

The New York Environmental Lawyer

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

Message from the Chair



Louis A. Alexander

As stated in the Environmental Conservation Law, it is the policy of New York State “to conserve, improve and protect [New York’s] natural resources and environment and to prevent, abate and control water, land and air pollution, in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well being.” This policy represents the central mission of the Department of Environmental Conservation in protecting our state’s natural resources and ensuring a healthful environment.

As we know, the Department’s responsibilities are extensive. Through eighteen divisions and nine regional offices, with a staff numbering over 3,700, the Department manages more than 1,900 facilities and 4.4 million acres of land. This is in addition to the Department’s responsibility for ensuring compliance with the state’s environmental laws and regulations, as well as many federal environmental obligations.

In April 2007, Assemblyman Pete Grannis became Commissioner of the Department of Environmental Conservation. A long-standing advocate for the environment, Commissioner Grannis has championed new and innovative strategies to address environmental issues and concerns. At our Section’s fall meeting, members of the Department’s executive staff described the policy and program approaches that the Department was pursuing, both in reforming existing programs and advancing new initiatives. At our Section’s Annual Meeting, Commissioner Grannis in his keynote address further

underscored the major goals and directions the Department would be pursuing. At both Section meetings, the Department expressed its interest in obtaining input from the environmental bar in the dialogue on environmental programs and policies.

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A blueprint of these new directions was detailed in the Commissioner's February 2008 testimony before a joint hearing of the New York State Legislature's Senate Finance Committee and Assembly Committee on Ways and Means. The Commissioner identified five priorities "to concentrate and organize the Department's work, guide the development of future initiatives, and revitalize [agency staff]." Specifically, the priorities are:

- **Combating Climate Change**—The Commissioner noted, as examples, the Department's work on initiatives to reduce greenhouse gas emissions, encourage low carbon design, research carbon sequestration and sustainable forestry, and elevate climate change awareness;
- **Fostering Green and Healthy Communities**—The Commissioner referenced in particular Department projects to promote smart growth, clean up contaminated properties, reduce waste generation and maximize recycling, promote community greening and urban forestry, and preserve open space;
- **Connecting New Yorkers to Nature**—In this regard, the Department is promoting environmental education and outdoor experiences, and providing access to green space close to where people live and work;
- **Building a Toxic-Free Future**—The Commissioner discussed innovative approaches that the Department was pursuing to reduce waste and use of toxins, promote green alternatives and technologies, support alternatives to the use of hazardous pesticides, and further public access to information on toxic substances; and
- **Safeguarding New York's Unique Natural Assets**—The Commissioner noted the Department's efforts to conserve and restore watersheds, ensure sufficient water management infrastructure, promote sound land use and planning, and protect biodiversity and unique ecosystems.

During the past year, the Department's organizational structure has been revamped. For example, a new Commissioner's Policy Office has been established to foster innovative and inter-program / divisional policymaking at the Department. An Office of Climate Change has also been created to coordinate and advance programs to address climate change issues. An Office of Natural Resource Damages has been established to assess and recover natural resource damages from responsible parties. An Office of Invasive Species will be coordinating programs to combat the adverse impacts of invasive species on our state's environment. The Department has also organized a wetlands team to develop plans to arrest the rapid loss of marshes in Jamaica Bay.

Significantly, the prior pattern of staff cutbacks at the Department has been reversed. In the past year alone, 109 positions have been added to facilitate implementation of Department programs and responsibilities.

In his February testimony, the Commissioner highlighted proactive and innovative policy approaches that have been implemented. For example, in the area of climate change, the agency has created the first-in-the-nation power plant carbon cap and trade program, has joined the Climate Registry and is a founding member of the International Carbon Action Partnership. For the first time in almost ten years, the Department will be updating the state's Solid Waste Management Plan, which will assist in advancing recycling and waste reduction policies.

The Department has also finalized rulemakings that support the agency's environmental mission. New regulations have been adopted to reduce mercury contamination from coal-fired power plants and reduce smog and acid rain-causing emissions from power plants. Other rulemakings in the proposal stage would revise new source review regulation governing construction and modification of power plants and other large industrial facilities, revise open burning rules and establish limits on outdoor wood-burning boilers. Rulemakings have been initiated in a number of areas to revise current regulations and programs, including the green building tax credit program, the state's solid waste regulations, and freshwater mapping and classification rules.

As discussed at our Section's fall and annual meetings, the Department's Office of General Counsel has been reorganized, merging the program and enforcement divisions. Renewed attention is being directed to investigating and prosecuting criminal violations of the state's environmental statutes, particularly reflected in the revamping of the Department's Bureau of Environmental Crimes Investigation. In addition, the Department is directing new attention to environmental justice concerns. An example of the integration of environmental justice and enforcement efforts, the Department recently undertook an initiative to address diesel trucks violating state air emission standards and engine idling laws in East Harlem, New York, an area with high asthma rates.

The past year has demonstrated renewed focus in addressing environmental issues and advancing the Department's agenda. It is an exciting time as environmental policies and programs are being reevaluated, and new initiatives implemented. The Department of Environmental Conservation has sought an open dialogue, which offers to members of the environmental bar a significant opportunity to participate in developing future environmental policies and programs.

Louis Alexander

From the Editor

In this issue, Lou Alexander starts the process of taking leave of his responsibilities by submitting what, for many other people, would be a year's worth of articles and other items. Lou's "Message From the Chair" discusses DEC's current policy orientation. The general policy goals that Lou, who is Assistant Commissioner, sets forth herein can only be seen as refreshing for the environmental lawyers, and other lawyers with a deep interest in environmental policy, who comprise the journal's readership. These goals hopefully give expression to the interests of citizens who are rapidly reawakening to environmental matters after the long national slumber of the past decade. One hopes, with quickening excitement, that regardless of who wins the presidential election, government, industry and citizens will act on renewed interests in addressing environmental problems in creative, and maybe even profitable, ways.



Lou also informs our readership about structural changes at DEC. As a practical matter, DEC is one of the more important agencies for many of our members. Knowing who are the Regional Directors and Regional Attorneys is manifestly important for attorneys who must ascertain the Department's goals and preferences regarding matters that impact on their clients' decision making. Lou provides an invaluable breakdown of DEC's nine regions, and each region's administrators (page 8). In my own quick scan of the list, I saw several recognizable names, some of whom regularly attend Section events. I am sure that many hurdles for attorneys are avoided merely by the expedient of a casual, and perfectly proper, conversation in an informal setting, such as our Section events tend to be. Then, mutual comfort levels can be established, concerns articulated, and potential differences explained.

After his review of DEC administrative matters, Lou turns to the Environmental Law Section's administration and activities. The breakdown of Section Committees and Committee chairs is always available in the back of the journal. Lou notes some new Section members who have been appointed to the Executive Committee (page 9). He also provides an excellent narrative of the Section's fall meeting at Saratoga Springs (page 10) and the Annual Meeting in New York City (page 4). Rounding out his update, Lou also announces the recipients of the Section's Minority Fellowships, a Section outreach program with which he has been associated for many years.

John Vassallo submits an article that argues how New York State, in contrast to the EPA and the State of California, has demonstrated regulatory inaction with respect to perchloroethylene (perc), used by dry cleaners, and the co-location of dry cleaning facilities with residential prem-

ises. John further posits that the regulatory inaction results not from regulatory lethargy but, rather, from structural entropy which, itself, is a consequence of several agencies being vested with regulatory power in this regard. In the absence of clear direction as to which agency is accountable for exercising that power, the agencies cancel one another out, so to speak.

John's proposition regarding agency inaction in the regulation of perc-residential co-location is a springboard for his wider-ranging discussion about theories of regulatory behaviors. He argues that, in a structural sense, the diffusion and overlapping of jurisdiction may often result in the fragmentation of responsibility in the "regulatory commons." With attribution to the theory's author, he analogizes the "regulatory commons" with the "tragedy of the commons" utilized in theories of environmental law and policy. John analyzes the theory, which he illustrates by reference to the regulation of perc co-location—contrasting New York State with other jurisdictions—but suggests that it has broader applicability to other environmental policies when multiple levels of government, to be effective, must coordinate their efforts. John's article placed first in the Section's William R. Ginsberg Memorial Essay Competition.

Patrick Donnelly's article, also a finalist in the Section's competition, addresses the more topical issue of the thinning polar ice cover and the consequential changes in regional ecology. Patrick uses the poignantly photogenic polar bear to illustrate the relationship between greenhouse gas emissions in temperate parts of the globe and habitat destruction in remote and exotic regions that always seemed safely out of reach. The preservation of many large, and endangered, terrestrial mammals may be counted among the success stories of modern environmental law and policies, and even that presents only a perpetual project. For elephants, many large cats, and possibly some larger primates, efforts to protect the habitat, and to engage local populations in those projects, have resulted in some great success—as with elephants—and more modest success—as with gorillas and orangutans. The problem with polar bears, of course, and other marine mammals, is that they are so finely attuned to a unique habitat that, biologically speaking, they have nowhere else to go. As ice disappears, it will not be replaced. So, too, with this magisterial mammal that has achieved such iconic status.

Megan DiMiceli submits a primer on site plan reviews, notes the growing trend by which courts tend to favor municipal planning boards in their decision-making, and further notes that parties challenging such decisions will have a difficult row to hoe in claiming constitutional violations. Jamie Thomas, who is concluding her term as Student Editor, shepherded the student case summaries.

