision. However, given the flexibility of planning for the local governments, land acquisition could easily be a part of their individual plans.

V. Conclusion

Although time has run out for Congress to pass these amendments, those that have been proposed over the last few years are, for the most part, a good start toward addressing the deleterious effects of climate change on our nation's coasts. Most of the proposed amendments acknowledge climate change as an issue and some even require climate change action plans. Some of the proposals also have specific goals and methodologies, encourage education of the public and policyholders, require more communication between levels of government through data sharing, and bolster enforcement provisions.

While most of the proposals would take positive steps forward, some of the provisions should be reconsidered. At least one act would encourage development of working waterfronts without consideration of the ecology of the particular site. The ecology of each site is a necessary factor for any development plan, as an unsustainable working waterfront will not benefit the community in the long term. In almost every act, enforcement provisions should be strengthened to at least include more frequent review of plans and progress. Although the development of the plans is itself a worthy goal, the CZMA amendments should look beyond the initial planning stages to prepare for implementation.

Another important provision is land acquisition, which several of the acts contained and two focused on. However, among these proposals, a common provision is to restrict the use of eminent domain in obtaining coastal property interests. While encouraging land acquisition would undoubtedly be a positive step toward addressing climate change effects, the limitation on eminent domain should be removed. Land or future interest acquisition would be the most efficient way for the government to manage coastal lands and prevent development that may ultimately be flooded or block the migration of wetlands. However, limiting eminent domain could potentially be very damaging, as it may deter local governments from taking a more proactive role in protecting their coasts, regardless of projected climate change effects. A compromise position may be to allow eminent domain only where property has already been damaged, although this may not be sufficient in the context of coastal wetland protection. As NOAA's Climate Change Stakeholder Meeting Report noted, fragmentation of ownership is a major hurdle that must be overcome if the nation's coasts are going to be adequately protected from the effects of climate change.

Ideally, Congress will take action soon to reauthorize or comprehensively amend the CZMA. Such an act might be a conglomeration of several of the proposals thus far, including the Senate Reauthorization and the Global Warming Act, in particular. It should have strong goals encouraging (or requiring) states to address climate change; it should delineate national methodologies or create a program to develop them; it should expand governmental communication and coordination, particularly with respect to data sharing; it should encourage land acquisition, whether title, easement, or future interest, without limiting eminent domain; it should require education of state and local policymakers and the public on the consequences of climate change; and it should be enforceable. Ultimately, it will be up to local communities to protect their coastlines, but decisive action from Congress is an important first step in helping those communities to attain this goal.

Endnotes

1. Intergovernmental Panel on Climate Change, Climate Change 2007: Synthesis Report (Nov. 2007), *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf (final part of the Fourth Assessment Report).
2. *See, e.g.*, United Nations Framework Convention on Climate Change, http://unfccc.int/2860.php (official website of the

United Nations conference on climate change which occurred from November 29, 2010 to December 10, 2010); American Clean Energy and Security Act, H.R.2454, 111th Cong. (May 15, 2009) (federal bill that would establish a cap and trade system for carbon dioxide emissions); REGIONAL GREENHOUSE GAS INITIATIVE MEMORANDUM OF UNDERSTANDING (Dec. 20, 2005), *available at* http://rggi.org/docs/mou_final_12_20_05.pdf (establishing a regional cap and trade program for participating Northeastern states); *Climate Change*, PlaNYC 2030, http://www.nyc.gov/html/planyc2030/html/plan/climate.shtml (detailing New York City's climate change mitigation and adaptation plan); DIV. OF COASTAL RES. & WATERFRONT, N. Y. STATE DEP'T. OF STATE, LONG ISLAND SOUND COASTAL MANAGEMENT PROGRAM 76 (1999), *available at* http://nyswaterfronts.com/downloads/pdfs/lis_cmp/Combined_Chapters.pdf (considering sea level rise when setting coastal policies).

3. PEW CENTER ON GLOBAL CLIMATE CHANGE, KEY SCIENTIFIC DEVELOPMENTS SINCE THE IPCC FOURTH ASSESSMENT REPORT 1 (June 2009), http://www.pewclimate.org/docUploads/Key-Scientific-Developments-Since-IPCC-4th-Assessment.pdf.
4. Randolph R. Lowell, *Coastal Smart Growth*, 22 PACE ENVTL. L. REV. 231, 232 (2005).
5. Robert L. Fischman, *Global Warming and Property Interests: Preserving Coastal Wetlands as Sea Levels Rise*, 19 HOFSTRA L. REV. 565 (1991).
6. Royal C. Gardner, *Rehabilitating Nature: A Comparative Review of Legal Mechanisms That Encourage Wetland Restoration Efforts*, 52 CATH. U. L. REV. 573, 585 (2003). A carbon sink stores more carbon than it releases. *Carbon Sequestration in Agriculture and Forestry: Frequent Questions*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/sequestration/faq.html.
7. Carbon sequestration is the storage of carbon, either biologically or geologically. Examples of biological sequestration are reforestation and wetland preservation. *See Carbon Sequestration in Agriculture and Forestry*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/sequestration/index.html. Geologic sequestration is accomplished by capturing the carbon emission at its source and injecting it into underground storage areas. *Geologic Sequestration of Carbon Dioxide*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/safewater/uic/wells_sequestration.html. For examples of actual sequestration projects, *see Carbon Sequestration and Offsets Solutions,* PEW CENTER ON GLOBAL CLIMATE CHANGE, http://www.pewclimate.org/what_s_being_done/in_the_business_community/sequestration.cfm.
8. Fischman, *supra* note 5, at 566-67.
9. *Id.* at 566-69.
10. *Id.* at 570 (citing James G. Titus, *Greenhouse Effect and Coastal Wetland Policies: How Americans Could Abandon an Area the Size of Massachusetts at Minimum Cost*, 15 ENVTL. MGMT. 39, 44 (Jan./Feb. 1991)).
11. *See generally* John R. Nolon, *Champions of Change: Reinventing Democracy Through Land Law Reform*, 23 PACE ENVTL. L. REV. 905 (2006) (discussing the history of land use and suggesting reforms).
12. Lowell, *supra* note 4, at 232, 250-51.
13. 16 U.S.C. §§ 1451-65 (2006).
14. *Id.*; Martin J. LaLonde, *Allocating the Burden of Proof to Effectuate the Preservation and Federalism Goals of the Coastal Zone Management Act*, 92 MICH. L. REV. 438, 438-39 (1993).
15. *Coastal Programs: Partnering with States to Manage Our Coastline*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., http://coastalmanagement.noaa.gov/programs/czm.html.
16. *See* Email from Jaime Ethier, Coastal Resources Specialist, Office of Coastal, Local Government, and Community Sustainability, New York State Department of State (Dec. 8, 2009, 13:05 EST) (on file with author) ("the focus on climate change and SLR has been minimal in local programs").
17. 16 U.S.C. §§ 1451-52.
18. *Id.* § 1452(2).
19. *Id.* § 1452(4), (5).
20. *Id.* § 1456(c)(1).
21. *Id.* § 1454.
22. *Id.* § 1455.
23. *Id.* § 1455(d)(2).
24. *Id.* § 1455(d)(3).
25. *Id.* § 1455(d)(10), (11).
26. *Id.* § 1455(d)(12).
27. *Id.* § 1455a.
28. *Id.* § 1456b.
29. *Id.* § 1455a(b)(1)-(4), (c)(2)(C).
30. *Id.* § 1456b(a)(1)-(9).
31. *Id.* § 1455b(a), (b).
32. *Id.* § 1455b(c)(3).
33. *Id.* § 1455b(d), (f), (g).
34. *Id.* § 1458(a).
35. *Id.* § 1458(c), (d).
36. *Id.* § 1462(a), (b).
37. *Id.* § 1462(c).
38. *Id.* § 1456a(B)(2)(b).
39. *Id.* § 1461(e).
40. NAT'L OCEANIC & ATMOSPHERIC ADMIN. & COASTAL STATE ORG., ENVISIONING OUR COASTAL FUTURE 3 (2007), *available at* http://coastalmanagement.noaa.gov/czm/media/PhaseIII.pdf.
41. *Id.* at 7.
42. *Id.* at 5-6.
43. *Id.* at 5, 10-11.
44. *Id.* at 11-12.
45. *See id.* at 12.
46. *Id.* at 12-13.
47. *Id.* at 12.
48. *Id.* at 13.
49. *Id.* at 14-20.
50. NAT'L OCEANIC & ATMOSPHERIC ADMIN. & COASTAL STATES ORG., STAKEHOLDER DISCUSSION SUMMARY BY TOPIC: CLIMATE CHANGE AND HAZARDS, *available at* http://coastalmanagement.noaa.gov/czm/media/ClimateChangeHazards.pdf.
51. *Id.* at 2.
52. *Id.* at 2-3.
53. *Id.*
54. *See* Email from Jaime Ethier, *supra* note 16 ("As [plans] are locally driven, for the most part, it usually requires someone on a local board to have some knowledge of or interest in climate change and sea level rise.").
55. *Id.* ("[M]y opinion is that the biggest hurdle to incorporating climate change into planning efforts is that it is a distant threat (not a common concern of the residents) and often communities have a difficult time addressing future unknown threats until their residents demand it.").
56. Sam Kalen, *The Coastal Zone Management Act of Today: Does Sustainability Have a Chance?*, 15 SOUTHEASTERN ENVTL. L.J. 191, 210 (2006).