Kevin Anthony Reilly

Highlights of the Annual Meeting

The New York State Environmental Law Section held its Annual Meeting on February 1, 2008. The morning's continuing legal education program, entitled "Brownfields Revisited: New Directions / New Opportunities," was ably co-chaired by David J. Freeman, of Paul, Hastings, Janofsky & Walker, LLP, Joan Leary Matthews, of the New York State Department of Environmental Conservation ("DEC"), Lawrence P. Schnapf, of Schulte Roth & Zabel LLP, and E. Gail Suchman, Esq., of Stroock & Stroock & Lavan LLP.

The CLE program consisted of three panels, the first of which addressed new developments at the state level. Val Washington, DEC Deputy Commissioner, and Dale Desnoyers, DEC's Director of the Division of Environmental Remediation, addressed the strengths and weaknesses of the current brownfield cleanup program, highlighting changes to restructure and reform the program that were contained in the governor's 2008 budget bill. Attention was particularly directed to the proposed amendment to cap the amount of the tangible property tax credit that would be available for participation in the brownfield cleanup program.

One of the highlights of cooperative action at the state level has been a stronger working relationship between the DEC and Empire State Development ("ESD"). Christine Costopoulos, the Director of Environmental Policy at ESD, underscored those efforts, as well as initiatives that ESD is undertaking in the brownfields area.

The second panel presented perspectives from the stakeholder community. Program Co-chair Lawrence Schnapf, Philip S. Bousquet of Green & Seifter Attorneys PLLC, David Palmer of the New York Lawyers for the Public Interest, Mark McIntyre of the New York City Mayor's Office of Environmental Coordination, and Gregory H. Gushee, Senior Vice President of The Related Companies, each addressed various aspects of the brownfield cleanup program. Implications of tax policy, environmental concerns regarding the levels of cleanup required, municipal considerations, development impacts, and recent judicial decisions relative to the brownfields program were reviewed.

The third panel addressed the ethical obligations of an attorney in determining whether to report a client's spill, where the client chooses not to report. Alan J. Knauf of Knauf Shaw LLP, and Second Vice-Chair of our Section, presented the applicable ethical rules and standards relating to such notification requirements.

The Section's luncheon / annual meeting immediately followed the morning CLE program. The annual meeting began on a poignant note with the presentation of a Section Award posthumously to Peter A. A. Berle. Peter was

one of the leaders of the environmental movement, and a tireless advocate for progressive environmental change. The inscription on the award reads as follows:

In recognition of his long years of leadership in environmental law, including as a member of the New York State Assembly, helping to establish the Adirondack Park Agency and to create the State Environmental Quality Review Act, serving as Commissioner of the New York State Department of Environmental Conservation, serving as President of the National Audubon Society, and serving as a model of personal and professional integrity for the New York State Bar.

Lila Berle accepted the award on behalf of her late husband, and she was joined by her daughter Mary. Mrs. Berle's remarks provided a warm remembrance of Peter and the great ideals for which he stood.

At the Section's luncheon, the Section was honored to have the keynote address presented by the current DEC Commissioner, Pete Grannis. In his remarks, Commissioner Grannis, who became commissioner in April 2007, stressed that the most fundamental role of the DEC is protecting the environment consistent with statutory obligations. He expressed the belief that sound environmental policy goes hand in hand with successful economic development. He pledged that, while he is Commissioner, the DEC will be open and responsive to the regulated community—businesses, individuals, and governmental entities, large and small. He underscored his belief that honest discussion not only leads to stronger relationships, but results in stronger outcomes. DEC Executive Deputy Commissioner Stuart Gruskin also addressed the luncheon and outlined various DEC priorities, including the brownfields cleanup program, upgrades to the state's wastewater infrastructure, recycling, climate change and greenhouse gas impacts, smart-growth policies, environmental justice, endangered species, and enforcement.

On behalf of the Section, former Section Chair Virginia Robbins presented a Section Award to Commissioner Grannis. The inscription on the award to Commissioner Grannis reads as follows:

In recognition of his exemplary leadership of the New York State Department of Environmental Conservation and his long-term dedication to, and achievement of, progressive environmental goals, including in the areas of air quality, environmental impact review, and safe hazardous waste disposal, while serving

with distinction in the New York State Assembly.

Former Section Chair James Periconi presented the report of the Section's Nominating Committee (the members of which also included Philip Dixon, Laurie Silberfeld, and Jennifer Hairie). Carl Howard was nominated as the new Section Secretary. The other current Section officers were advanced to the next higher office. Commencing on June 1, 2008, Joan Leary Matthews will become Chair of the Section upon the retirement of current Chair Lou Alexander.

The Section's Awards Committee (comprising Philip Weinberg, Jean McCarroll, and Michael Lesser), in addition to the Section Awards, awarded certificates of merit to two members of our Section: Jennifer L. Hairie (co-chair of the Section's Energy Committee); and Kevin G. Ryan (co-chair of the Section's Environmental Impact Assessment Committee). Chair Lou Alexander, on behalf of the Section, presented a gift to Walter Mugdan, who had served with distinction as Chair in 2006-2007. Under Walter's direction and leadership, our Section has been significantly strengthened both organizationally and in its leadership role on environmental issues.

In addition, summer fellowships were awarded to four minority law students: Osafo Barker, Andrew T. Jhun, Kyu-Ah Julia Kang, and Erika Selli. An article on the fellowship program appears on page 45 of this issue. We were also joined at the luncheon by two past minority fellowship recipients, Jorge Figueroa and Sheila Jain.

Also, at the previous evening's reception, the Section presented a plaque to former Section Chair Gail S. Port in gratitude for her long-standing commitment and dedication to the Section.

Attendance at both the morning CLE program and at the Section's luncheon / annual meeting was at a record level. In addition, this year's guests at the luncheon

included a number of students from Pace and other law schools. We were also pleased that Jamie Thomas, the student editor of "Recent Decisions in Environmental Law" which appears in each edition of the Section's *Environmental Lawyer* newsletter, and who is a recent graduate of St. John's University School of Law School, was able to join us.

The afternoon was devoted to meetings of the Section's committees and Executive Committee. A number of the committees held working sessions on issue agendas. In particular, as part of the Global Climate Change Committee meeting, Professor Nicholas Robinson, joined by Terri Unger, gave an excellent presentation entitled "After Kyoto, What? The Roadmap from Bali."

The Executive Committee meeting addressed a number of matters, including membership issues, the status of the Section's advocacy initiatives, diversity issues, financial matters (with a positive note that the Section again finished the year with a budgetary surplus), reports from various committees and the New York Bar Foundation, and consideration of green guidelines for the NYSBA, among other matters.

As noted at the Executive Committee meeting, upcoming programs on the schedule include the Section's Legislative Forum (held on May 7), the June 3, 2008 EPA Region II program (of which the Section is a co-sponsor), and the Section's Fall Meeting (September 26-28) in Hauppauge, Long Island.

The Annual Meeting marked another successful year for our Section, and offered an excellent forum for discussing critical environmental issues and for the exchange of new ideas. And of course, it provided a great opportunity to interact with long-standing colleagues as well as to make new acquaintances in our environmental community.

Louis Alexander

Save the Dates
Environmental Law Section
FALL MEETING
September 26-28, 2008
Hyatt Regency • Long Island

**Scenes from the
Environmental Law Section
2008 Annual Meeting
February 1, 2008
New York Marriott Marquis**



Lila Berle and daughter Mary Berle accepting Environmental Law Section Award given posthumously to Peter A.A. Berle. A former commissioner of the Department of Environmental Conservation and president of the National Audubon Society, Peter Berle was recognized for his environmental commitment and achievements



Comissioner Grannis receiving Environmental Law Section Award for his leadership on environmental issues from Section Council representative Virginia C. Robbins



Department of Environmental Conservation Commissioner Pete Grannis giving keynote address at the Environmental Law Section luncheon



Lila Berle and daughter Mary Berle



Section chair Louis A. Alexander making a point during opening remarks



Commissioner Grannis and Stuart Gruskin, DEC Executive Deputy Commissioner, at luncheon meeting



Section Council Certificate of Merit recipient Kevin G. Ryan receiving congratulations from Michael J. Lesser



Lawrence P. Schnapf, one of the co-chairs of the Section's CLE program.



Section Council Certificate of Merit recipient Jennifer L. Hairie with Stuart Gruskin and Section officer Philip H. Dixon



(at left) Dale Desnoyers, Director of DEC's Division of Environmental Remediation, at the Section's CLE program



One of the Section's morning CLE panels on brownfield issues, with Section First Vice-Chair Joan Leary Matthews



Section member and former Chair John Hanna, Jr. raising a question at the luncheon meeting on DEC policy

Regional Offices at the Department of Environmental Conservation

During the course of the past year, various staff appointments have been made at the Department of Environmental Conservation's regional office level. Set forth below is a list of the current Regional Directors and the attorneys in each of the Department's nine regions, in addition to regional office addresses.

REGION 1

Regional Director
SUNY@ Stony Brook
50 Circle Road
Stony Brook, NY 11790-3409

Peter Scully

Regional Attorney

Vernon Rail

Assistant Regional Attorneys

Craig Elgut
Gail Rowan
Kari Wilkinson
Susan Schindler
Ingrid Peterson, paralegal

REGION 2

Regional Director
One Hunter's Point Plaza
47-40 21st Street
Long Island City, NY 11101-5407

Suzanne Mattei

Regional Attorney

Louis Oliva

Assistant Regional Attorneys

John Byrne
Udo Drescher
Robert Hernan (Commissioner Initiatives)
Gail Hintz
Megan Joplin
John Nehila
John Urda
Lisa Garcia (Environmental Justice)
Louise Munster, paralegal

REGION 3

Regional Director
21 South Putt Corners Road
New Paltz, NY 12561-1620

William Janeway

Regional Attorney

John Parker

Assistant Regional Attorneys

Joyce Giudice
Carol Krebs
Kelly Turturro

REGION 4

Regional Director
1130 North Westcott Road
Schenectady, NY 12306-2014

Gene Kelly

Regional Attorney

Richard Ostrov

Assistant Regional Attorneys

Jill Phillips
Karen Lavery

REGION 5

Regional Director
1115 NYS Route 86, P.O. Box 296
Ray Brook, NY 12977-0296

Elizabeth Lowe

Regional Attorney

Christopher Lacombe

Assistant Regional Attorneys
Steven Brewer

REGION 6

Regional Director
317 Washington Street
Watertown, NY 13601-3787

Judy Drabicki

Regional Attorney

Randall Young

Assistant Regional Attorney
Nels Magnuson

REGION 7

Regional Director
615 Erie Blvd West
Syracuse, NY 13204-2400

Kenneth Lynch

Regional Attorney

Bruce Fein

Assistant Regional Attorneys
Jennifer Powell
Margaret Sheen
Barbara McGinn

REGION 8

Regional Director
6274 East Avon-Lima Rd
Avon, NY 14414-9519

Paul D'Amato

Regional Attorney

Leo Bracci

Assistant Regional Attorneys
Lisa Perla Schwartz
James Bradley

REGION 9

Regional Director
270 Michigan Avenue
Buffalo, NY 14203-2999

Abby Snyder

Regional Attorney

Maureen Brady

Assistant Regional Attorneys
Teresa Mucha
Annette Sansone
David Stever
Karen Draves

Executive Committee: Welcome to New Members

Central to the governance of our Environmental Law Section is the Executive Committee. The Executive Committee consists of the Section officers, the Section Delegate and Alternate Delegate to the House of Delegates of the State Bar Association, the chairs and co-chairs of the Section's standing committees and task forces, the members of the Section Council (comprising the former Section Chairs), and at least five, but not more than fifteen, members-at-large. The responsibilities of the Executive Committee include, in part, facilitating the development of Section policy, implementing the Section's purposes, proposing new Section programs and initiatives, and approving the Section's annual budget.

Since June 2007, a number of Section members have been newly appointed to the Executive Committee and we very much welcome and appreciate their participation and interest in the Section. The new members include the following:

Kathleen L. Martens, member-at-large
Eileen D. Millett, member-at-large
John Parker, member-at-large

Gary A. Abraham, co-chair, Public Participation, Intervention & ADR

James A. Boglioli, co-chair, Coastal and Wetland Resources

Megan Rose Brillault, co-chair, Pollution Prevention
Kelly Corso, co-chair, Environmental Business Transactions

Janis E. Fallon, co-chair, Water Quality
Yvonne E. Marciano, co-chair, Legal Ethics
Ruth A. Moore, co-chair, Agriculture and Rural Issues
Edward F. Premo, II, co-chair, Land Use

Hon. Eleanor Stein, co-chair, Global Climate Change
Randall C. Young, co-chair, Legal Ethics

Also joining the Executive Committee this past year are a new NYSBA executive committee liaison, John S. Marwell, and a new liaison from the Young Lawyers Section, Joseph F. Castiglione. We look forward to working with John and Joe on Section activities.

Several of our existing Executive Committee members have recently taken on new positions. These include:

Vincent Altieri, co-chair, Global Climate Change
Teresa M. Bakner, co-chair, Legislation
Janice A. Dean, co-chair, Membership
Robert H. Feller, co-chair, Environmental Business Transactions
Virginia C. Robbins, co-chair, Global Climate Change
Peter C. Trimarchi, co-chair, Biotechnology, Nanotechnology and the Environment

Among the initiatives that the Executive Committee has advanced are proposals in support of legislative changes. These include, for example, support for: amending the New York Freshwater Wetlands Law to assume the administration of the federal freshwater wetlands program in New York; legislation that would lessen restrictions on standing for plaintiffs under the State Environmental Quality Review Act; legislation that would expand the coverage of New York State's bottle bill; and revisions to the New York State Brownfield Cleanup. The specific position papers the Section has adopted with respect to these initiatives can be found at the Environmental Law Section's homepage at the New York State Bar Association website (www.nysba.org/Environmental).

Louis A. Alexander

Request for Articles



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

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(212) 340-0403

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

www.nysba.org/Environmental Lawyer

Highlights: Fall 2007 Section Meeting

Against a backdrop of perfect autumn weather emblazoned with scarlet and gold, the Section held its fall meeting at the Gideon Putnam Hotel in Saratoga Springs, New York on October 12–14, 2007.

At Friday night's dinner, the Section welcomed Department of Environmental Conservation ("DEC") Deputy Commissioner and General Counsel Alison H. Crocker who gave the opening address. Ms. Crocker outlined the recent restructuring of the DEC's Office of General Counsel, the creation of two Deputy Counsel positions, and the heightened coordination of legal resources between the agency's central office and its nine regional offices. Ms. Crocker advised that the DEC was in the process of revisiting and updating a number of its enforcement and other legal-related policies. DEC Deputy Counsels Michelle Crew and Philip LoDico were also present and, with Alison Crocker, interacted with many of our members during the evening.

On Saturday morning, immediately prior to commencement of the continuing legal education ("CLE") program, the Section hosted a special guest, New York State Bar Association President-elect Bernice K. Leber. President-elect Leber spoke on the critical importance of various environmental issues confronting our state and nation, including most particularly, global warming and climate change. She underscored her intent to have the New York State Bar Association, with the assistance of our Environmental Law Section, take a forward-looking role on these issues.

The first panel of the morning program addressed new directions at the DEC. With the appointment of a new commissioner in April 2007, significant changes have been underway at the DEC. Stuart F. Gruskin, DEC's Executive Deputy Commissioner, outlined events of the first six months in the new administration, including executive hiring, establishment of a Policy Office and a Climate Change Office, and the development of commissioner priorities. Mr. Gruskin discussed new initiatives that were being implemented at the agency to enhance environmental protection and to strengthen various environmental programs. Deputy Counsel Michelle Crew discussed aspects of the reorganization of the Office of General Counsel, noting the consolidation of the divisions of legal affairs and enforcement. She emphasized the efforts being undertaken to ensure consistency on state-wide enforcement issues, and improved coordination in enforcement and permitting initiatives. Robert E. Hernan, Senior Counsel for Commissioner Initiatives, outlined new initiatives relating to asthma/outdoor air and to urban rivers. He noted that his position has been charged with developing a strategy and structure for identifying environmental problems that were not being addressed in

the ordinary course of the agency's business, and taking enforcement action to resolve those matters.

Anne Reynolds, Director of the Commissioner's Policy Office, discussed the rationale for the office's formation, its mission, and the types of matters that the Policy Office would be addressing. Concluding the first panel was a presentation by Leslie J. Surprenant, a biologist with DEC, on the problems of invasive species in New York State. Ms. Surprenant documented the significant adverse impacts and costs of invasive species on our state's environment. Various species were discussed, from the Asian Longhorn Beetle to the Chinese Mitten Crab to "didymo" algae. She reviewed various efforts being undertaken on the federal and state level, including New York State's creation of an invasive species task force, to manage and curtail the impacts of invasive species.

The next panel addressed the issue of noise, reviewing noise methodology, noise impacts, and the manner by which noise is considered in environmental reviews. William R. Adriance of the DEC's Division of Environmental Permits reviewed the State legal and regulatory language that addresses noise. He discussed the Department's guidance entitled "Assessing and Mitigating Noise Impacts," which serves to identify when noise levels may cause a significant environmental impact and gives methods for noise impact assessment, and avoidance and reduction measures. Eric Zwerling, Adjunct Professor at the Rutgers Noise Technical Assistance Center in New Brunswick, New Jersey, provided a comprehensive review of the impacts of noise exposure, the fundamentals of sound (as to intensity and frequency), and commonly used and reported metrics (such as time-weighted averaging and percentile levels).

The concluding panel addressed "cutting-edge" issues under the State Environmental Quality Review Act. Michael B. Gerrard of Arnold & Porter LLP addressed climate change in the context of the environmental impact review process, and the importance of such review in seeking to achieve reductions in greenhouse gases. He noted that, in reviewing projects, direct operational impacts, purchased electricity, induced trips, construction impacts, and the impact of climate change on a project (for example, rising sea levels and greater temperature variations) were factors to be evaluated. Christopher Rizzo of Carter Ledyard & Milburn LLP addressed the issue of alienation of parkland in the context of the public trust doctrine and SEQRA, and, in particular, whether environmental review can be delayed until after alienation authority is secured. Kevin G. Ryan, tackled the issue of determining when the SEQRA statute of limitations period begins. He discussed the implications of the Court of

Appeals decision in *In re Eadie*, and the inconsistent New York case law in this area.

The morning CLE program was ably coordinated by panel chairs from the Section: George A. Rodenhause, Teresa M. Bakner, Mark A. Chertok, and Kevin G. Ryan.