57. *Id.* at 214-21.
58. *Id.* at 216-17.
59. *Id.* at 219.
60. Randolph R. Lowell, *Coastal Smart Growth*, 22 PACE ENVTL. L. REV. 231 (2005).
61. *Id.* at 258-59.
62. *See* discussion, *supra* Part I.
63. Fischman, *supra* note 5, at 571-72.
64. It should be noted that while the foregoing proposals are those most adapted to addressing climate change, other proposals have been made that would amend the CZMA for other purposes, such as aquaculture and addressing the effects of oil spills. National Sustainable Offshore Aquaculture Act, H. R. 4363, 111th Cong. (Dec. 16, 2009) (establishing a regulatory system for sustainable offshore aquaculture and requiring permit applications for aquaculture to be reviewed for consistency pursuant to the CZMA) Securing Health for Ocean Resources and Environment Act, S.3597, 111th Cong. (Jul. 15, 2010); Clean Energy Jobs and Oil Company Accountability Act of 2010, S.3663, 111th Cong. (Jul. 29, 2010) (amend the CZMA to provide grant money to states for implementation of preparedness plans for responding to oil spills and other emergency situations arising from certain "energy activities"); see also Securing Health for Ocean Resources and Environment Act, H.R.6292, 111th Cong. (Sept. 29, 2010) (house companion bill).
65. H.R.1905, 111th Cong. (Apr. 2, 2009).
66. Coastal State Climate Change Planning Act of 2008, H.R.5453, 110th Cong. (Feb. 14, 2008).
67. H.R.1905 § (2)(a) (delineating what would be 320(a)).
68. *Id.* (delineating what would be 320(b)).
69. *Id.* (delineating what would be 320(c)(3)).
70. *Id.* (delineating what would be 320(d)(2)).
71. *Id.* (delineating what would be 320(d)(3)).
72. *Id.* (delineating what would be 320(c)(5)). Reducing marine debris and adding aquaculture projects do not qualify for priority.
73. *Id.* § (2)(c).
74. S.533, 111th Cong. (Mar. 5, 2009).
75. S.741, 110th Cong. (Mar. 1, 2007).
76. H.R.2565, 110th Cong. (June 5, 2007).
77. S.533 § (2)(a) (delineating what would be 306A(a)(2)).
78. *Id.* (delineating what would be 306A(a)(1), (2)).
79. *Id.* (delineating what would be 306(A)(b)(2)).
80. *Id.* (delineating what would be 306(A)(b)(4), (5)).
81. *Id.* (delineating what would be 306(A)(b)(6)).
82. H.R.2548, 111th Cong. (May 21, 2009).
83. Keep Our Waterfronts Working Act of 2007, H.R.3223, 110th Cong. (July 30, 2007).
84. *Id.* § (2)(a) (delineating what would be 320(b)(3)).
85. *Id.*
86. *Id.* (delineating what would be 320(c)(2)(B)).
87. *Id.* (delineating what would be 320(c)(3)).
88. *Id.* (delineating what would be 320(d)-(f)).
89. *Id.* (delineating what would be 320(g)(1)).
90. *Id.* (delineating what would be 320(g)(2), (3)).
91. *Id.* (delineating what would be 320(k).
92. *Id.* (delineating what would be 320(h)(1), (2)).
93. *Id.* (delineating what would be 320(h)(5), (6)).
94. *Id.* (delineating what would be 320(h)(3)).
95. *See infra*, Part IV.A.3.ii.
96. H.R.4914, 111th Cong. (Mar. 23, 2010).
97. *Id.* § 3(d).
98. H.R.368, 111th Cong. (Jan. 9, 2009).
99. H.R.1907, 110th Cong. (Sept. 23, 2008).
100. S.170, 111th Cong. (Jan 8, 2009).
101. H.R.368 § (2)(a) (delineating what would be 307A(b)).
102. *Id.* (delineating what would be 307A(c)).
103. *Id.* (delineating what would be 307A(d)(1)).
104. *Id.* (delineating what would be 307A(d)(2)).
105. *Id.* (delineating what would be 307A(d)(3)).
106. *Id.* (delineating what would be 307A(e)).
107. *Id.* (delineating what would be 307A(f)(1), (2)). Note that the Senate version of the act requires only a 25% match. S.170 § 3(d).
108. H.R.368 § (2)(a) (delineating what would be 307A(f)(3)).
109. *Id.* (delineating what would be 307A(f)(4)(A), (B)).
110. *Id.* (delineating what would be 307A(f)(4)(C)).
111. *Id.* (delineating what would be 307A(i)(1)(A), (B)).
112. *Id.* (delineating what would be 307A(i)(1)(C)).
113. S.22, 111th Cong. (Jan. 8, 2009).
114. *Id.* § 12502 (Found in Title XII, Part II, Subtitle E).
115. *Id.* § 12502 (delineating what would be § 307(A)(b)).
116. *Id.* (delineating what would be § 307(A)(c)(7)(B)).
117. *Id.* (delineating what would be § 307(A)(f)(2)-(4)).
118. Subtitle B, §§ 12201-08, 35 U.S.C.§§ 3501-3507 . Other notable provisions of the Omnibus Act include those in Title XII (Oceans), Part II, the NOAA Undersea Research Program Act of 2009: Subtitle C, the Integrated Coastal and Ocean Observation System Act of 2009 and Subtitle D, the Federal Ocean Acidification Research and Monitoring Act of 2009.
119. H.R.2400, 110th Cong. (May 21, 2007).
120. *Id.* § 12205(b)(1).
121. *Id.* § 12202(c)(8).
122. S.1933, 111th Cong. (Oct. 27, 2009).
123. *Id.* The House Companion bill, the Climate Change Safeguards for Natural Resources Conservation Act, is essentially the same with a slightly different stated purpose: "To establish an integrated Federal program to protect, restore, and conserve the Nation's natural resources in response to the threats of climate change and ocean acidification." H.R.2192, 111th Cong. (Apr. 30, 2009).
124. S.1933 § 4(a).
125. *Id.* § 4(b).
126. *Id.* § 4(c).
127. *Id.* §§ 5, 6.
128. *Id.* § 7.
129. *Id.* § 9.
130. *Id.* § 9(c)(4)(C).
131. *Id.* § 9(e).
132. *Id.* § 8(e)(4).
133. H.R.1690, 111th Cong. (Mar. 24, 2009).
134. H.R.5452, 110th Cong. (Feb. 14, 2008); H.R.1690 at § (2) (delineating what would be 306B(d), which adds a public access provision to the 2009 act).
135. H.R.1690 at § (2)(a) (delineating what would be 306B(a)).

136. *Id.* (delineating what would be 306B(b)).
137. *Id.* (delineating what would be 306B(h)(1), (2)).
138. *Id.* (delineating what would be 306B(h)(4)).
139. *Id.* (delineating what would be 306B(g), (i), (j)).
140. *Id.* (delineating what would be 306B(l)).
141. H.R.5451, 110th Cong. (Feb. 14, 2008).
142. Coastal Zone Enhancement Reauthorization Act of 2007, S.1579, 110th Cong. (June 7, 2007).
143. *Id.* § 3(8) (delineating what would be 302(14), (15)).
144. *Id.* § 4(1), (9) (delineating what would be 303(2), (7), (8), 306(A)(e)).
145. *Id.* § 12 (delineating what would be 309A(a)(1)). The Secretary would also assist entities in obtaining financial or technical assistance from other federal agencies. *Id.* § 12 (delineating what would be 309A(e)).
146. *Id.* § 12 (delineating what would be 309A(a)(2), (d)).
147. *Id.* § 12 (delineating what would be 309A(a)(4), (5)).
148. *Id.* § 20 (delineating what would be 320).
149. *Id.*
150. S.2211, 110th Cong. (Oct. 19, 2007).
151. *Id.* § 101(2).
152. *Id.* § 101(3).
153. *Id.* § 102(a)(1).
154. *Id.* § 102(a)(2), (3)(A).
155. *Id.* § 102(b)(1).
156. *Id.* § 102(b)(2).
157. *Id.* § 102(c).
158. *Id.* § 102(d).
159. *Id.* § 103.
160. *Id.* § 104(a), (b)(1)-(3).
161. *Id.* § 104(b)(4).
162. *Id.* § 104(b)(6)(B).
163. *Id.* § 105(a), (b).
164. *Id.* § 201(a) (delineating what would be 320(d)(2)(A)).
165. *Id.* § 201(a) (delineating what would be 320(d)(2)(B)).
166. *Id.* § 201(a) (delineating what would be 320(d)(3), (4)).

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Ethics Update

Ann Lapinski and Randall Young

Opinions of the NYSBA Committee on Professional Ethics

NYSBA Comm. on Professional Ethics, Formal Op. 846, issued October 27, 2010, extends the reasoning of Opinion 828 regarding the extent to which agency attorneys may consult with investigators who communicate with represented parties. This is particularly relevant to attorneys who represent regulatory agencies. The Committee on Professional Ethics determined that attorneys may assist with drafting forms even if there is a chance that they will be received by counter parties who may already have legal representation. Further, Rule 4.2 is not triggered by non-lawyer employees of an insurance company sending forms to claimants if the company's attorney was not consulted about specific claimants who were to receive the forms even though the attorney designed the forms.

NYSBA Comm. on Professional Ethics, Formal Op. 845, issued October 14, 2010, addresses fee sharing among attorneys. The Committee determined that Rules 1.7, 1.8(f) and 8.4(f) allow an attorney acting solely as a real estate broker to share commissions with other attorneys who refer buyers or sellers, so long as the fee sharing arrangement did not place the referring attorney in violation of the Rules. Accordingly, if the referring attorney represented either the buyer or the seller in the transaction, the broker-attorney could share her commission only if the referring attorney obtained the client's informed consent to the arrangement and remitted or credited the referral fee to the client.

NYSBA Comm. on Professional Ethics, Formal Op. 844, issued October 8, 2010, addresses the issue of whether a part-time county legislator may accept a court appointment as an attorney for a child in most Family Court proceedings. The Committee decided in the negative. Because the legislature approves the appointments of the County Attorney and counsel for the Department of Social Services and sets their budgets, accepting an appointment to represent a child in a Family Court proceeding in which the County Attorney or Department of Social Services attorney appeared would violate Rules 8.4(d) and 1.11(f)(2). Rule 8.4 states that lawyers shall not engage in conduct prejudicial to the administration of justice. Rule 1.12(f)(2) prohibits lawyers who are also public officials from using their public position to influence a tribunal in favor of a client.[1]

NYSBA Comm. on Professional Ethics, Formal Op. 843, issued September 10, 2010, states that lawyers may access public pages of an opposing party's social networking site for the purpose of gathering impeachment material in pending litigation. The Committee reasoned that using information contained in public profiles on social networks such as Facebook or MySpace is analogous to information contained in other forms of media.

However, the Opinion also provides guidance regarding what attorneys may not do. Any use of deception to obtain information would violate Rule 8.4(c) which prohibits a lawyer from engaging in conduct involving "dishonesty, fraud, deceit, or misrepresentation," as well as Rule 4.1, which prohibits a lawyer from making a false statement of fact or law to a third person. For example, using a third person to "Friend" the opposing party to access social network pages not available to the public would violate the Rules.[2]

The Committee offered a footnote stating that Rule 4.2 and 4.3 could apply to "Friending" or otherwise contacting parties through a social network. Rule 4.2 prohibits attorneys from contacting represented parties without the consent of opposing counsel, and Rule 4.3 requires that attorneys make their role clear to parties whose interests are likely to conflict with the interests of the attorney's client.

NYSBA Comm. on Professional Ethics, Formal Op. 842, issued September 10, 2010, advises that attorneys may use online data backup if they use "reasonable care" to ensure the provider will protect client confidences. This requires the lawyer using such a service to take several specific steps set forth in the Opinion to investigate the level of security and confidentiality provided by the service and to ensure confidential data can be obliterated from the system if the lawyer becomes dissatisfied.

NYSBA Comm. on Professional Ethics, Formal Op. 841, issued April 12, 2010, states that an attorney handling a product liability matter may send e-mails to other attorneys requesting that they refer cases involving injuries caused by that product to the requesting attorney. Rule 7.3 restricts how lawyers may solicit clients, but a "solicitation" is an "advertisement" initiated by or on behalf of the lawyer. Because Rule 1.0(a) specifically excludes communications between lawyers from the definition of "advertisements" for the purposes of the Rules, the e-mails in question were not impermissible solicitations.

NYSBA Comm. on Professional Ethics, Formal Op. 840, issued March 26, 2010, explains a change regarding an attorney's payment of litigation expenses for clients being represented pro bono. Previously, attorneys could only pay a client's litigation expenses if the attorney was representing the client pro bono **and** the client was indigent.[3] Rule 1.8(e) now states that a "a lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client." (Emphasis added.)

Appellate Division Decisions of Interest

Matter of D'Ambrosio [4th Dept 10-1-2010] Slip Opinion 07016

An attorney disciplined by another jurisdiction may be disciplined in New York for the underlying misconduct unless, among other things, the proceedings in the foreign jurisdiction deprived the attorney of due process of law. 22 N.Y. Com. Codes R. & Regs. Tit. 1022.22.

Respondent contended that the referee in a foreign disciplinary proceeding denied him due process of law by taking judicial notice of a third jurisdiction's rule of professional conduct. The Fourth Department held that Respondent received due process because he had notice of the allegations against him; he participated in a hearing at which he was represented by counsel; and a court reviewed the record and briefs of the disciplinary tribunal before sustaining the charges.

Matter of Cristella B. [2d Dept 10-5-2010] Slip Opinion 07165

Although a child in a neglect proceeding is entitled to legal representation, Rule 4.2 (the "no contact rule") applies only to attorneys and does not prohibit department of social services case workers from interviewing the child, nor does it require that the case workers notify the child's attorney before such interviews. The constitutional and statutory duties of the agency toward children distinguish the agency's case workers from attorneys who represent parents or other parties in Family Court proceedings.

In re Antoine, 74 AD 3d 67 (1st Dept 2010)

Individuals licensed to practice as legal consultants in this state are subject to professional discipline in the same manner and to the same extent as members of the bar in New York.[4] However, summary revocation of a license to practice is not permitted.

Commission on Public Integrity Matters

Advisory Opinions

Opinion 10-02

In response to a question from DEC about two attorneys who were providing volunteer services for the Office of General Counsel, the Commission issued an opinion stating that two-year and lifetime bar provisions set forth in Public Officers Law (hereinafter "POL") §73(8) apply to persons who volunteer as part-time staff attorneys in the Department of Environmental Conservation's Office of General Counsel.

Opinion 10-04

The Department of Environmental Conservation ("DEC") asked the Commission to reconsider the 30-day recusal period set forth in Advisory Opinion No. 06-01 with respect to employees who have been targeted for layoffs. In Advisory Opinion No. 06-01, the Commission articulated guidelines for a State officer or employee to follow when engaging in communications with a prospective employer, with whom he or she, or whose agency, has matters pending, regarding potential post-government employment. The Commission clarified Advisory Opinion No. 06-01 to the extent that the 30-day recusal period set forth in the post-government employment guidelines is set aside for those State officers and employees who may be subject to layoffs, or who have the option of accepting a position at a reduced salary or in another location in lieu of a layoff, provided the employee recuses him or herself from all matters pertaining to any private entity with which the employee has employment-related discussions.