That afternoon, Section members participated in a number of activities. Section member (and General Counsel for the Office of Parks, Recreation and Historic Preservation) Glen Bruening arranged a tour of the Saratoga Spa Park. Led by Park Naturalist Alli Schweizer, the tour covered the history, architecture, and geology of the park, with stops at a number of the famed healing water springs. Section member Carl Howard, along with several other Section members, embarked on a vigorous hike up one of the local mountains on a picture-perfect Saturday afternoon. Other conference attendees chose to avail themselves of massages and baths in the park facilities, or to visit museum and shops in downtown Saratoga Springs.

On Saturday evening, the Section was honored to have Carol Ash, Commissioner of the Office of Parks, Recreation and Historic Preservation ("OPRHP"), as its keynote speaker. Commissioner Ash provided an overview of New York's magnificent park system, discussed the financial and infrastructure needs of our parks, and outlined various initiatives that OPRHP was implementing to preserve and improve our park resources. Following her presentation, Commissioner Ash spent time with Section members to further discuss park issues.

Also at Saturday evening's dinner, Miriam Villani, who has been the long-standing coordinator of the Section's law school essay contest, announced the 2007 Professor William R. Ginsberg Memorial Essay Contest award recipients. These included John A. Vassallo III of Pace University School of Law, Ian J. Silverbrand of Cornell Law School, Patrick D. Donnelly of Pace University

School of Law, and Heather Lee Drayton of Hofstra University School of Law.

On Sunday morning, Teresa Bakner of Whiteman Osterman & Hanna, Dominic R. Cordisco of Drake Loeb Heller Kennedy Gogerty Gaba & Rodd PLLC, and Drayton Grant of Grant & Lyons, LLP presented a forum on wetlands issues. Specifically, the forum addressed the question of what wetlands and streams are regulated under the federal Clean Water Act, focusing particularly on new federal guidance issued in response to the *Rapanos* decision.

Following the wetlands forum, time was allocated for meetings of the Section's committees and Executive Committee. Among the matters addressed by the Executive Committee were new membership initiatives presented by Membership Committee Chair Howard M. Tollin, the adoption of revised Section Bylaws (which had been prepared by Section Members Walter E. Mugdan, Miriam E. Villani, and Philip H. Dixon), and a review of the Section's positive financial status by Section Treasurer Barry R. Kogut. In addition, David J. Freeman presented a brownfields position paper proposing various reforms to the brownfields program. The position paper reflected the work of David and his co-chair, Lawrence P. Schnapf, together with other members of the Hazardous Waste / Site Remediation Committee. Following discussion, the position paper was approved by the Executive Committee. A copy of the position paper, which has subsequently been presented to state agency and legislative personnel, can be accessed through the Environmental Law Section's homepage at the New York State Bar Association's website (www.nysba.org/environmental)

As the fall meeting came to a close, plans were already in the works for the Annual Meeting to be held in New York City on February 1, 2008.

Louis Alexander

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Agency Inaction and the Regulatory Commons Theory: Lessons Learned from New York State's Experience with Dry Cleaner Co-Location

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[I]n a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, *the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government.* The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.¹

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence, a double security arises to the rights of the people. *The different governments will control each other, at the same time that each will be controlled by itself.*²

Throughout the winter of 1787–88, Alexander Hamilton, James Madison, and John Jay vigorously expounded the virtues of a federalist form of government in order to convince several states (principally New York) to ratify the newly proposed United States Constitution.³ The quotations above demonstrate these great men's concern—a palpable concern at the time, with the propensity of government to oppress the people's rights and liberties. These statements show that the principal fear was of a government too active in the affairs of its subjects. It was evidently not within the foresight of even these great minds to predict that a fragmented, federalist government could lead to *inaction* that might also pose a rival threat to the people's health, safety, and welfare. Hindsight and experience, however, provide an enlightening perspective.

Administrative agencies are a hallmark of modern government in the United States, a nation in which regulations and policies impact virtually every aspect of citizen life. Contrary to common perception, recent scholarship suggests that the proliferation of regulatory agencies under the United States' federalist system may, in certain circumstances, foster governmental inaction and disincentive to address the public good.⁴ This form of inaction is an integral aspect of a greater phenomenon that has been labeled the "regulatory commons," and both stem from the presence of too many unguided authorities in a particular area of regulation.⁵ The regulatory commons and its corresponding inaction have been evident in New York State's treatment of residences that are co-located with dry cleaners using the chemical perchloroethylene ("perc" or "PCE")⁶ as a cleaning solvent.

Perc regulation has recently received ample attention at the national level. On July 27, 2006, the Environmental Protection Agency ("EPA") promulgated major amendments to the federal regulations governing perc use in dry cleaning.⁷ Then, on January 25, 2007, the State of California Air Resources Board issued a resolution to ban

the use of perc in dry cleaning statewide.⁸ This resolution made California the first state in the nation to ban perc for use as a dry cleaning solvent. Shortly thereafter, a major television news program ran a segment that highlighted some of the controversies surrounding perc regulation.⁹ The program also documented a New York City family's concern that their apartment's close proximity to a dry cleaning establishment was hazardous to their health.¹⁰ This concern is a real one. In New York State, unlike in California, the public health hazards posed by dry cleaner and residence co-location have not been comprehensively or effectively addressed, even though four separate agencies participate in this area of regulation.¹¹

This comment argues that New York State's failure to resolve the co-location issue has been due to inaction characteristic of the regulatory commons phenomenon, and not to a lack of knowledge or technical infeasibility. The agencies involved in New York State's efforts to address this issue did not properly allocate authority and responsibility at the outset of the program initiative, and failed to follow through with what little allocation did occur. The agencies also failed to implement a system to track progress toward what should have been the program's ultimate objective—eliminating co-location altogether through zoning codes.

New York State's dry cleaner "story" imparts depth to the regulatory commons theory, which has thus far only been explicated through a project-specific example.¹² The dry cleaner example demonstrates how the regulatory commons phenomenon can play out in a regulatory *program* that involves numerous agencies at different levels of government. It also highlights the greater need for regional authorities to act as informational liaisons that facilitate interagency communication and provide closely tailored environmental health protection to local communities. The regional authorities' role as intermediary is a critical one, as a growing number of agencies try to keep

pace with population growth, increased urban density, and public-health threats, such as bioterrorism, that will certainly test the regulatory response system in the not-too-distant future.¹³

Part I of this comment will overview the regulatory commons theory recently articulated in the legal and political science literature.¹⁴ Part II will apply this theory to New York State's treatment of dry cleaner and residence co-location, a real-life example that provides a classic exposition of regulatory commons inaction at a programmatic level. Part III will take the lessons and comments from the dry cleaner example and apply them to the solutions that have been advanced as possible means to remedy the regulatory commons phenomenon.

I. Novel Theories on Regulatory Behaviors: Inaction and the "Regulatory Commons"

Recent scholarship by Professor William Buzbee, a Professor of Law at Emory Law School, has detailed a phenomenon of interagency dynamics¹⁵ that environmental enforcement agents will encounter at some point in their day-to-day practice. This scholarship describes and labels a form of regulatory inaction which may influence an enforcement authority that carries out its charge in concert with the activities of numerous other authorities in the same or similar areas of regulation. Aside from Professor Buzbee's scholarship, theories of regulatory inaction have remained largely unaddressed by the legal and political science literature. A central aspect of Professor Buzbee's theory, termed the "regulatory commons," is the ideological link he makes between the early environmental movement's "tragedy of the commons" scenario and the regulatory enforcement landscape in a federalist society.¹⁶ The starting point to understanding Professor Buzbee's theory, then, must begin with reference to Garrett Hardin's landmark publication *The Tragedy of the Commons*.¹⁷

Garrett Hardin's theory on the exhaustibility of commons' resources (i.e., his tragedy of the commons), though often cited to promote privatization,¹⁸ was developed principally to show that human population growth and all of its associated problems would continue unchecked if left to the decision-making processes of the rational individual actor.¹⁹ Hardin's explanation of how the rational individual will consume resources from a commonly owned resource pool can be summarized as follows: Faced with the choice of removing additional units from the commons resource, the individual weighs the benefit of removal against its detriment, *but only as to himself*.²⁰ In the short-term, the individual's additional consumption from the common pool resource only marginally harms that individual and the resource pool in comparison to the substantial personal gain the individual accrues from extracting the additional resources.²¹ But over the long-term, all individual actors rationally seek to improve their lot by maximizing their use of the

commons resource.²² Thus, the individual actor's consumption of only a fraction of the common pool resource aggregates to the cumulative detriment of the whole. As Hardin wrote, "[t]herein is the tragedy. Each man is locked into a system that compels him to increase [his utilization of a common resource] without limit—in a world that is limited."²³

Hardin's proposed solution was to "legislate temperance,"²⁴ and it is in this solution that the connection between Hardin's tragedy of the commons and Professor Buzbee's regulatory commons theory begins to take shape. According to Hardin, "[t]he social arrangements that produce responsibility are arrangements that create coercion, of some sort."²⁵ In the modern field of environmental law, these "arrangements" take the form of myriad environmental regulations that are imposed by an equally formidable number of administrative agencies. Hardin proposed this administrative forum as the ideal vehicle by which to keep the law in step with changing societal principles of morality.²⁶ But Hardin, citing John Adams, was wary of a government by men, and not law, for he believed "[b]ureau administrators, trying to evaluate morality of acts in the total system, are singularly *liable to corruption*."²⁷ Keeping the administrative custodians honest, Hardin stated, would be the greatest challenge to legitimizing a regulatory system based on administrative law.²⁸ "*Quis custodiet ipsos custodes?*"—"Who shall watch the watchers themselves?"²⁹ Hardin's general warning to "watch the watchers" was made in the context of fear of agency corruptibility. Still, this warning reflects a broader sentiment, one that is wide enough to encompass the notion that merely entrusting the public's health to numerous administrative agencies provides inadequate assurance that these agencies will in fact take action.

Garrett Hardin, like Hamilton, Madison, and Jay before him, was concerned more with potential governmental malfeasance, and also failed to consider the dangers of regulatory *inaction*.³⁰ Professor Buzbee's "regulatory commons" theory is the first to comprehensively address this analytical gap. The theory draws a connection to Garrett Hardin's administrative agency solution to the tragedy of the commons and shows that regulatory agencies may sometimes behave in a manner similar to Hardin's rational individual actor. Like the rational individual, a rational administrative agency may avoid taking action in an area of regulation in which other regulators are present and are perceived to be equally capable of addressing the regulatory issue.³¹

After the connection to Garrett Hardin's tragedy of the commons, the next step in understanding the regulatory commons theory is recognizing the United States government as a multi-layered, federalist framework.³² The hierarchical and lateral organization of government departments under this federal system creates an intentionally fragmented regulatory regime.³³ Vertical fragmentation results from the jurisdictional division of

agencies between the federal and state levels, with further division at the state level between state government, regional authorities, and local municipal governments.³⁴ Horizontal fragmentation results from jurisdictional division across areas of regulatory subject matter.³⁵

Consider, for example, the regulatory codes and policies that a dry cleaning facility must comply with to operate in Westchester County, N.Y. The facility must follow the federal and state operational requirements contained in 40 C.F.R. § 63³⁶ and title 6, § 232 of the *Official Compilation of Codes, Rules, and Regulations of the State of New York* to obtain a permit to operate from the New York State Department of Environmental Conservation (“NYSDEC”).³⁷ The facility remains subject to annual compliance inspections, at minimum, even after this permit has been issued.³⁸ The dry cleaner is also subject to permitting and inspection regulations and other policy initiatives, which the New York State Department of Health (“NYSDOH”) and the Westchester County Department of Health (“WCDOH”) require beyond what is mandated by the NYSDEC.³⁹ Finally, the facility must meet all applicable local building and zoning codes. Requirements for dry cleaning establishments in the City of Yonkers, N.Y., for example, show the specificity with which local codes can address aspects of dry cleaner regulation. These requirements range from standards for facility structural materials, to limitations on chemical usage, ventilation requirements, and restrictions on facility location in the community.⁴⁰

The vertical and horizontal fragmentation present in New York State’s framework for dry cleaner regulation is a significant element of the regulatory commons theory, and contributes to what Professor Buzbee terms “jurisdictional mismatch.”⁴¹ Jurisdictional mismatch occurs if multiple agencies are able to participate in an area of regulation, but no one agency has jurisdiction that is squarely matched to the targeted harm or activity.⁴² When jurisdictional mismatch is present, the regulatory opportunity is analogous to a commons resource into which an agency will be reluctant to invest. According to Professor Buzbee,

[c]entral to the regulatory commons dynamic are the concepts [*sic*] of the regulatory opportunity as a commons resource and the idea of jurisdictional mismatch. . . . If a social ill is juxtaposed against a fragmented or overlapping legal or political setting, especially if the ill’s causes and effects do not fall within a particular jurisdiction, the social ill is less likely to be addressed by regulatory action than in settings where a particular institution is viewed by all as having regulatory primacy.⁴³

The regulatory commons can be crudely summarized as follows: 1) there are many potential regulatory opportunities in society, all of which are up for grabs among numerous agencies;⁴⁴ 2) the opportunity present in the general regulatory arena is analogous to the *common pool resource*;⁴⁵ and 3) the agencies capable of crafting a regulatory program to meet the opportunity are the *consumers of the resource*.⁴⁶ Historically, the predominant view advanced in the legal and political science literature is that multi-agency involvement in a particular regulatory area will lead to over-regulation, much as the common resource is over-consumed in the traditional commons scenario.⁴⁷ Professor Buzbee’s theory takes a different tack by suggesting that over-regulation is only one possible outcome on a continuum of outcomes that may occur if many authorities are present in the same area of regulation.⁴⁸ On the polar opposite end of this continuum, the presence of too many agencies can lead to partial, or even total, inaction to address a perceived social harm.⁴⁹ Thus, while regulatory commons “dynamics *could* lead to excessive and potentially conflicting regulation by numerous policymakers in diverse institutions, . . . [they will] *more often . . . create incentives for political inattention*.”⁵⁰ Similar to Hardin’s rational farmer, who neglects to maintain the common pasture knowing well that any investment would also benefit other consumers of the common resource, the rational regulatory agency avoids spending limited funds to develop programs which others agencies can take credit for or appropriate for their own use at no expense.⁵¹

II. Dry Cleaner Co-Location and the Regulatory Commons in New York State

Dry cleaning facilities that use perc as a cleaning solvent in New York State are covered by several layers of regulation. These facilities are subject to the federal National Emission Standards for Hazardous Air Pollutants (“NESHAP”) contained in 40 C.F.R. § 63, and to the state operational requirements that are contained in NYSDEC Part 232. Facilities must also comply with NYSDOH and county health department regulations and guidelines. Additional county or local municipal requirements may also be applicable.⁵²

The vast majority of dry cleaners use perc,⁵³ and the service-oriented nature of this business means that facilities are sited in close proximity to retail shops, food establishments, and residential locales as a matter of customer convenience. Dry cleaners are frequently located on the ground floor of multi-unit apartment complexes in urban and suburban areas;⁵⁴ this physical arrangement has been termed “co-location.”⁵⁵ To varying degrees, all of the agencies that regulate dry cleaning facilities in New York State currently have rules or policies to directly address the co-location issue. Yet even after 13 years with this issue on the environmental health radar, these agencies have been unable to prevent the migration of fugitive

perc emissions from dry cleaning establishments into adjacent residences.⁵⁶ This is a classic instance of regulatory commons inaction.

The mundane nature of dry cleaning and the pervasiveness of dry cleaners in the cosmopolitan environment raise the question of why this industry is so heavily regulated. Perc exposure and inhalation is closely linked to a laundry list of adverse human health outcomes, including numerous neurological, kidney, liver, reproductive, and respiratory pathologies.⁵⁷ The need to prevent this exposure through regulation is magnified by observations that perc is the most commonly found volatile halogenated hydrocarbon in human blood.⁵⁸ This chemical is highly soluble in blood and adipose tissue, and has a considerably longer half-life *in vivo* (i.e., in the human body) than most other solvents.⁵⁹ Not surprisingly, the results of biological measurements taken from people living next to cleaners over a one-week period have shown a marked increase in perc concentration over the sampling period,⁶⁰ reflecting the compound's cumulative nature and lengthy *in vivo* residence time. Cumulative perc exposure risk, even at low levels of exposure, is therefore a particularly relevant concern. Furthermore, perc seemingly defies containment efforts, and a perc-trichloroethylene mixture is the binary mixture (a mixture composed of only two chemical constituents) most often found at Superfund sites.⁶¹

The federal government regulates perc through its power over interstate commerce and its listing of the chemical as a hazardous air pollutant under the Clean Air Act.⁶² A major purpose of the Act is to require the development of NESHAPs that target air pollutant emissions sources.⁶³ The standards contained in 40 C.F.R. §§ 63.320–325 constitute the NESHAP for dry cleaning facilities that use perc as a cleaning solvent.

In the preamble to the dry cleaner NESHAP, the EPA makes clear that its primary objective was to quickly promulgate broad dry cleaner rules so that perc concentrations in the nation's ambient air could be lowered as quickly as possible.⁶⁴ Potential indoor air contamination, and thus the issue of co-location, was an ancillary consideration, if any consideration at all.⁶⁵ The preamble also discusses the EPA's decision to take a more lenient approach to the regulation of area-source dry cleaners, the facility category that pervades the urban and suburban landscape.⁶⁶ Facilities in the area-source category are the type of facility that is most likely to co-locate with residential buildings. Thus, by leniently regulating area-source cleaners, the EPA again conveyed a strong message that the federal government was unwilling to take a firm position against co-location. The EPA's rationale for imposing less-stringent regulations on area-source dry cleaning facilities is explained by the following language in the NESHAP preamble:

The EPA does not agree that the health effects information regarding PCE is so compelling that it warrants application of MACT [Maximum Available Control Technology] to all small area source dry cleaners. There are a range of opinions in the scientific community as to the potential for PCE to cause cancer in humans. Further, to the extent that PCE may be a human carcinogen, existing evidence indicates that its potency is very low.⁶⁷

This sentiment set the tone for the weak dry cleaning machine standards contained in the NESHAP,⁶⁸ and clearly stood as another independent ground that reflected the EPA's regulatory posture against taking any real action to prohibit dry cleaner co-location.