Enforcement Actions

The Commission charged Clifton Van Guilder, a former employee of DEC, with violations of POL §§73(5) and 74(3)(d), (f) and (h) based upon Mr. Van Guilder's behavior while he was employed as an Environmental Engineer at DEC. Mr. Van Guilder allegedly solicited the U.S. Department of Energy (hereinafter "DOE") to fund a position for him at the Knolls Atomic Power Laboratory while he had an active matter before KAPL. DOE has a permit from DEC. Mr. Van Guilder settled the matter with admissions to violations of the POL and a fine of $15,000.

Guidance

The Commission on Public Integrity issued a guidance document to state employees limiting attendance at legislative receptions to circumstances where the event meets the following "widely attended gathering" criteria: 1) the event must be open to at least twenty-five people; 2) principal purpose must be to promote the exchange of information (not a "meet and greet"); 3) attendees must represent a diverse range of interests; and 4) public officials' attendance must relate to their official job duties. Compliance is an obligation for state employees who might attend such a reception and lobbying firms who sponsor such events.

Endnotes

1. *See also* NYSBA Comm. on Professional Ethics, Formal Op. 798 (2006).
2. *See* Philadelphia Bar Op. 2009-02 (2009).
3. NYSBA Comm. on Professional Ethics, Formal Op. 786 (2005) and DR -5-103(B)(2).
4. 2 NY Comp. Codes R. & Regs. tit. 22 §§ 521.5, 1200.

Ann Lapinski is an Associate Attorney with the New York State Department of Environmental Conservation's Office of General Counsel. Randall Young is co-chair of the NYSBA Environmental Law Section's Task Force on Professional Ethics. The abstracts above are provided for informational purposes. Consult the full text of the Rules of Professional Conduct, advisory opinions, and judicial opinions when dealing with specific issues. Nothing in this column reflects the position of the NYSDEC.

Administrative Decisions Update

Prepared by Robert A. Stout Jr.

In the Matter of the Alleged Violation of Article 9 of the Environmental Conservation Law and Part 196 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York, by James W. McCulley, Respondent. DEC Case No. R5-20050613-505

December 30, 2010

Summary of Decision

The Acting Commissioner granted the Department's motion for the clarification of an earlier-entered Order dismissing enforcement action against Respondent, finding that the Commissioner has the inherent authority to clarify a final decision where he deems it necessary to correct errors in law or fact in an underlying decision.

Background

An Order was issued by the Commissioner on May 19, 2010, addressing an alleged violation of 6 NYCRR Part 196.1 (the "Order") arising from the improper operation of a motor vehicle within the State Forest Preserve on a portion of Old Mountain Road in the Town of North Elba. Believing the Order (which dismissed the enforcement action against the Respondent) "misapprehended or misapplied the applicable law" the Department moved for clarification of five portions of the Order, but did not seek reversal of the dismissal of the action against the Respondent. The Department sought to clarify: 1) the obligations of the Town of Keene and the Town of North Elba to improve and maintain Old Mountain Road; 2) the language relating to ATV and snowmobile use of Old Mountain Road "to eliminate any implication that ATV or snowmobile use of highways is lawful where a town has not opened the highway; 3) that portion of the Order that stated "the road is deemed abandoned when the town superintendent, based on written consent of the town board majority, files a description of the highway abandoned with the town clerk;" 4) the extent to which hiking, skiing, snowshoeing, and similar recreational uses promoted by the Department pursuant to the Adirondack Park State Land Master Plan and/or Unit Management Plans are indications of "travel or use as a highway" under Section 205(l) of the Highway Law; and 5) the language used in the Order with respect to the Department's failure to meet its burden of proof and the language used in the hearing report with respect to the dismissal of the action "as a matter of law."

The Respondent took the position that: 1) the Department is not authorized to submit a post-order motion for "clarification;" and 2) the Department is not authorized to reargue points of law that were fully argued, litigated, and adjudicated in an administrative proceeding.

The Adirondack Park Agency ("APA") and Adirondack Council petitioned to intervene. In its petition, the Adirondack Council sought re-argument and clarification of the Order, and requested that the complaint be reinstated "for the sole purpose of re-establishing the underlying factual and legal record on which the Commissioner may determine whether to grant the (motions)." The APA asserted that the Order failed to take into account the legal effect of the Adirondack Park State Land Master Plan (the "Master Plan") and also sought to "augment the record… with details regarding the 1987 Master Plan comprehensive update and its characterization of the former Old Mountain Road in the Sentinel Wilderness."

Ruling of the Acting Commissioner

The Acting Commissioner conceded that there is no express authority in 6 NYCRR Part 622 or the Environmental Conservation Law for the Department to reconsider an Order, or to entertain other post-order motion practice. Rather, the Acting Commissioner pointed to several Rulings of the Commissioner which held that the Department has power to clarify its underlying decision or correct an error. Accordingly, the Acting Commissioner found that the points of clarification requested by the Department are significant for an understanding of the Order and its future application and granted its motion for clarification. In so granting the motion, the Acting Commissioner stated that the Department's motion was merely to: (a) address perceived ambiguities; (b) address any misapprehending or overlooking of applicable law or governmental policy; (c) ensure a clear understanding of the intent and scope of language used in the Order; and (d) clarify the interrelationship of legal language that appears in the Order with that in the underlying hearing report.

The Acting Commissioner found that there was a reasonable likelihood that the APA's rights would be adversely affected absent clarification of the Order and thus granted its petition to intervene. With respect to the Adirondack Council's petition for intervention, the Acting Commissioner found that there was a reasonable likelihood that its rights which are "separate from and not necessarily congruent with" the interests of the DEC and APA would be substantially adversely affected by the Order and as such, granted the petition, except to the extent that the petition raised additional issues. The Adirondack Council's request to reinstate the notice of hearing and complaint against the Respondent was deemed unnecessary.

The Respondent had also moved for former Commissioner Grannis, who had issued the Order, to be recused from this proceeding. While the Commissioner's departure rendered this request moot, the Acting Commissioner indicated that even if Mr. Grannis were still the Commissioner, the recusal request would be denied. The Acting Commissioner held that "[a]lthough prejudgment of the specific facts of a pending proceeding may require disqualification, mere familiarity with the facts without prejudgment does not require disqualifica-tion" (Citing *Matter of 1616 Second Ave. Rest., Inc. v. New York State Liq. Auth.*, 75 NY2d 158, 162 [1989] in which case the Court of Appeals found that certain statements made by the Chairman of the State Liquor Authority to a legislative oversight committee did indicate prejudgment of facts at issue.)

A briefing schedule, limited to the five points of clarification requested by the Department, was established by the Acting Commissioner.

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Recent Decisions and Legislation in Environmental Law

Recent Decisions

Western Watersheds Project v. Rosenkrance, No. CV 09-365-E-BLW, 2010 WL 3522244 at *1 (D. Idaho, July 29, 2010)

Facts

Congress utilized the Federal Land Policy and Management Act of 1976 (FLPMA) to allocate the selection and management of wilderness areas to the Secretary of the Interior and the Bureau of Land Management (BLM).[1] The FLPMA directs the Secretary to recommend lands to the President, who then recommends lands to be permanently designated as wildnerness to Congress.[2] During Congressional review of the recommendations, these lands are given "wilderness study area" (WSA) designation and are managed by BLM.[3] In 1980, BLM issued an Intensive Wilderness Inventory for Idaho ("the Inventory") in order to assess lands for wilderness designation pursuant to the Wilderness Act of 1964.[4] The Inventory designated an area known as the Burnt Creek Unit as a WSA.[5]

Procedural History

In 2002, the BLM granted Scott Whitworth a grazing permit on an allotment within the boundaries of the Burnt Creek WSA.[6] In 2005, the Idaho District Court ordered that grazing on Whitworth's allotment halt between 2005 and 2008, holding that BLM's analysis in granting the permit was flawed due to its failure to consider sufficient alternatives.[7] Subsequently, BLM re-issued a permit to Whitworth and allowed him to recommence grazing on that allotment.[8] In 2009, the Western Watersheds Project ("WWP"), a non-profit conservation group, challenged the re-issuance of the permit on the grounds that BLM again used an improper environmental analysis.[9] WWP argued that BLM's decision violated both the National Environmental Protection Act (NEPA) and the FLPMA and should be set aside as "arbitrary and capricious under the Administrative Procedure Act."[10]

Issue

Was BLM's 2009 decision to re-issue a grazing permit to Whitworth arbitrary and capricious?

Rationale

All actions within a WSA must be in compliance with the BLM's Interim Management Policy and Guidelines for Lands Under Wilderness Review ("IMP").[11] The IMP requires that the environmental analysis ("EA") for a project within a WSA answer the following question: "[i]f the project's impacts, including cumulative impacts, had existed at the time of the intensive inventory, would those impacts have disqualified the area or any portion of the area from being identified as WSA or from being included in WSA?"[12] The court held that in order to answer this question, the Burnt Creek EA needed to address and determine "whether the impacts of this grazing permit—and the cumulative impacts of grazing throughout the WSA—impair the wilderness values set forth in the Inventory."[13] Although the EA contained a conclusory allegation regarding the impact of temporary fencing on the WSA, it failed to perform an analysis of the proposal's impacts.[14] Furthermore, it only discussed a single wilderness value from the Inventory—naturalness—and failed to consider the other two wilderness values that appeared in the Inventory ("solitude," and "primitive and unconfined recreation").[15] The court also noted that the EA only recognized that certain activities—namely the fencing—might impair wilderness values of the WSA, but failed to determine "the critical question of whether [the action] *actually* impairs wilderness values."[16]

Finally, the Court noted that the IMP required that the EA consider not only the specific site but also the WSA in its entirety.[17] In the case at hand, the EA failed to discuss whether grazing across the entire Burnt Creek WSA would impair the wilderness values detailed in the Inventory.[18] For these previously noted reasons, the court held that the Final Decision of BLM violated the FLPMA and was therefore arbitrary and capricious under the Administrative Procedures Act (APA).[19] WWP's motion for summary judgment was granted, and BLM's motion denied.[20]

Conclusion

The court adopted WWP's argument that BLM's decision to re-issue a grazing permit to Whitworth was arbitrary and capricious, holding that BLM's environmental analysis failed to address two issues.[21] The first issue was whether the Burnt Creek WSA wilderness values ("as they existed at the time BLM recommended the area be set aside for wilderness") would be impaired should BLM permit grazing on the allotment.[22] The second issue the EA failed to discuss was the cumulative effects of BLM's decision to allow grazing on the allotment in relation to other permitted grazing across the Burnt Creek WSA in its entirety.[23] As a result of these deficiencies in the EA, the court set aside the permit.[24]

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Endnotes

1. *Western Watersheds Project v. Rosenkrance*, No. CV 09-365-E-BLW, 2010 WL 3522244 at *1 (D. Idaho July 29, 2010). *See also* 43 U.S.C. § § 1701 *et seq*.
2. *Western Watersheds Project*, 2010 WL 3522244 at *1.
3. *Id.*
4. *Id.* at *1-2.
5. *Id.*
6. *Id.* at *3.
7. *Western Watersheds Project*, 2010 WL 3522244 at *1.
8. *Id.*
9. *Id.*
10. *Id.* at *5.
11. *Id.*
12. *Western Watersheds Project*, 2010 WL 3522244 at *5 (internal quotations omitted).
13. *Id.* (internal quotations omitted).
14. *Id.*
15. *Id.*
16. *Id.* at *6.
17. *Western Watersheds Project*, 2010 WL 3522244 at *7.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at *1.
22. *Western Watersheds Project*, 2010 WL 3522244 at *1.
23. *Id.*
24. *Id.*

* * *

Shellfish, Inc. v. N. Y. State Dep't of Envtl. Conservation, 76 A.D.3d 975, 908 N.Y.S.2d 53 (2d Dep't 2010)

Facts

This case involves a dispute over expired Surf Clam Permit No. 156650 issued by the Department of Environmental Conservation (DEC). Petitioner, Shellfish, Inc., (Shellfish) held a 2006 surf clam permit for a fishing vessel, Susan II. In August 2006, Shellfish sold the Susan II. In December 2006, Shellfish applied for and was granted a 2007 permit for the Susan II. In September 2007, DEC revoked the permit on the grounds that Shellfish no longer owned the Susan II.[1] In December 2007, Shellfish sent the DEC notification on a form letter that it had, in fact, sold the Susan II and was requesting that Surf Clam Permit be transferred to the fishing vessel C-Hawk. The form letter stated on its face that such notification must be sent to the DEC 10 days prior to a sale or transfer, in accordance with 6 NYCRR 43-3.5. The 2007 permit was allowed to expire pursuant to its own terms at the end of 2007. In December 2007, Shellfish received a preprinted form to renew the permit for the Susan II for 2008. Shellfish filed the application for the C-Hawk instead, but was notified by the DEC that the permit for the C-Hawk would not be issued because the status of the Susan II was yet to be clarified.[2]

Procedural History

In May 2008, Shellfish commenced an action against the DEC seeking to compel the DEC to issue the 2008 permit and to review the DEC's decision to allow the 2007 permit to expire without a hearing and to resolve the DEC's authority to revoke permits. Shellfish alleged, inter alia, that the denial of the 2008 permit was arbitrary and capricious, in violation of NY CPLR 7803(1). The DEC moved to dismiss pursuant to CPLR 3211(a)(7) and CPLR 7804(f). The Supreme Court, Suffolk County, found that the issues raised by Shellfish were academic because the 2007 and 2008 fishing seasons had ended. Accordingly, the Supreme Court dismissed the case. Shellfish appealed and the Appellate Division, Second Department affirmed for a different reason.[3]

Issues

(1) Whether the issues raised by Shellfish regarding clam permits from 2007 and 2008 are moot because the 2007 and 2008 fishing seasons are over?