Dry cleaner co-location was concededly a nascent public health issue in the United States when the NESHAP was first promulgated in September 1993.⁶⁹ Most of the non-occupational perc exposure studies conducted since then have focused on dry cleaners that are co-located with residences.⁷⁰ This focus strongly indicates that perc migration into residential indoor air environments presents a perc-related health risk second only to the exposure scenarios evident in occupational environments in which the chemical is used. Less attention has been given to perc exposure risk in *businesses* attached to dry cleaners, perhaps because customers are transient, and are therefore only infrequently exposed to low concentrations. Furthermore, compared to workers in the dry cleaner facility, workers in a co-located business will be exposed to much lower concentrations of perc during a standard work day. Occupants of co-located residences, on the other hand, may be exposed to relatively low concentrations of perc as compared to dry cleaner workers, but may be exposed over periods of time greatly exceeding the standard eight-hour workday (consider, e.g., the elderly, stay-at-home parents, disabled persons, etc.). Still, one non-residential perc study documented significantly elevated perc levels of 2,200 ug/m³ in a store adjacent to a dry cleaner, and the co-located business exposure scenario certainly warrants further inquiry.⁷¹

The migration of fugitive perc emissions from dry cleaners into attached or nearby residences was first identified as a public health issue by a study conducted in Germany in the late 1980s.⁷² The 1991 Schreiber study, referenced in the preamble to the dry cleaner NESHAP, was the first major study on co-location performed in the United States.⁷³ This study was jointly conducted by the NYSDOH and the NYSDEC.⁷⁴ The Schreiber study compared airborne perc concentrations in six residences that were co-located with dry cleaners in the Albany, N.Y. area against concentrations in the indoor air in control residences and the ambient air.⁷⁵ Perc concentrations were significantly higher in the co-located residences (ranging

from 300 ug / m³ to 55,000 ug / m³) as compared to control residences that were located at a distance from dry cleaner facilities (ranging from < 6.7 ug / m³ to 103 ug / m³).⁷⁶

The exposure risks of living next to a dry cleaning establishment have been well documented since the seminal 1991 Schreiber study. For example, a study conducted by Garetano and Gochfeld in 1995 measured perc concentrations in the indoor air of twelve co-located residences in New Jersey and found that concentrations ranged from 470 ug / m³ to 4,200 ug / m³.⁷⁷ Similarly, in 2002, a study conducted by Schreiber et al. measured perc concentrations in two New York City apartment buildings in which dry cleaning facilities were sited on the first floor, and found that mean perc concentration throughout the building ranged from 650 ug / m³ to 6,100 ug / m³.⁷⁸ Then, in 2005, McDermott et al. measured concentrations of perc in the indoor air of apartment buildings sited with dry cleaners in New York City, and found that in 12 of 24 apartment buildings assessed, perc concentrations ranged from 194 ug / m³ to 5,000 ug / m³.⁷⁹

Collectively, the co-location studies have identified several factors that may facilitate perc migration from a dry cleaning establishment into attached or nearby residences. First, as a general rule of thumb, the concentration of perc measured in a residence co-located with a dry cleaner is directly linked to the concentration present in the dry cleaner—perc concentrations in the residence will increase in proportion to any increase observed within the facility.⁸⁰ The location of emissions exhaust equipment is another factor, as it has been observed that perc-saturated emissions deliberately exhausted from a facility can make their way from the outside air back into the building.⁸¹ In addition, studies conducted in the early 1990s strongly associated elevated perc concentrations in co-located residences with the type of machine in use at the dry cleaner facility.⁸² Other studies emphasized the role of building materials⁸³ and facility exhaust ventilation equipment.⁸⁴

The take home message from all of these studies appears to be that any variable that can increase the perc concentration within a dry cleaner is also a factor that leads to an increase in the perc concentration measured in a co-located residence. Beyond those factors already mentioned, additional considerations include the type of machine emission controls and machine capacity,⁸⁵ garment off-gassing,⁸⁶ and the degree of operator compliance with machine inspection and maintenance requirements imposed by dry cleaner regulations.⁸⁷

Perc may also indirectly make its way into the residential indoor air environment through the exhaled air or clothing of dry cleaner workers, a transport mechanism that to date has been greatly understudied and underestimated.⁸⁸ This offsite introduction would result in what has been termed paraoccupational exposure, a type of exposure that occurs when workers transport a hazardous material from the workplace into the home, at

which point family members may be exposed.⁸⁹ Paraoccupational exposure has more traditionally been associated with hazardous materials in particulate form, and with substances such as lead, asbestos, and arsenic,⁹⁰ but may be relevant to perc transport as well.⁹¹ An in-depth discussion of paraoccupational and other potential perc transport mechanisms and exposure routes is far beyond the scope of this comment.

The preamble to the dry cleaner NESHAP did make direct reference to the environmental health hazards posed by dry cleaner and residence co-location. The issue was acknowledged by the EPA's response to commenters who had pressed the Agency to implement stricter vapor barrier and facility ventilation standards.⁹² But the EPA decided not to codify a solution in the dry cleaner regulations.⁹³ Instead, in the preamble, the Agency expressed hope that state and local governments would initiate their own studies to determine whether dry cleaners and residences should co-exist in zoning code harmony.⁹⁴ The EPA also asked states and the public to "provide their views on . . . [t]he appropriate Federal role in encouraging or requiring steps to reduce PCE contamination of indoor air."⁹⁵ The EPA did nothing more to address co-location until the NESHAP was finally amended on July 27, 2006, 13 years later.⁹⁶

In New York State, even though aggressive dry cleaner regulations have been developed to bolster the federal NESHAP,⁹⁷ no agency has taken any real lead to eliminate co-location. Critically, no real efforts have ever been made to recruit local zoning authorities to implement what is probably the most obvious solution—banning dry cleaner and residence co-location altogether through zoning codes. Instead, similar to the call for local assistance made by the EPA in the NESHAP preamble, the NYSDEC regulations express hope that municipalities will zone away the co-location problem. This hope is reflected by language that is embedded within the operative component of NYSDEC's part 232 dry cleaner regulations. According to this language, "[t]he issue of whether a particular proposed or existing mixed use facility may be allowed to co-locate or remain co-located is to be determined by the appropriate State or local officials responsible for implementation of any relevant building codes or zoning ordinances."⁹⁸ Furthermore, the part 232 regulations contain no provisions that extend directly into the residential air space, and co-location is addressed only insofar as equipment engineering controls are calculated to improve perc emissions containment.⁹⁹

The NYSDOH has tried to fill the gap in the NYSDEC regulations by establishing *guideline* perc concentration targets for residential indoor air.¹⁰⁰ Accordingly, the NYSDOH *recommends* that perc concentration in residential indoor air be kept below a range of 100 ug / m³ to 1,000 ug / m³, and ideally below 100 ug / m³.¹⁰¹ However admirable the NYSDOH initiatives may be, these guidelines are not maximum contaminant levels (MCLs),

but are mere recommendations that are unenforceable standing alone. Under these guidelines, the NYSDOH incurs no obligation to force dry cleaners to alter facility conditions so that elevated perc concentrations in a co-located residence are reduced to the recommended levels. This discretion does not further the exposed residents' best interests. And, if the NYSDOH does act, compelling the dry cleaner to help lower perc concentrations in the co-located residence can be problematic without readily enforceable MCLs, particularly if the cleaner is in compliance with NYSDEC and other regulations. The absence of MCLs that are enforceable against a facility is another aspect of the NYSDOH approach that clearly does not further the best interests of exposed residents. Clearly, the NYSDOH's soft guidelines approach is a significant defect in this agency's policy on dry cleaner and residence co-location.

Like the EPA and the NYSDEC, the NYSDOH has also articulated its intention to recruit the assistance of local zoning and building authorities in the agency's efforts to eliminate co-location. In 1997, the NYSDOH Division of Environmental Health Assessment distributed a memorandum to NYSDOH regional directors, district directors, and city and county health commissioners, detailing an anticipated plan of attack.¹⁰² According to the memorandum,

[a]lthough beyond the regulatory scope of DEC Part 232, DOH has made commitments to carry out activities related to dry cleaning facilities and to assess potential impacts on public health. *Recognizing the limitations of resources and staff at both DOH and Local Health Departments*, the following activities are anticipated:

1. The [NYS]DOH will work with zoning and building code authorities to seek amendments to the codes that will prohibit new dry cleaners from residential buildings, and thereby reduce the public's exposure to perchloroethylene.

2. The [NYS]DOH will continue to direct and develop the Dry Cleaner Program in which assessments of indoor air quality are conducted *in response to complaints* and *in response to* information suggesting that substantial exposure to perchloroethylene may be occurring . . .

4. The [NYS]DOH will continue to *recommend* that the Local Health Departments assess indoor air quality (*as staffing allows*) *in response to complaints* and *in response to* information from inspection reports which suggest that substantial exposure to perchloroethylene may be occurring.

5. The [NYS]DOH will compile a database of information from the [Local Health Department] facility inspection reports and indoor air investigations. . . .