(2) Did the DEC properly deny Shellfish a Surf Clam permit for 2008?

Rationale

The Court ruled that the issues presented by Shellfish are not moot and should be addressed. The Court identified three factors which indicate an exception to traditional mootness doctrine: (1) a likelihood of repetition; (2) a situation evading review; and (3) substantial and novel issues not previously ruled upon.[4] Regarding the first factor, the Court noted that the DEC amended its regulations in 2009 limiting the issuance of Surf Clam permits only to those persons who had received one the year prior. Therefore, since Shellfish was denied a permit in 2008, it may repeatedly be denied permits in the future under the 2009 DEC amendment.[5] Looking to the second factor, the Court noted that the Surf Clam permits are valid for only one calendar year; therefore, it is unlikely that any controversies arising from the denial of such a permit could be resolved by a court before the calendar year lapses.[6] Finally, the Court noted that the arguments of both parties regarding various statutes and regulations related to the issuance of Surf Clam permits presented substantial and novel issues the Court should address.[7]

The Court ruled that the DEC properly denied Shellfish's 2008 Surf Clam Permit Application. The Court noted that it is undisputed that Shellfish violated 6 NYCRR 43-3.5(c), which requires that owners of permit holding vessels notify the DEC in writing at least 10 days prior to any sale, transfer, or replacement of the vessel. Not only did Shellfish fail to notify the DEC of Susan II's sale in August 2006, but it also obtained a 2007 Surf Clam Permit

for the vessel and submitted weekly trip reports through July 2007 for it.[8]

The Court also noted that it is undisputed that the DEC failed to comply with its own regulations regarding the revocation of the 2007 permit and denial of the 2008 permit, which required advanced notice of permit revocations. However, the fact remains that the revocation and denial were prompted by Shellfish's initial failure to comply with DEC regulations. Therefore, the Court ruled that the revocation and denial of the 2007 and 2008 permits, respectively, were not arbitrary and capricious.[9]

The Court also ruled that there was no merit to Shellfish's contention that 6 NYCRR 43-3.5 was not in effect in 2007 and 2008. Prefatory language in 6 NYCRR 43-3.1 states that the regulations in question are only to be in place until a surf clam management plan is adopted.[10] Shellfish argues that when the DEC adopted the "Fishery Management Plan for the Mechanical Harvest of the Atlantic Surf Clam in New York State Waters of the Atlantic Ocean" (Management Plan) in 2004, the regulations in 6 NYCRR 43-3.5 were no longer in effect. However, the Management Plan states that all regulations from subpart 6 NYCRR 43-3 shall remain in effect, including the 10-day notice requirement for the sale of a vessel.[11] Therefore, the Court ruled that under both the Management Plan and 6 NYCRR 43-3.5, Shellfish failed to comply with its duty to notify the DEC of the intention to sell the Susan II and was properly denied a 2008 permit.[12]

Conclusion

The Court ruled that the Supreme Court, Suffolk County, was incorrect in dismissing Shellfish's complaint as moot. Because the DEC's denial of a Surf Clam Permit was capable of repetition, evaded review, and presented novel and substantial issues, the Court had the power to rule on the merits. However, because Shellfish failed to notify the DEC of the intention to sell the Susan II in violation of 6 NYCRR 43-3.5, the DEC's decision to deny Shellfish a permit for 2008 was not capricious and arbitrary. Therefore, the Court affirmed the trial court's dismissal.

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Endnotes

1. *Shellfish, Inc. v. N. Y. State Dep't of Envtl. Conservation*, 76 A.D. 3d 975, 976-77 908 N.Y.S.2d 53 (2d Dep't 2010).
2. *Id.*
3. *Id.* at 977.
4. *Id.* at 978.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 979.
9. *Id.*
10. *Id.*
11. *Id.* at 980.
12. *Id.*

* * *

Ferraro v. Town Bd. of Amherst, 79 A.D.3d 1691, __ N.Y.S.2d __, 2010 N.Y. Slip Op. 09691, 2010 WL 5395786, (4th Dep't 2010)

Facts

In February 2007, Benderson Development Company, LLC sought rezoning for a planned mixed unit development from the Town of Amherst on a parcel located proximally to both the University of Buffalo and a residential area known as Maple Avenue.[1] The property, consisting of 31.589 acres zoned Community Facilities and 1.737 acres zoned R-3, had previously been the Buffalo Shooting Club.[2] The Bicentennial Comprehensive Plan of the Town of Amherst had identified the property to be developed as part of the "University of Buffalo Focal Planning Area."[3] The development proposal included condominiums, townhouses, hotel, retail and restaurant space, accounting for over 200,000 square feet of buildout. Traffic studies done in conjunction with the development proposal indicated that the Maple Road driveways would "accommodate weekday traffic of approximately 17,000 vehicles."[4]

The Town Board initially held a public hearing to consider the rezoning request.[5] Maple Road residents petitioned the Town Board to reverse the proposed rezoning. Benderson Development Company, LLC amended the rezoning request to include a 4.5-acre conservation buffer, within 101 feet between the residents and the proposed development.[6] The Town Assessor determined that a supermajority was not needed to approve the proposal.[7] The Commissioner of the County of Erie Department of Environment and Planning reviewed the proposal and found it inconsistent with the Comprehensive Plan because the areas proposed for development by Benderson Development Company, LLC were within the identified "green" area for open space and recreation.[8] The Town Board approved the proposal and the rezoning by a vote of 4 to 3 in June 2008.[9]

Procedural History

Maple Road residents filed a CPLR Article 78 and declaratory judgment action, seeking to annul the rezoning approval. The trial court held in favor of the Town's determination for rezoning. The residents appealed in the case at bar.[10]

Issue

Whether the revised rezoning request by Benderson Development Company, LLC required a supermajority vote of the Town Board of the Town of Amherst under N.Y. Town Law § 265(1)(c), to authorize approval of the rezoning when the proposal included a 101 foot buffer zone between the Maple Avenue residents and the development although shared driveways were not included in the buffer zone.

Rationale

Town of Amherst Law requires that in order for a rezoning request that is protested against by "owners of [20%] or more of the area of land directly opposite thereto, extending [100] feet from the street frontage of opposite land" must be approved by a three-quarters majority vote of the Town Board.[11] The Maple Road residents argued that the buffer zone included driveways that would be used in the redevelopment and that their exclusion from the rezoning proposal was inappropriate.[12] The residents further argued that if the driveways were properly included in the rezoning, the residents would be within 100 feet of the proposal and that to pass the rezoning, a three quarters majority was required and because it was not achieved, the rezoning should be annulled.[13]

The court held that because "the driveways would serve a dual purpose…[they] were not required to be rezoned."[14] The court noted that this determination by the Zoning Board of Appeals was not challenged by petitioners, and as such, the Maple Road residents were not within 100 feet of the property proposed to be rezoned and could not require the supermajority vote of three quarters of the Town Board.[15]

Absent establishment of a "clear conflict" between the comprehensive plan and the rezoning, the legislative determination will be upheld.[16] The court found that the intent of the Comprehensive Plan was flexibility, and to serve as a guide for development. While the Plan identified the property use as greenspace and the proposal was in direct conflict with that identification, mixed-use development was not inconsistent with nearby property designations. Because the proposal was consistent with the overall Plan, the court found no clear conflict and upheld the legislative determination by the Town Board.[17]

Conclusion

The rezoning was approved based on the entirety of a comprehensive planning process despite conflict with the specific parcel designation because the local legislative body could find consistency with the overall intent of the Plan.

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Endnotes

1. *Ferraro v. Town Bd. of Amherst*, 79 A.D.3d 1691, __ N.Y.S. 2d. __, 2010 N.Y. Slip Op. 09691, 2010 WL 5395786 at *1-2 (4th Dep't 2010).
2. *Id.* at *3 (Fahey, J. dissenting).
3. *Id.* at *4.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at *4-5.
9. Local Law No. 8 of 2008.
10. *Ferraro,* at 2010 WL 5395786 *1.
11. N.Y. Town Law § 265(1)(c).
12. *Ferraro,* 2010 WL 5395786 at *2.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at *3 (citing *Bergstol v. Town of Monroe*, 15 A.D.3d 324, 325 (2d Dep't 2005).)
17. *Id.*

* * *

Air Conditioning, Heating & Refrigeration Inst., et al., v. City of Albuquerque, No. 1:2008cv08-633 (D. N.M. Sept. 30, 2010)

Following the precedent set forth by the Southern District of New York in *Metropolitan Taxicab Board of Trade v. City of New York*,[1] the District Court of New Mexico found that municipal sustainable housing standards that are more stringent than federal standards are preempted as a matter of law.

Facts

On September 17, 2007, the Albuquerque City Council passed a bill adopting the Albuquerque Energy Conservation Code ("the Code"), which related to sustainable building and construction. Cap and TradeThe Plaintiffs, three trade associations representing manufacturers, distributors, and installers of heating, ventilation, and air conditioning (HVAC), asserted that certain portions of the Code were preempted by federal law. The section of the Code relevant to the court's analysis was the prescriptive compliance path section, which requires that the HVAC system and equipment comply with minimum efficiency standards and is limited to small retail and office buildings. The efficiency standards set forth in the Code set a higher standard for efficiency than the applicable federal standards for the particular products in question. Cap and TradeThe City, however, cited *Metropolitan Taxicab* for the proposition that "a local law is not preempted when it only indirectly regulates parties within a preempted field and presents regulated parties with viable, non-preempted options."[2]

Issue

Whether a municipal energy conservation code that relates to sustainable buildings and construction is preempted by federal law when portions of the code set higher efficiency standards than federal law.

Rationale

The City of Albuquerque, as defendant, argued that the prescriptive compliance path is not preempted because there are other lawful compliance paths included in the Code. Cap and TradeFurther, the City argued that because other compliance paths are lawful performance-based paths, the prescriptive path, which is only available to buildings under 20,000 square feet, is saved from preemption as a lawful alternative and that the optional prescriptive path merely provides guidance toward energy goals and does not constitute a mandate. Cap and TradeThe court, however, disagreed reasoning that the prescriptive path sets forth specific requirements that HVAC is mandated to be met in order to comply with the Code.

The court, in its analysis, looked to congressional intent of the National Appliance Energy Conservation Act,[3] and in doing so it looked to the relevant preemption statute, which states that "[a] standard prescribed or established under section 6313(a) of this title shall... supersede any State or local regulation concerning the energy efficiency or energy use of a product for which a standard is prescribed or established.…"[4] Moreover, the court found no support for the City's argument that the inclusion of one or more alternatives for compliance in a regulation keeps each of the alternatives from being considered a regulation. The court found that argument is directly contrary to Section 6297's broad preemption provision.