6. The [NYS]DOH and Local Health Departments will continue to use existing authority under the Public Health Law to order the owner of any dry cleaning machine or facility to immediately abate nuisance conditions found to be detrimental to life and health. . . .¹⁰³

However, despite the encouraging commitments anticipated by this memorandum, no notable statewide efforts were ever taken to proactively assess the risks of co-location or to eliminate the problem altogether using local zoning authority.¹⁰⁴

III. Filling the Gaps: Extracting Lessons from the Dry Cleaner Story

The regulatory commons phenomenon has been a subtle reality in New York State's treatment of dry cleaner co-location, a fragmented program that cannot be fully discerned until the codified regulations, practical policies, and numerous prerogatives of at least three agencies have been reconciled.¹⁰⁵ Inaction characteristic of the regulatory commons theory recently articulated by Professor Buzbee has prevented the systematic elimination of dry cleaner and residence co-location in New York State. In line with the regulatory commons theory, the agencies participating in this program have behaved in a manner similar to rational individuals who seek to conserve limited resources and act in their own best interest.¹⁰⁶ Without compelling legal mandates or other incentives emanating from controlling jurisdictional authority, virtually none of the agencies in New York State's dry cleaner co-location program have made significant headway towards developing a proactive dry cleaner co-location policy or eliminating the problem altogether.¹⁰⁷ Nor have these agencies fully capitalized on the resources and expertise that each is already committing to move forward in this regulatory initiative.

The EPA amended 40 C.F.R. § 63 on July 27, 2006,¹⁰⁸ and in doing so, finally stepped up to confront the health hazards posed by dry cleaner and residence co-location.¹⁰⁹ Under these amendments, new dry cleaning facilities that use perc onsite are barred from setting up shop in residential buildings, and existing co-located facilities are to be phased out over a 14-year period.¹¹⁰ This blunt prohibition and phase-out approach to eliminating co-location is a straightforward and obvious solution. It could easily have been put into place at a much earlier date, perhaps 13 years ago when the NESHAP was promulgated in 1993. Then, the anticipated 14-year phase-out would have been accomplished by 2007. And it is not necessary for the prohibition against dry cleaner and

residence co-location to have emanated from the federal government. New York State agencies at both the state and local level have independent jurisdiction under public health-focused laws, and zoning codes, to prohibit co-location outside of any imperative issued by the federal government.¹¹¹

Unfortunately, the July 2006 NESHAP amendments do not end the dry cleaner co-location story in New York State. Residents currently living in buildings with dry cleaning facilities that use perc as a cleaning solvent continue to be at risk from exposure to migrating fugitive perc emissions. Thus, there is still a need to develop a more effective and proactive dry cleaner co-location enforcement protocol, as the NESHAP will continue to authorize these perc exposures until the culmination of the 14-year phase-out. In New York State, at least, the level of interagency cooperation necessary to accomplish this work cannot be attained without first confronting the regulatory commons phenomenon.

Dry cleaner co-location is not glamorous subject matter, and this issue may not be of pressing national import.¹¹² Still, New York State's experience with dry cleaner co-location provides insight into the regulatory commons dynamic and is therefore broadly applicable to regulatory action—or lack thereof—in the United States' federalist system. The dry cleaner example provides a specific, programmatic basis by which to assess and expand upon some of the theoretical solutions that Professor Buzbee has suggested may tighten the gaps evident in our fragmented regulatory regime. This example is also valuable because it suggests that regional or pseudo-local agencies, such as health departments, should continue to take on a greater role in statewide environmental regulatory initiatives. Health departments in New York State, for example, have already begun to move beyond their traditional “health” role and more into the realm of environmental compliance and enforcement.¹¹³ The remainder of this section will consider the lessons that can be extracted from New York State's programmatic treatment of dry cleaner and residence co-location, in context with some of Professor Buzbee's postulated solutions to the regulatory commons phenomenon.

The regulatory commons theory has been applied to a specific, project-based example in which the regulatory processes have a localized result.¹¹⁴ Professor Buzbee states, however, that “[a] tougher question is how to facilitate *regionally needed infrastructure or social investments* when regulatory fragmentation would, at minimum, add costs to and discourage such ventures. . . .”¹¹⁵ Regulating dry cleaner co-location in New York State embodies just this “tougher question.” Professor Buzbee has proposed several answers to this question so that in regulatory settings in which multiple agencies are involved, social investments at the regional level will be assured notwithstanding each agency's incentive to protect its scarce re-

sources. The merits of these suggestions are corroborated by observations that can be taken from the dry cleaner example.

Professor Buzbee suggests three basic measures that, if implemented correctly, may temper the inaction characteristic of the regulatory commons phenomenon: 1) properly allocating responsibility among centralized and decentralized regulatory actors;¹¹⁶ 2) “creat[ing] . . . routine methods and venues to increase information about regulatory goals;”¹¹⁷ and 3) offering monetary incentives to overcome the information-gathering costs faced by the agencies charged with implementing the regulatory program.¹¹⁸ These suggested measures are by no means revolutionary concepts, but much can be said about placing tried-and-true techniques into practice. An observer looking back on New York State's treatment of dry cleaner co-location over the past 13 years bears witness to the effect that neglecting these measures can have on the efficacy of a regulatory initiative.

First, and critically, the proper allocation of authority and responsibility among agencies in a multi-agency regulatory regime must be a consideration of highest order when designing any regulatory program. Failure to allocate the agencies' roles at the program's inception sets the program up to fail. Further, and equally critical, some mechanism must be instituted to ensure that the agencies follow through with whatever allocation has been decided upon. A failure to institute such a mechanism is perhaps the key factor that has led to New York State's inability to effectively deal with the co-location issue.

Properly allocating authority and responsibility does not require any one agency to bear the brunt of managing the regulatory initiative. To the contrary, the apportionment of authority and responsibility should be spread among the multiple agencies to create a spectrum of involvement at the many levels of government that may be operative within one particular regulatory program.¹¹⁹ Similarly, leadership is not a one-dimensional concept, and the leadership taken by the different agencies may assume different forms.

There are three separate dimensions, or forms, of agency leadership capacity, and all dimensions must be accounted for. The most fundamental dimension of agency leadership capacity is the *jurisdictional* component. The jurisdictional aspect of agency leadership is somewhat akin to a court of law's subject matter jurisdiction. Jurisdictional leadership should be assumed in proportion to the agency's competence to regulate the subject matter underlying the regulatory program. Some agencies will be more competent with respect to the underlying subject matter than other agencies, and should therefore take a more prominent position in the regulatory program. Whether an agency has adequate jurisdictional competency to be included in a new program is a threshold consideration at the program's inception.

An agency's jurisdictional leadership ability, or competence, depends on two conditions—1) it must be legally enabled to address the subject matter at issue, and 2) it must have adequate resources to do so. Detailed discussion of the first condition, legal enablement, is beyond the scope of this article. Suffice it to say that the law must be in effect which allows the agency to take any necessary action with respect to the new regulatory program.

The second condition, resource capacity, has quantitative and qualitative aspects. The quantitative component is the most conspicuous, being the agency's fiscal budget, the number of staff employed, and the allocation of staff according to program priority within the agency. Not surprisingly, money is the guidepost to gauging the quantitative component of an agency's resource capacity. Without money, an agency hires less staff and has difficulty justifying the commitment of existing personnel to support the launch of a new regulatory program. On the flipside, as an agency's fiscal budget increases, staffing goes up (in theory), and it is easier for the agency to commit to the success of a new program.

The qualitative component of an agency's resource capacity, though less conspicuous than the quantitative component, is also important. The agency's strengths in this sense are reflected by the training and skill-sets of the agency's staff. Money is critical to gauging this component of resource capacity as well. Budgetary constraints affect staff salary. Lower salary translates into applicants for agency position openings that are less qualified on both an educational and experience level. Money also determines whether an agency can ensure staff are equipped with current technology and are kept up to date and certified in modern inspection methodologies. In sum, if an agency has legal enablement but does not have sufficient money in its budget or qualified staff, this agency will not meet the threshold of jurisdictional competence and cannot assume any leadership role in a new regulatory program. Furthermore, in the absence of financial assistance, local and regional agencies will most likely remain dispassionate about investing in the development of program initiatives that have originated at the state or federal level.

The second form of agency leadership capacity is termed *directional* leadership. This form can only be assumed by an authority that is capable of providing direction or oversight in a regulatory program. In substance, directional leadership most closely resembles Professor Buzbee's agency primacy.¹²⁰ A key difference between directional leadership and Professor Buzbee's agency primacy, as he is understood to use this term, is that directional leadership may be assumed by multiple agencies with respect to discrete, separate aspects of the regulatory program.¹²¹

Furthermore, jurisdictional competence is not a prerequisite to an agency assuming directional leadership.

The minimum requirement for assumption of the directional form of leadership is that the agency doing so has both the legal and practical power to direct. With this form, however, one agency must be set up as the agency perceived to be capable of guaranteeing the program's progress. This agency herdsman will guarantee progress either by implementing legal mandates or by offering monetary incentives. By doing so, a guided regulatory consensus is established to ensure that all players remain focused on the same program goals.

Coordination leadership is the final leadership form. This form relates to the agency or agencies that functionally serve as information bridges in the regulatory program. The information bridges connect the data that is generated at the front lines during program implementation to the policymakers that sculpt the program's ultimate direction. In a sense, then, a primary agency coordinator is the information middleman in the regulatory process. The information middleman's role is likely to be most significant under circumstances in which there is a large geographical gap between the policymakers and the object of regulation.