Conclusion

The District Court ultimately found that the prescriptive provisions of the Code that required the use of heating, ventilation, or air conditioning products with energy efficiency standards more stringent than federal standards are regulations that concern the energy efficiency of covered products, and are, therefore, preempted as a matter of federal law.

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Endnotes

1. 633 F.Supp.2d 83, 95-96 (S.D.N.Y. 2009).
2. *Id.* at 95-96 (S.D.N.Y. 2009).
3. 42 U.S.C. § 6316(b)(2)(A).
4. *Id.*

* * *

Akiak Native Cmty. v. U.S. EPA, 625 F.3d 1162 (9th Cir. 2010)

Facts

On October 31, 2008, the United States Environmental Protection Agency (EPA) approved the State of Alaska's application to assume the responsibility for administering portions of the National Pollutant Discharge Elimination System ("NPDES") in accordance with the Clean Water Act (CWA). The CWA established the NPDES program "to regulate the discharge of pollutants into the navigable waters of the United States."[1] Though EPA was initially solely responsible for administering the NPDES permitting program in each state, Section 402(b) of the CWA expressly provides for the transfer of the permitting authority to state officials after the state meets specific criteria. After a state submits "a full and complete description of the program it proposes to establish and administer under state law" and certifies "that the laws of such State… provide adequate authority to carry out the described program,"[1] EPA "shall approve" each application "unless [EPA] determines that adequate authority does not exist" under the State's law "to perform nine specified categories of functions in connection with the state's administration of the NPDES program."[2] After a state's program is approved and the state is granted permitting authority, EPA still retains oversight over the program and it can object to any individual permit given by the state that does not comply with the CWA's requirements[3] or even withdraw its approval of the whole program if the state fails to administer the program in accordance with the CWA.[4] After EPA deemed the State of Alaska's original application to administer the Alaska Pollutant Discharge Elimination System ("APDES") incomplete, the State resubmitted its application on May 1, 2008. After this application was found to be complete by EPA, the agency held a 60-day notice and comment period, as well as three public hearings in Alaska, and then published a document of its Response to Comments. EPA found that the APDES program met all of the requirements of Section 402(b) of the CWA and thus approved the State's application on October 31, 2008, and the permitting program was delegated to Alaska on November 7, 2008, with the State to assume control in four phases lasting from 2008 until 2011. Cap and Trade

Procedural History

Petitioner Akiak Native Community filed a petition for review of EPA's approval of the State of Alaska's application to administer the APDES program. Motions to intervene were granted for the State of Alaska in support of EPA and the Elkow Tribal Council and others in support of Petitioners.

Issues

The main issue in this case is whether EPA's decision to transfer authority to the State of Alaska to administer the NPDES permitting system was arbitrary or capricious. Specifically, the court addressed the petitioner's allegations that EPA failed to adequately ensure "(1) that Alaska state law will provide the same opportunities for judicial review of permitting decisions as required by federal law; (2) that the State has the necessary enforcement tools to abate permit violations; and (3) that subsistence resources will be protected as mandated by the Alaskan National Interest Land Conservation Act ("ANILCA")."[5]

Rationale

Courts review challenges to EPA actions under Section 509(b) of the CWA under the Administrative Procedure Act's arbitrary and capricious standard.[6] Under this highly deferential standard, an agency's decision will not be vacated "unless it has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or it is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[7]

The issue pertaining to judicial review began with a disagreement as to the proper meaning of the pertinent regulation which provides, *inter alia*, that the state "provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process."[8] Further, it maintains that such standard will be met "if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit," but it will not be met "if it narrowly restricts the class of persons who may challenge the approval or denial of permits."[9] The court accepted EPA's interpretation that the regulation establishes a general standard by which to evaluate state programs, rather than a requirement that the State program be subject to judicial review that is the same as that available in challenges of federally issued permit decisions. In addressing whether Alaska's program actually met the general standard required by the regulation, the court had to determine the significance of the "losers pay" rule governing the award of attorney's fees for civil actions in Alaska that was in contrast with the federal fee-shifting "dual standard" that does not award fees to a prevailing defendant unless the action was "frivolous, unreasonable, or groundless, or [if the] plaintiff continued to litigate after it clearly became so."[10] The court reasoned that it was difficult to determine the impact that Alaska's rule would actually have on public participation and on the availability of judicial review. Further, the court found that there were safeguards to prevent the risk of paying substantial attorney's fees from deterring public interest plaintiffs. Namely, Alaska Rule of Civil Procedure 82 allows for the court to vary an award of attorney's fees based upon numerous factors, two of which were relevant to the issues in this case providing "the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly-situated litigants from the voluntary use of the courts" and "other equitable factors deemed relevant."[11] Additionally, the State of Alaska had pledged that it would not seek attorney's fees from unsuccessful permit challengers "unless the appeal was frivolous or brought simply for purposes of delay" and there was no evidence that prevailing third-party intervenors had been awarded substantial attorney's fees in the past. The court found that EPA's approval of the APDES was not arbitrary or capricious despite the uncertainty regarding the possibility of attorney's fee awards. Further, the court noted that EPA would still maintain oversight of the program and it can withdraw its approval if it finds that the program fails to meet the CWA standards.

On the next issue, the court found that there was no reason to conclude that Alaska lacked adequate enforcement remedies because the State's law enabled the State to sue permit violators. The court reasoned that the lack of ability for state officials to assess civil penalties administratively, which was inconsistent with EPA's ability to do so, did not, by itself, warrant the denial of Alaska's application, as the CWA was silent regarding administrative penalties and the regulations expressly provided that administrative assessment of penalties is "not mandatory." Further, though such authority was "highly recommended" in the regulations, Alaska law expressly permitted the other two "highly recommended" means of enforcement identified in the regulations, i.e., "suing to recover costs related to remedial efforts and suing for compensation for environmental damage."

Regarding the ANILCA issue, the court looked to the recent Supreme Court decision in *Home Builders* where the petitioners argued that EPA failed to consider the effects that its transfer of the NPDES program to Arizona would have on endangered and threatened species under Section 7(a) of the Endangered Species Act.[12] Following the Supreme Court's holding, the Ninth Circuit found that a requirement to consider section 810 of ANILCA would similarly add a tenth criterion to the CWA's mandate and thus change Section 402(b)'s statutory command. Cap and Trade

Conclusion

The Ninth Circuit held that EPA's decision to approve the State of Alaska's application for NPDES permitting authority was not arbitrary or capricious and denied the petition for review.

Dissent

Judge Schroeder disagreed with the majority only on the issue of judicial review, finding that the APDES failed to satisfy Congress's explicit public participation mandate[13] because of the "loser pays" attorney's fee system and its potential adverse deterrence effects. The dissent argued that the program did not meet the regulation's standard because Alaska law only offers access to the courts to those petitioners willing and able to risk having to pay attorney's fees and thus believed the delegation to be arbitrary and capricious.

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Endnotes

1. 33 U.S.C. § 1342(b).
2. 33 U.S.C. § 1342(b)(1)-(9).
3. 33 U.S.C. § 1342(d)(2)(B).
4. 33 U.S.C. § 1342(c)(3).
5. *Akiak Native Commty*, 625 F.3d at 1164.
6. *Am. Mining Cong. v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992).
7. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife* ("Home Builders"), 551 U.S. 644, 658 (2007) (citations omitted).
8. 40 C.F.R. § 123.30.
9. *Id.*
10. *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978).
11. Alaska R. Civ. P. 82(b) (3)(I), (K).
12. *Home Builders*, 551 U.S. at 649.
13. *See* 33 U.S.C. § 1251(e) ("[p]ublic participation in the development, revision, and enforcement of any regulation…established by the Administrator or any State…shall be provided for, encouraged, and assisted by the Administrator and the States.").

* * *

Albano v. Town of Islip, No. 28127-2007, 2010 NY Slip Op 33232(U), 2010 WL 4732789 (Sup. Ct., Suffolk Co. Nov. 8, 2010)

Facts

Petitioners sought to build a single-family house on a parcel of wetland that was adjacent to the Connequot River in the Town of Islip. The river would flow through the rear yard of the property. The Town of Islip Board of Appeals granted a variance for the construction subject to approval by the Engineering Department. However, in a memo dated June 26, 2007, David Janover, the Islip Town Engineer, denied the application for a wetlands permit to construct the house because he found that the proposed construction on the wetland would have an adverse impact on the environment. Most notably he found that the drainage problems and additional flooding of the road and adjacent properties would cause more pollutants to pass into the Connequot River and eventually into the Great South Bay.

Procedural History

Petitioners brought this Article 78 proceeding requesting mandamus relief claiming that the Town Engineer's decision to deny the wetlands permit was not derived from of a rational basis, but was arbitrary and capricious. Petitioners submitted affidavits of an environmental scientist and the former Town Engineer for the Town of Islip, both attesting to petitioners' claim that the construction will not adversely impact the river or adjacent wetlands. Further, petitioners claim that "the denial of the permit amounts to a constructive taking of the subject premises without compensation."[1]

Issue

Whether the Town Engineer's denial of the wetlands permit was arbitrary, capricious, and an abuse of discretion after the Town of Islip Board of Appeals granted a variance for the construction of the single-family dwelling.

Reasoning

In an Article 78 proceeding, the appropriate inquiry that the court must address is whether the determination by the agency had a rational basis. Such a decision should not be disturbed or substituted by the court unless the agency's action was "arbitrary, unreasonable, irrational, or indicative of bad faith."[2] The court relied on the holding in *Ball*, which held "[w]here there are conflicting conclusions of the experts, the agency's decision to rely on its own expert does not render the determination arbitrary, capricious, or lacking in rational basis."[3] Here, respondents were "entitled to rely on their own expert's opinion in denying the application," even though the Town Engineer's determination disagreed with those made by the petitioner's experts.[4]

Conclusion

Petitioners' request for mandamus relief seeking to have the court review the respondent's determination was denied and the proceeding dismissed. Also, petitioners' "constructive taking" claim failed because they were aware of the wetlands regulations prior to purchasing the property.

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Endnotes

1. *Albano v. Town of Islip*, No. 28127-2007, 2010 NY Slip Op 33232(U) (N.Y. Sup. Ct., Nov. 8, 2010).
2. *Id.* (citing *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 809 N.Y.S.2d 98 (2d Dep't 2005)).
3. *Id.* (citing *Ball v. N.Y. State Dep't of Envtl. Conservation*, 35 A.D.3d 732, 826 N.Y.S.2d 698 (2d Dep't 2006).
4. *Id.*

* * *

Supreme Court Grants Cert. in Second Circuit Court's Decision in *American Electric Power Co. v. Connecticut*

The Supreme Court has granted certiorari for the Second Circuit's decision in *American Electric Power Co. v. Connecticut*.[1] The Petitioners, the American Electric Power Company, the Tennessee Valley Authority, and other large American electric utility companies, in their petition for writ of certiorari argued that the Supreme Court should rule that the Plaintiffs, eight states, the City of New York, and three non-profit land trusts, did not have standing, the case presented a non-judiciable political question, and finally the claims do not constitute a federal common law nuisance.

In the Second Circuit, the Plaintiffs sued multiple electric power corporations that own and operate fossil-fuel-fired power plants in twenty states under the federal common law of nuisance. Plaintiffs claimed that the Defendant power companies were significantly contributing to climate change, which ultimately resulted in causing the Plaintiffs severe current and future injuries. Ultimately, the Plaintiffs sought to force the Defendants to cap and reduce their carbon dioxide emissions. The Second Circuit found that: (1) the case did not present a nonjusticiable political question; (2) the Plaintiffs have standing; (3) the Plaintiffs stated claims under the federal common law of nuisance; (4) the Plaintiffs' claims are not displaced by the Clean Air Act ("CAA"); and, finally, (5) the Tennessee Valley Authority ("TVA"), a quasi-governmental defendant, is not immune from the suit.[2] As a result of the Second Circuit's decision, state governments and advocacy groups can seek injunctive relief against greenhouse gas-emitters based on common-law nuisance theories.

The Supreme Court's eventual ruling on the matter could have an even larger impact that would affect countless other climate-change lawsuits that are now pending in federal courts, as well as future litigation. The Supreme Court granted certiorari on three questions: (1) whether states and private parties have standing to seek injunctive relief against utility companies for their contribution to climate change; (2) whether a cause of action to cap emissions can be implied under the federal common law of nuisance; and (3) whether Plaintiffs' claims present "nonjusticiable" political questions.[3] With regard to the second question, the Defendants argue that the Clean Air Act establishes a comprehensive statutory scheme that displaces any federal common-law nuisance claims.[4] The Plaintiffs claim that the Clean Air Act does not displace their common-law claims unless and until the Environmental Protection Agency takes regulatory action to control such emissions.[5] Their claim was upheld by the Second Circuit. The third question being looked at by the Supreme Court focuses on whether the Plaintiffs' claims to cap the Defendants' emissions at "reasonable" levels would be governed by "judicially discoverable and manageable standards" or could be resolved without "initial policy determination[s] of a kind clearly for nonjudicial discretion."[6]

If the Supreme Court upholds the Second Circuit's decision it could set strong precedent allowing other states and interest groups to bring suits seeking to enjoin large emitters of carbon dioxide. If, however, the Court reverses the decisions, it could halt pending climate-change and related lawsuits and create a precedent that would aid industries that are contributing to the climate-change crisis. In that case, attempts to limit carbon emissions could be done through the legislative and executive branches only.

Oral arguments were heard April 19, 2011.

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Endnotes

1. *Connecticut v. American Electric Power Co.*, 582 F.3d 309 (2d Cir. 2009).
2. Alona G. Metz and Taraneh Fard, *Supreme Court To Decide Fate of Global Warming Litigation In American Electric Power Co. v. Connecticut*, Climate Change and Clean Technology Blog, December 22, 2010, http://www.cleantechlawblog.com/2010/12/articles/global-climate-change/supreme-court-to-decide-fate-of-global-warming-litigation-in-american-electric-power-co-v-connecticut/.
3. Chadbourne & Parke LLP, "Climate Change" Litigation Update—U.S. Supreme Court Grants Certiorari in Climate Change Lawsuit—Will Decide Whether Companies May Be Sued for Their Greenhouse Gas Emissions And Resultant Contribution to Global Warming, www.chadbourne.com, December 20, 2010, http://www.chadbourne.com/files/Publication/e3150a98-9359-489b-833e-ccb5ae1aa52d/Presentation/PublicationAttachment/f5fa7936-76d0-49da-b402-47ab0e72313e/ClimateChagne-%20Cert%20Granted%20in%20AEP%20ca_3.pdf.
4. *Id.*
5. *Id*.
6. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

* * *

The Wilderness Society v. Kane County, __ F.3d __ (10th Cir. 2011), 2011 WL 79487

Facts

This case concerns off-road vehicle access to federal lands in southern Utah.[1] The Grand Staircase-Escalante National Monument lies partly within Kane County, Utah, and is managed by the federal Bureau of Land Management (BLM).[2] The Monument is crossed by a number of routes, which have been closed to off-road vehicle access by the BLM, pursuant to its management plan for the Monument.[3] Kane County claims those routes as county roads, established under the 1866 federal land grant known as R.S. 2477.[4] Between 2003 and 2005, the County replaced BLM signs on the disputed routes with its own signs, and enacted a local ordinance opening county roads including the disputed routes to off-road vehicle use.[5] The signs were removed, and the ordinance rescinded, during the course of the ensuing lawsuit.[6]

Procedural History

The Wilderness Society (TWS) filed suit against the County in 2005, and won a summary judgment in district court declaring that the County's actions violated the Supremacy Clause and enjoining similar actions by the County in the future.[7] The Tenth Circuit affirmed the district court in a 2-1 panel decision.[8] The circuit court then granted a rehearing en banc, and this decision, vacating the district court decision and remanding for dismissal, was issued in early January.[9] The case was heard en banc by eleven judges: six joined the majority opinion, three concurred, and two (the same two who formed the majority of the panel decision) dissented.[10]

Issue

The case turned on a question of standing. To have standing, a plaintiff must show "an 'injury in fact' that a favorable judgment will redress,"[11] and must assert the plaintiff's "own legal rights and interests."[12] TWS members "used lands 'within earshot of the disputed roads for recreational purposes'"[13] and could not do so if the roads were noisy. This gave the plaintiff an injury in fact that an injunction could redress, but what (or whose) legal rights were being asserted?

Rationale

As the majority saw it, the plaintiff TWS lacked standing because it was asserting the legal rights of a third party—the federal government's property rights—in a dispute over whether or not the Monument routes closed by the BLM were established County rights of way under R.S. 2477. "TWS has taken sides in what is essentially a property dispute between two landowners, only one of which is represented (Kane County). But TWS lacks any independent property rights of its own."[14] The majority found no "countervailing considerations"[15] such as a confidential relationship between plaintiff and third party or any "genuine obstacle"[16] to the third party asserting its own rights, and thus denied TWS standing.

The panel majority's argument, repeated here in dissent, was that TWS did have standing as a party with an injury to its recreational and aesthetic interests caused by the operation of a preempted local ordinance, a claim that could not have been brought by the United States.[17] The case at bar, the dissent argued, does not depend on a final determination of property rights that should be decided in a quiet title action between the landowners. An injunction against Kane County "unless and until…it proves in a court of law that it possesses a right of way to any such route" would be a perfectly possible outcome.[18] Furthermore, "[e]ven if Kane County had successfully established the validity of its claimed rights of way by bringing a [quiet title] action, the preemption issue would remain," since "the United States may regulate even valid rights of way."[19]

The three concurring judges considered the case moot once the County rescinded its ordinance. The absence of an "openly expressed intent"[20] by the County to reenact the ordinance was enough, for the concurrence, to allay suspicion that the rescission was merely "temporarily altering questionable behavior."[21] (The concurrence also argued that no Supremacy Clause argument applied here, since the County was merely asserting an interest in the disputed routes that arose from federal law, "not acting pursuant to authority given to it by any state law."[22] The dissent in turn pointed to Utah Code §§ 41-22-10.1 and 10.5, allowing Utah counties to designate roadways by posting signs, and asserted that a county signage program is not federal law enforcement.[23])

Conclusion

There are hints in these opinions of the fraught context in which this case was decided. The concurrence calls the questions "hotly disputed,"[24] while the dissent describes the local situation as "chaotic and hostile."[25] The legally decisive point here is really in how each side chooses to frame the case, rather than in the arguments about standing they are able to make once it is framed. The majority calls this a property dispute in which a third party has no place, without presenting analysis that demonstrates how it reached that characterization. ("TWS obviously seeks to enforce the federal government's property rights.…"[26]) The dissent, on the other hand, focuses on "a citizen's right to protest and be heard on the supremacy of federal rules and regulations"[27] and the injury to the aesthetic and recreational rights of TWS's members. No doubt, the larger issues at stake here, pitting local against federal control and motorized against quiet recreation, have not been settled by dismissal of this case.

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Endnotes

1. *Wilderness Soc'y v. Kane County*, __ F.3d __ (10th Cir. 2011), 2011 WL 79487, *2.
2. *Id.*
3. *Id.*
4. *Id.* R.S. 2477 was repealed in 1976 by the Federal Land Policy and Management Act (FLPMA), but FLPMA expressly preserved any existing rights of way. Pub. L. No. 94-579, § 701(a), 90 Stat. 2743, 2786.
5. 2011 WL 79487 at *2.
6. *Id.*
7. *Wilderness Soc'y v. Kane County*, 560 F. Supp. 2d 1147 (D. Utah 2008).
8. *Wilderness Soc'y v. Kane County*, 581 F.3d 1198 (10th Cir. 2009).
9. 2011 WL 79487 (January 11, 2011).
10. *Id.*
11. *Id.* at *4 (quoting *Elk Grove Unified Sch. Dist. V. Newdow*, 542 U.S. 1, 11 (2004)).
12. *Id.* at *4 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).
13. 2011 WL 79487 at *5.
14. *Id.* at *7.
15. *Id.* at *8 (quoting *Warth v. Seldin*, 422 U.S. 490, 500-01 (1975)).
16. *Id.*
17. 2011 WL 79487 at *24.
18. *Id.* at *17.
19. *Id.* at *21.
20. *Id.* at *11.
21. *Id.* at *26.
22. *Id.* at *12.
23. *Id.* at *29.
24. *Id.* at *10.
25. *Id.* at *16.
26. *Id.* at *7.
27. *Id.* at *14.

* * *

Women's Voices for the Earth, Inc. v. Procter & Gamble Co., 29 Misc.3d 358, 906 N.Y.S.2d 721 (Sup. Ct., N.Y. Co. 2010)

Facts

Women's Voices for the Earth, Inc. ("Voices for the Earth") brought a special proceeding pursuant to CPLR Article 78 ("Article 78") seeking a declaratory judgment and an injunction in mandamus to compel Procter & Gamble Co. ("Procter & Gamble") to comply with the New York State Department of Environmental Conservation's ("DEC") regulations.[1] Specifically, Voices for the Earth sought Procter & Gamble's compliance with 6 NYCRR 659.6(a), which it alleged requires Procter & Gamble to file reports detailing the ingredients in their household cleaning products.[2] DEC promulgated the regulation pursuant to its authorization under Environmental Conservation Law ("ECL") § 35-0107.[3]

Procedural History

Procter & Gamble moved to dismiss Voices for the Earth's amended petition, additionally arguing that in the alternative, the court should stay the proceeding until DEC is joined as a party.[4] Procter & Gamble alleged that the statute did not provide a private right of action; Voices for the Earth failed to exhaust its administrative remedies; Voices for the Earth did not have standing; mandamus was unavailable, as the regulations in question are discretionary; and that DEC is a necessary party.[5] In response, Voices for the Earth countered that the regulations are facially mandatory; Article 78 and the common law provide a cause of action in mandamus; it has standing due to its members' use of Procter & Gamble's products; and that because DEC actions are not being challenged, DEC is not a necessary party.[6]

Issues

1. Does Voices for Earth have standing to bring an Article 78 mandamus proceeding to compel compliance with 6 NYCRR 659.6(a)?
2. Does the statute in question, 6 NYCRR 659.6(a), provide a private right of action?

Rationale

1. Standing

The court first examined standing, noting that some or all of the members of Voices for the Earth must demonstrate that they "'would suffer direct harm, injury that is in some way different from that of the public at large.'"[7] Voices for the Earth failed to make this showing and did not demonstrate that its members' injuries were any different than that of the general public.[8]

2. Private Right of Action

Despite already holding that Voices for the Earth did not have standing, the court went on to additionally hold that ECL § 71-3103, which authorizes the Attorney General to enforce ECL Article 35, does not provide a private right of action. The first prong of the inquiry as to whether a private right of action exists is whether plaintiffs "are part of 'the class for whose particular benefit the statute was enacted.'"[9] The court stated that Voices for the Earth failed to satisfy this first prong, noting the statute was passed for the benefit of the public at large and the fact that Voices for the Earth pursued an Article 78 mandamus proceeding "does not lead to a different result."[10]

Conclusion

The court dismissed Voices for the Earth's amended petition by a July 28, 2010 decision and order due to Voices for the Earth's failure to allege standing, and the finding that there is no private right of action under ECL § 71-3103.

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Endnotes

1. *Women's Voices for the Earth, Inc. v. Procter & Gamble Co.*, 29 Misc.3d 358, 358-59, 906 N.Y.S.2d 721, 722-23 (2010).
2. *Id.* at 359.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id*.
7. *Id.* at 360 (*quoting Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 774, 570 N.Y.S.2d 778 (1991)).
8. *Id.*
9. *Id.* (*quoting Carrier v. Salvation Army*, 88 N.Y.2d 298, 302, 644 N.Y.S.2d 678, 667 (1996)).
10. *Id.* at 360-361.

* * *

South Coast Air Quality Management Dist. v. F.E.R.C., 621 F.3d 1085 (9th Cir. 2010)

Facts

Pursuant to the Natural Gas Act (NGA), South Coast Air Quality Management District (South Coast) petitioned for review of orders made by the Federal Energy Regulatory Commission (FERC) approving the expansion of an existing pipeline to allow natural gas to flow northward carrying gas from Mexico into California. South Coast has also petitioned for review of the FERC orders confirming the environmental impact statement (EIS) pursuant to the National Environmental Policy Act (NEPA).[1]

North Baja Pipeline LLC (North Baja) operates a pipeline that travels from Arizona, through California and down to the international border with Mexico. The pipeline currently only transports natural gas in a southbound direction. North Baja commenced the action at issue after applying to FERC for a permit to expand and modify its pipeline system to facilitate the transport of natural gas from Mexico into the Basin.[2] The Basin is in the jurisdictional area of South Coast. Upon completion of the proposed modifications to the pipeline, gas would be transported into the California system and then dispersed using a local public utility corporation.[3]

In accordance with NEPA, FERC issued an EIS for the proposed project, focusing on whether any potential environmental impacts may result from an expansion of the pipeline. South Coast filed the EIS with USEPA and included responses from the public comment period. In South Coast's response, it alleged that FERC was in violation of its duties under NEPA, the Clean Air Act, and the Natural Gas Act. South Coast claimed that FERC only looked at the environmental impact relating to construction and use of the pipeline and failed to consider effects of natural gas emissions. South Coast asserted that failure to look at the consequences of consumer use and to adopt measures to remedy that impact was a violation of FERC's federally mandated duties.

Lastly, South Coast previously argued that the maximum Wobbe Index (WI), used to measure the interchangeability of natural gas, should be 1360 in California. FERC denied the proposal and decided on a WI of 1385, which it found "should not result in a material increase in the emission of air pollutants."[4] FERC based this on the standard set by the Public Utilities Commission of the State of California (CPUC).[5] South Coast filed the instant petition for review.[6]

Issues

1. Did the EIS adequately consider the environmental impact of end-use burning of gas?
2. Did FERC's approval of the pipeline expansion violate the NGA?
3. Was FERC obligated by the CAA to execute a full conformity determination as to the effects of end-use burning?
4. Was FERC's reliance on the CPUC's natural gas quality standards reasonable?

Rationale

Under NEPA, federal agencies are required to prepare a detailed EIS regarding the environmental effects of their major federal actions. NEPA's goals are to 1) ensure that an agency like FERC will have good information about the potential environmental effects of its action and will carefully consider that information when making a decision; and 2) guarantee that this information will be made available for the public to consider.[7] The court in this case reviewed FERC's substantive NEPA decisions and determined that the agency, after almost two years of preparation and public input, had in fact adequately and reasonably considered the environmental impact and had disclosed this impact to the public. FERC, by complying with CPUC standards, clearly considered the impact of end-use burning.[8]

The purpose of the NGA is to promote the development of natural gas supplies and provide the resource at reasonable costs.[9] The NGA grants FERC the power

to authorize interstate pipelines. When FERC evaluates a proposal for a certificate of public necessity and convenience under NGA section 7, it is to balance a number of factors to determine "that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity."[10] Here, FERC determined that approving the North Baja Pipeline, in accordance with CPUC standards, would be serving the public interest by increasing natural gas supplies and making it more affordable. Additionally, FERC determined that natural gas is less environmentally damaging than some of its alternatives.[11] The court held that South Coast failed to show that FERC abused its discretion under the NGA.[12]

The CAA imposes specific requirements on federal agencies whose actions have the potential to affect state efforts to achieve national ambient air quality standards. An agency must prepare a conformity analysis examining the effects of the project's emissions and must mitigate them if the agency's action is likely to result in direct or indirect emissions that will exceed a threshold set out by USEPA.[13] In the present case, FERC did not file a conformity analysis regarding the Baja North pipeline project so the court had to look at whether the end-use emissions of the project qualified as direct[14] or indirect[15] as set out by the statute.

The court examined whether the agency's action would fall into the category of indirect emissions.[16] The court determined that any indirect emissions that may result in this case are not reasonably foreseeable because the emissions would not be identifiable at the time the conformity determination is made, the location of such emissions is not known and the amount released is not readily quantifiable.[17]

Finally, the court determined that FERC was not obligated to perform a full conformity determination under the CAA because there remains substantial uncertainty with regard to the eventual use of the Baja North natural gas. The CAA does not require FERC to use its authority to change or affect state air quality issues.[18]

FERC, in its final EIS, required that only gas which met the strictest state guidelines be delivered to customers. FERC adjusted its standards to those determined by the CPUC when it lowered the WI standard from 1437 to 1385. The court held that FERC's EIS statement contained a reasonably thorough discussion of the environmental impact of its actions, based on the information available from CPUC.[19] The court also found there was no merit to South Coast's claim that CPUC had dodged its responsibility to analyze emissions in the Basin.[20]

Conclusion

The court denied South Coast's petition for review,[21] holding that FERC:

1. adequately considered the end-use burning of gas in its EIS;
2. did not violate the NGA or CAA; and
3. reasonably relied on CPUC's natural gas standards.

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Endnotes

1. *S. Coast Air Quality Mgmt. Dist. v. F.E.R.C.*, 621 F.3d 1085, 1085-86 (9th Cir. 2010).
2. *Id.* at 1089 (stating that the Basin predominantly consists of four counties: Orange, Los Angeles, Riverside, and San Bernardino).
3. *Id.*
4. *Id.* at 1090.
5. *Id.* at 1093.
6. *Id.* at 1090.
7. *Id.* at 1092.
8. *Id.* at 1093-94.
9. *Id.*
10. *Id.* at 1098-99 (quoting, 15 U.S.C. § 717f(e)).
11. *Id.* at 1099.
12. *Id.*
13. *Id.*
14. *Id.* at 1099-1100 (defining "direct emissions" as "emissions of a criteria pollutant 'that are caused or initiated by the Federal action and occur at the same time and place as the action'").
15. *Id.* at 1100 (defining "indirect emissions" as those that "1) are caused by Federal action but could occur at a later time or may be farther removed in distance from the action itself but are reasonably foreseeable; and 2) the Federal agency can practicably control and will maintain control over it due to a continuing program responsibility of the Federal agency").
16. *Id.*
17. *Id.* at 1101.
18. *Id.*
19. *Id.* at 1095.
20. *Id.* at 1096.
21. *Id.* at 1101.

* * *

In re Doctor, No. CO2-20100514-64, 2010 N.Y. ENV. LEXIS 44 (DEC July 21, 2010)

Facts

This case pertained to a suit brought by the New York Department of Environmental Conservation ("DEC") against Garry Doctor for his unauthorized and unreported application of pesticides in two Brooklyn restaurants.[1] Doctor held a Category 7A commercial pesticide applicator certification for structural and rodent control that was set to expire in 2011.[2] However, pesticide application in restaurants requires a 7F certification, which Doctor did

not possess.[3] Records from two Brooklyn Popeye's Chicken and Biscuit restaurants revealed that Doctor made 136 commercial pesticide applications between October 2007 and March 2010.[4] Additionally, Doctor failed to file an annual report documenting his pesticide applications in 2009.[5]

Doctor had been a partner in the business All-City Pest Control, LLC until the partnership was dissolved in June 2009.[6] Subsequently, Doctor began doing business under the name Reliable Pest Control.[7] However, DEC records did not include a commercial pesticide business registration for any entity named "Reliable" or "Reliable Pest Control."[8]

Procedural History

DEC charged Doctor with violations under Article 33 of the Environmental Conservation Law (ECL) and 6 NYCRR 325.[9] Doctor was charged with a total of 137 violations.[10] DEC personally served process on Doctor in June 2010, and followed up by filing a motion with DEC's Office of Hearing and Mediation Services (OHMS) for an order without a hearing.[11]

Issues

1. Whether DEC's motion for order without hearing should be granted.
2. Whether DEC's requested civil penalty in the amount of $137,000 should be granted.
3. Whether Doctor's Category 7A should be revoked.

Rationale

A. DEC's Motion for Order Without a Hearing

The court granted summary judgment to DEC on Doctor's violations of ECL 33-1301(8), ECL 33-1205(1) and 6 NYCRR 325.7(b) regarding the unauthorized and unreported application of pesticides by Doctor.[12] ECL 33-1301(8) states that it is "unlawful for any person to engage in the application of pesticides without a pesticide applicator certificate registration issued by [DEC], except while working under the direct supervision of a certified applicator."[13] Additionally, Section 325.7(b) of 6 NYCRR dictates that "no certified commercial pesticide applicator shall engage in the application of pesticides for which certification is required other than in a category or subcategory specified on the certification."[14] These 136 applications constituted the majority of violations under the ECL and NYCRR.[15]

Doctor's failure to file an annual report was found to be a clear violation of ECL 33-1205(1), which requires that all commercial pesticide applicators file an annual report detailing pesticide applications.[16] Doctor's failure to file this report constituted an additional violation.[17]

Summary judgment was denied on Doctor's alleged violation of ECL 33-1301(8-a) and 6 NYCRR 325.23(a). ECL 33-1301(8-a) states that it is "unlawful for any person or business to engage in the business of applying pesticides unless the business is registered."[18] Similarly, 6 NYCRR 325.23(a) mandates that "each business engaged in the commercial application of pesticides must register annually with the Department."[19] The court denied summary judgment on Doctor's alleged failure to register with DEC as a business because there were triable issues of fact regarding Reliable Pest Control's corporate status and Doctor's personal liability.[20]

B. Requested Civil Penalty

DEC sought a civil penalty in the amount of $1,000 per violation.[21] Pursuant to ECL 71-2907(1), DEC is authorized to impose "a civil penalty of up to $5,000 for the first violation of ECL Article 33 or its implementing regulations, and up to $10,000 for any subsequent violation."[22] The court recommended that DEC impose a total civil penalty in the amount of $137,000 (137 violations at $1,000 per violation).[23]

C. Revocation of Category 7A Certification

DEC sought the revocation of Doctor's commercial pesticide applicator certification.[24] Under DEC's pesticide enforcement policy, DEE-12, a certification should be revoked "where the respondent has engaged in conduct indicative of a disregard of health, safety, and environmental protection."[25] In the case at hand, as Doctor possessed a Category 7A certification, he was reasonably expected to be aware of the enhanced training obligations a Category 7F certification required.[26] Even though he was aware or reasonably should have been aware of the heightened Category 7F certification requirements, Doctor applied pesticides in restaurants without the requisite training and certification.[27] The court held that these actions demonstrated Doctor's "significant disregard for health and safety and environmental protection."[28]

Conclusion

Doctor was found to be in violation of ECL Article 33 and 6 NYCRR 325 due to his unauthorized and unreported commercial pesticide application at two Brooklyn restaurants.[29] A civil penalty of $137,000 was imposed and Doctor's commercial pesticide application certification was revoked.[30] Former DEC Commissioner Grannis, through his Assistant Commissioner for Hearings and Mediation Services, adopted the Administrative Law Judge's summary report as his decision and concluded that "the revocation of [Doctor's] commercial pesticide applicator certification is clearly warranted on this record" due to his disregard of health, safety, and the environment.[31]

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Endnotes

1. *In re* Doctor, No. CO2-20100514-64, 2010 N.Y. ENV. LEXIS 44, , at *1 (DEC July 21, 2010).
2. *Id.* at *9.
3. *Id.* at *3, 9-10.
4. *Id.* at *3.
5. *Id.* at *2.
6. *Id.* at *10.
7. *Id*.
8. *Id.* at *11-12.
9. *Id.*
10. *Id.* at *7, 16.
11. *Id.* at *1-2.
12. *Id.* at *13-14.
13. *Id.* at *12.
14. *Id.*
15. *Id.* at *13.
16. *Id.* at *13-14.
17. *Id.*
18. *Id.* at *14.
19. *Id.*
20. *Id.* at *14-15.
21. *Id.* at *15.
22. *Id*.
23. *Id.* at *16.
24. *Id.*
25. *Id.* at *17.
26. *Id*.
27. *Id.* at *17.
28. *Id.*
29. *Id.* at *18.
30. *Id*. at *2, 18.
31. *Id.* at *2.

Recent Legislation

Diesel Emissions Reduction Act of 2010

On January 4, 2011 President Obama signed House of Representatives Bill 5809, creating Public Law 111-364, the Diesel Emissions Reduction Act of 2010.[1] Originally sponsored by U.S. Representative Jay Inslee of Washington's 1st District, the Bill is intended to be an extension of the Energy Policy Act of 2005.[2]

The Diesel Emissions Reduction program was originally enacted as part of the Energy Policy Act of 2005, and was designed to improve air quality by providing and funding a replacement plan for old outdated diesel engines.[3] Although new diesel engines with updated technology are more efficient and longer lasting than the comparable gasoline engine, without the proper technology, outdated diesel engines can pollute at a rate much higher than that of the gasoline engine.[4] The original Diesel Emissions Reduction Act of 2005 provided over $1 billion dollars in funding to replace outdated diesel engines and machinery but was scheduled to expire in mid-2011.[5] The new Diesel Emissions Reduction Act of 2010 reinstates the provisions of the Energy Policy Act of 2005 and provides grants, rebates, and low-cost loans for the replacement of outdated diesel engines.[6] The Act calls for $100,000,000 to be appropriated per year from 2012–2016 for purposes of diesel engine replacement and upgrade.[7]

The Act allows for owners of outdated diesel machinery to apply for grant money and low-cost loans for the replacement of "dirty" diesel engines.[8] The grants and loans, once allocated, can be used by the owning entity at any eligible contractor for update or full replacement of the diesel engine.[9] The Diesel Emissions Reduction Act of 2010 defines eligible contractor as a shop that has contracted with the funds administrator, having the capacity to sell diesel equipment or upgrade diesel vehicles with Environmental Protection Agency-certified technology.[10]

The New Diesel Emissions Reduction Act of 2010 is slated to take effect in October 2011, just as the Diesel Emissions Reduction Act of 2005 is scheduled to sunset.[11]

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Endnotes

1. *H.R. 5809: Diesel Emissions Reduction Act of 2010, 111th Congress* 2009–2010, GOVTRACK.US, http://www.govtrack.us/congress/bill.xpd?bill=h111-5809.
2. *Id.*
3. The Library of Congress, *Committee Reports: 109th Congress (2005-2006) Senate Report 109-133*, THOMAS, http://thomas.loc.gov/cgi-bin/cpquery/?&dbname=cp109&sid=cp109Nwob7&refer=&r_n=sr133.109&item =&&&sel=TOC_3006&.
4. *Diesel Emissions Reduction Act Moves Forward, Needs Support*, CLEANENERGY.ORG (Dec. 2, 2010), http://blog.cleanenergy.org/2010/12/02/der/.
5. Thomas, *supra* note 3.
6. Diesel Emissions Reduction Act of 2010, H.R. 5809, 111th Cong. § 2 (2010).
7. H.R. 5809, § 797.
8. H.R. 5809, § 2.
9. H.R. 5809, § 2.
10. H.R. 5809, § 2.
11. H.R. 5809, § 4.

* * *

What About *Our* Water Part 2: Plugging the Leak

New York State is dripping wet. Over 70,000 miles of rivers and streams marbleize its land, and its water laps the shores of more than 7,600 lakes, ponds, and reservoirs. Moreover, the state cradles two of the five Great Lakes, where more fresh water sloshes about than any other place on Earth. The abundance of water has given the state government the luxury of leaving water withdrawals mostly unregulated. Current oversight is limited to the Department of Health's (DOH) drinking water regulation and the Department of Environmental Conservation's (DEC) reporting requirement for large withdrawals; otherwise, water use is governed only by the common law doctrines of riparian rights and the public trust.

Recently, however, concerns over falling water levels in the Great Lakes-St. Lawrence River Basin have developed, and in 2008, culminated in the Great Lakes Compact (Compact).[1] Under the Compact, New York and seven other states are legally bound to enact water conservation policies that improve and efficiently manage withdrawals from the Great Lakes Basin, which covers approximately 50 percent of the state. Yet, the DEC currently lacks the authority to fulfill the state's obligations under the Compact, and with energy companies thirsty for massive volumes of water for hydrofracture gas extraction, the regulatory vacuum has never been so apparent.

At former Governor Paterson's request, Senator Thompson introduced legislation addressing this problem in 2010. Senate bill S8280 (same as Assembly Bill A11436)[2] grants DEC the authority to regulate the state's surface and ground water by creating a permitting process for those who have the capacity to withdraw 100,000 gallons of water or more per day. This regulatory program not only allows New York to meet its responsibilities under the Compact, but also introduces sound conservation practices for such large water withdrawals statewide. Smaller withdrawals, such as municipal drinking water, are not subject to the new regulation, but will continue to be regulated by DOH for the protection of public health.

The State Senate passed the bill in 2010, but the Assembly failed to act. The bill is expected to be re-introduced in early 2011. Once the bill is law, New York will be performing its duties under the Great Lakes Compact, and this leaky regulatory structure will follow the notion of unlimited resources into the pages of history.

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Endnotes

1. Great Lakes-St. Lawrence River Basin Water Resources Compact, Dec. 13, 2005, *available at* http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Water_Resources_Compact.pdf.
2. S. 8280, 233rd N.Y. Leg. Sess.

* * *

The Reduction of Lead in Drinking Water Act

On January 4, 2011, President Obama signed Senate Bill 3874, the Reduction of Lead in Drinking Water Act, into law.[1] Sponsored by Senator Barbara Boxer of California, and introduced in September of 2010,[2] the bill became Public Law No: 111-380.[3] The Act amends Section 1417 of the Safe Drinking Water Act (SDWA) to change the statutory definition of "lead free."[4]

The SDWA prohibits any person from introducing into commerce, or using in public water systems or plumbing that provides potable water, pipes, plumbing fixtures and fittings, solder, or flux, that are not lead free.[5] Prior to the enactment of S. 3874, "lead free" was defined as not containing more than 0.2 percent lead in solders and flux, and 8 percent lead in pipes and pipe fittings.[6] With regard to plumbing fittings and fixtures intended to be used with drinking water, the statute required manufacturers to assist third-party certifiers in establishing voluntary standards for an acceptable level of lead leaching.[7]

The amendment maintains the maximum level of lead allowed in solders and flux at 0.2 percent.[8] However, the new definition of "lead free" for pipes, pipe fittings, plumbing fittings and fixtures, is considerably more stringent than before. Lead free for these pipe and plumbing accessories now requires the manufacturer to ensure that there is no more than 0.25 percent lead in a weighted average of the wetted surfaces.[9] To calculate the weighted average of each wetted component the Act provides a formula that must be used: the percentage of lead in each wetted component multiplied by the "ratio of the wetted surface area of that component to the total wetted surface area of the entire product."[10] The average weighted lead content of the entire product is the sum of the weighted percentages of lead in each wetted component.[11]

Pipe and plumbing fittings and fixtures that are used solely for non-potable services and components used in specified potable water valves are exempt from these prohibitions.[12] The new definition of lead free will become effective thirty-six months from the bill's enactment.[13]

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Endnotes

1. The Library of Congress, *Bill Summary & Status: 111th Congress (2009 - 2010): S.3874: All Information*, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN03874:@@@L&summ2=m&.
2. *Id.*
3. Reduction of Lead in Drinking Water Act, Pub. L. No. 111-380, § 124 Stat. 4131 (2011).
4. *Id.*
5. Safe Drinking Water Act, 42 U.S.C. § 300g-6(a)(1-3) (2006).
6. *Id.* § 300g-6(d)(1-2).
7. *Id.* § 300g-6(d)(3) & (e).
8. Reduction of Lead in Drinking Water Act, § 2(a)(2).
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* § 2(a)(1).
13. *Id.* § 2(b).

* * *

The Environmental Access to Justice Act

The State Environmental Quality Review Act (SEQRA) was passed in 1975 to protect the public from environmental harm resulting from government actions.[1] While the statute does require agencies to provide a public comment period, the only meaningful recourse a citizen has for an improper SEQRA determination is judicial review under CPLR Article 78.[2] Without Article 78 review an agency can fulfill SEQRA and approve even the most detrimental projects by simply ignoring objections raised during the comment period.

In 2009, the New York State Court of Appeals held in Save the Pine Bush, Inc. v. Common Council of City of Albany[3] that a citizen has standing in an Article 78 suit reviewing a SEQRA decision only if that citizen proves that the alleged injury differs "in kind or degree"[4] from the injury sustained by the general public. Under this requirement, a citizen who suffers the same type or amount of harm as the general public cannot sue for judicial relief. Restricting standing in this way snatches Article 78 away from concerned citizens, and slashes the number of citizens who may, in a court of law, hold government agencies to the standards set forth by the legislature in 1975.

To correct this glaring deficiency in New York's environmental policy, Senator Thompson sponsored a bill drafted to remove the "in kind or degree" barrier to attaining standing in Article 78 proceedings.[5] Senate Bill S1635 (Assembly Bill A3423) is titled the "Environmental Access to Justice Act," and it occupies a mere five lines of substantive text. Brevity, however, is not exclusive of significance. If the State Assembly passes the Bill as the Senate did in 2010, no New York citizen will be denied standing for failing to sustain more harm than the public at large, and any person or group will be able to challenge government actions that adversely impact the environment.

Opponents have raised the concern that the bill will open the proverbial floodgates of litigation; that increased access to judicial review of SEQRA determinations will drag worthy projects into protracted and frivolous lawsuits. This is a good concern. However, it fails to consider Article 78's existing limitations, such as the cost of litigation and exhaustion of administrative remedies.[6] Between the traditional standing doctrine and the requirements under Article 78, an additional requirement for SEQRA actions seems unnecessary. On the other hand, there is no disputing that greater access to the court creates the potential for more lawsuits. Whichever argument prevails, the fact remains that without the ability to bring a suit for judicial review, SEQRA amounts to little more than paperwork.

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Endnotes

1. N.Y. Environmental Conservation Law § 8-0101.
2. N.Y. Civil Practice Law & Rules § 78 (CPLR).
3. *Save the Pine Bush, Inc. v. Common Council of City of Albany*, 13 N.Y.3d 297, 890 N.Y.S.2d 405 (2009).
4. *Id.* at 309 (citing *Soc'y of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 775 570 N.Y.S.2d 778, (1991)).
5. S. 1635, 233rd N.Y. Leg. Sess.
6. CPLR § 7801.

* * *

Annual Meeting and Section Business Meeting

January 27-28, 2011 • Hilton New York • New York, NY

Barry Kogut and Rosemary Nichols at Section Awards Ceremony

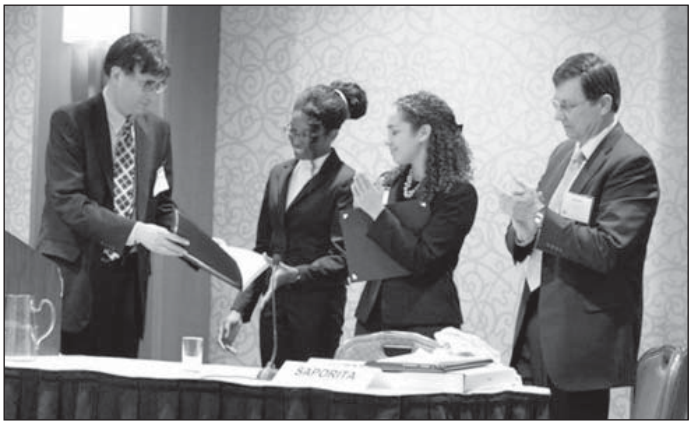
NYSDEC Commissioner Joe Martens

Phil Dixon and Barry Kogut

At the Section Business Meeting, as part of the Section's celebration of its 30th Anniversary in 2010, four members were honored: Rosemary Nichols, Gail Port, Walter Mugdan, and Lou Alexander. The inscriptions on the awards presented read as follows:

- Rosemary Nichols, Esq., in recognition of her enthusiastic and faithful participation in the life of the Section and her pioneering as the first woman chair of the NYSBA Environmental Law Section.
- Gail S. Port, Esq., in recognition of her strength and steadfastness in promoting the well-being of the NYSBA Environmental Law Section and her unlimited creativity and energy in addressing environmental legal issues.
- Walter E. Mugdan, Esq., in recognition of his extraordinary commitment of time and effort to the NYSBA Environmental Law Section, his brilliant presentations to educate Section members, and his efforts to encourage and support new lawyers in government service.
- Louis A. Alexander, Esq., in recognition of his dedication to excellence, passion for detail, and commitment to the ideals of the profession in his service to the NYSBA Environmental Law Section.

Barry Kogut and Walter Mugdan at Section Awards Ceremony



Lou Alexander, Letecia Whetstone, Noelle Diaz, and Barry Kogut at Minority Law Student Fellowship Award Ceremony

Barry Kogut and Lou Alexander at Section Awards Ceremony

Section Committees and Chairs

The Environmental Law Section encourages members to participate in its programs and to contact the Section Officers or Committee Chairs for information.

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