New York State's treatment of dry cleaner co-location showcases the program inefficacy that may result if regulatory leadership in its three dimensions is not effectively apportioned from the outset of a regulatory program, and if the apportionment is not duly followed. The leadership roles must be thoroughly considered and accounted for at the program's inception, before an agency's disincentive to act becomes firmly rooted. In the co-location example, there should have been little difficulty in determining which agencies were to assume jurisdictional, directional, and coordination leadership as the terms have been described above. This determination was seemingly accomplished under the 1997 memorandum that was distributed by the NYSDOH Division of Environmental Health Assessment to regional health departments.¹²²

According to the detailed plan of attack contained in the 1997 memorandum, local health departments were positioned to take the lead in the fieldwork component of a co-location program, with the NYSDOH presumably at the helm to provide support and coordination between the numerous county departments.¹²³ But the language contained in this memorandum reveals that any anticipated efforts by the local health departments would be made on a voluntary and reactive basis only, and without meaningful financial or other resource assistance.¹²⁴ It is not surprising that in the absence of a concrete legal mandate or significant financial incentive, only one local health department proactively attacked the co-location problem.¹²⁵

Local health departments are unlikely to take initiative to develop and enforce their own co-location assessment programs, even though they have the independent authority to do so.¹²⁶ Accordingly, the NYSDOH, as the natural lead agency in this matter relative to the local

health departments, must adopt a firmer posture with the pre-existing program that is reflected by the 1997 memorandum. The NYSDOH must, in other words, assume directional leadership with respect to the local departments' efforts and must either impose a legal imperative or offer a monetary incentive to spur these departments to action. One way for the NYSDOH to effectuate this leadership role is to codify its soft perc guideline recommendations into hard-and-fast, enforceable MCLs.¹²⁷ Doing so will signal that the local departments should prioritize co-location and work to eradicate this public health hazard.

"In New York State, several agencies have been participants in a complicated and, for the most part, admirable regulatory initiative to address dry cleaner and residence co-location."

The NYSDOH's failure to assume directional leadership in New York State's co-location efforts can be traced directly to the EPA's similar failure at the national level.¹²⁸ By inviting local authorities to shape the federal government's role, or to determine that no role should be played at all, the EPA signaled that co-location was not a federal priority. The invitation also implied that authorities at the state, local, and regional levels were free to ignore the issue altogether. Considering the little attention the EPA gave to co-location in the preamble to the dry cleaner NESHAP, the EPA's posture on this health hazard was arguably more counterproductive to the colorable call for local resolution of the issue than had nothing on the topic been discussed at all. It is clear that if the federal government established any consensus on this issue, it was that co-location did not qualify as a public health concern warranting much attention. The EPA hoped that state or local authorities would take responsibility to eliminate co-location notwithstanding the federal government's non-committal posture. Unfortunately, this same non-committal posture appears to have infected the state, local, and regional agencies.

Even had authority and responsibility been properly allocated, and a clear consensus established, eliminating dry cleaner and residence co-location would still have been difficult without better modes of communication and information sharing between the involved agencies. A consistent theme running through New York State's dry cleaner co-location story is the communication breakdown between every thread in the jurisdictional lattice, starting with the federal government at the center of this lattice. Arguably, the federal government correctly entrusted more local authorities with the primary responsibility to implement any measures (whatever they turned out to be) to eliminate co-location.¹²⁹ But exactly how these local governments were to be apprised of the co-location issue's existence, let alone how to go about elimi-

nating the health hazard, was clearly not a major forethought in the EPA's call for local assistance. The EPA's reference to the local authorities' expected role, without more, placed too much reliance on James Madison's theoretical notions of checks and balances in a federalist society.¹³⁰ No mechanisms to facilitate open lines of communication were developed so that information could be transferred between the EPA and the state, regional and local authorities.

This failure to establish a communication framework for information sharing was also evident at the New York State level. Like the federal NESHAP, NYSDEC part 232 failed to create or suggest a basis for lines of communication between the state, regional, and local authorities.¹³¹ The 1997 memorandum distributed by the NYSDOH Division of Environmental Health Assessment indicates that the NYSDEC and the NYSDOH had noble intentions to tackle the problem. However, with Westchester County, N.Y. being the sole exception,¹³² no systematic statewide efforts were ever taken, at the regional or local level, to even begin the individualized co-located facility assessments recommended by the federal NESHAP.

IV. Conclusion

The story of dry cleaner co-location does not encompass a glamorous subject matter, nor does the subject matter necessarily have nationwide appeal. But the significance of this story transcends its subject matter by providing deep insight into the regulatory commons phenomenon, which is unquestionably a matter of broad application in the United States' federalist system. Looking back through the pages of the co-location story, there are periodic notations to suggest that the federal, state, or local governments should have prohibited co-location long before the very recent NESHAP amendments took a significant step toward this prohibition. It should not have taken 13 years to take real action to resolve this issue. Hindsight, of course, provides the clearest of perspectives. In New York State, several agencies have been participants in a complicated and, for the most part, admirable regulatory initiative to address dry cleaner and residence co-location. Yet despite this attention, and despite the recent NESHAP amendments, perc exposure presented by the co-location scenario will be a continued risk until the last co-located facilities are phased out in 2020.¹³³ Thus, there is still ample opportunity for New York State to evaluate the program critiques that have been presented in this article.

Endnotes

1. THE FEDERALIST No. 28, at 180-81 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).
2. THE FEDERALIST No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).
3. See Clinton Rossiter, *Introduction* to THE FEDERALIST PAPERS, at viii-ix (Clinton Rossiter ed., 1961).

4. See William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1 (2003) (hereinafter *Regulatory Commons*); William W. Buzbee, *The Regulatory Fragmentation Continuum, Westway, and the Challenges of Regional Growth*, 21 J.L. & POL. 323 (2005) (hereinafter *Westway*).
5. See *Regulatory Commons*, *supra* note 4, at 5; see also *infra* p. 14.
6. See Gabriella Aggazzotti et al., Indoor Exposure to Perchloroethylene (PCE) in Individuals Living with Dry-Cleaning Workers, 156 SCI. OF THE TOTAL ENV'T 133, 133 (1994) ("Of the volatile halogenated hydrocarbons, perchloroethylene (PCE) is the one most commonly detected when environmental exposure to these substances is being evaluated in humans."). Furthermore, a perc-trichloroethylene mixture is the most frequently occurring binary mixture (i.e., a mixture with only two chemical constituents) found at Superfund sites. See Lawrence H. Lash et al., Renal Toxicity of Perchloroethylene and S-(1,2,2-Trichlorovinyl) glutathione in Rats and Mice: Sex- and Species-Dependent Differences, 179 TOXICOLOGY & APPLIED PHARMACOLOGY 163, 163 (2002).
7. See generally National Perchloroethylene Air Emission Standards for Dry Cleaning Facilities, 71 Fed. Reg. 42,724 (July 27, 2006) (to be codified at 40 C.F.R. pt. 63). See also discussion *infra* p. 17.
8. See Cal. Air Resources Board, Res. 07-5 at 2, 5 (Cal. 2007) (accepting the Board's staff proposal to "phase out the use of Perc machines for dry cleaning at the end of their useful life, and require all Perc machines to be removed from service by January 1, 2023"), available at <http://www.arb.ca.gov/regact/2007/perc07/res075.pdf>. The resolution directs the Air Resource Board's Executive Officer to adopt proposed additions and amendments to CAL. CODE REGS. tit. 17, § 93109 (1993) as they were set forth in an Air Resources Board staff report released on December 8, 2006. See *id.* The Board stated that adoption of an all-out ban on perc is the most effective way to "virtually reduce all potential Perc cancer risks from dry cleaning operations" and stimulate the "increased usage of alternative technologies and solvents." See *id.* at 3-4.
9. See Tracy Smith, *Cancer Danger From Dry Cleaning? Tracy Smith Explores Possible Risk of Commonly Used Chemical Called "Perc,"* CBS NEWS, THE EARLY SHOW, Feb. 23, 2007, <http://www.cbsnews.com/stories/2007/02/23/earlyshow/contributors/tracysmith/main2507444.shtml>.
10. See *id.* The family featured in this program claims to have experienced neurological effects (such as the inability to concentrate), nausea, headaches, and dizziness due to acute exposure to fugitive perc emissions that migrated from the dry cleaner facility into the attached apartments. The New York City Department of Health measured elevated concentrations of perc in the resident's breath, urine, and breast milk. See *id.*
11. See *infra* p. 14.
12. See *Westway*, *supra* note 4, at 323.
13. The author is a former Radiological Dose Assessor for Westchester County, N.Y., a densely populated area bordering New York City that is the location of the controversial Indian Point nuclear power plant. In a plant-related emergency, including a potential terrorist attack, dose assessors synthesize data that is transmitted from the plant to determine whether evacuation instructions should be communicated to the six cities, sixteen towns, and twenty-three villages that comprise the County. The dose assessor role is one of many that were created or bolstered after the September 11, 2001 terrorist attacks. The County's fortified role as security information liaison between state and federal agencies and the approximately 50 Community and 150 Non-Community Public Water Supply Systems situated in the County is another prime example of this regional authority's important role in the terrorism response system.
14. See generally sources cited *supra* note 4.
15. See *id.*
16. See *Regulatory Commons*, *supra* note 4, at 4-22.
17. Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).
18. See Zygmunt J.B. Plater, Robert H. Abrams & William Goldfarb, ENVIRONMENTAL LAW & POLICY: NATURE, LAW & SOCIETY ch. 2, § 1, at 34-40 (1st ed. 1992).
19. See Hardin, *supra* note 17, at 1244.
20. See *id.* ("As a rational being, each herdsman seeks to maximize his gain. Explicitly or implicitly, more or less consciously, he asks, 'What is the utility to me of adding one more animal to my herd?'").
21. Hardin uses the example of herdsmen who graze their cattle on a common pasture. *Id.* When faced with the choice of adding another beast to his herd, the individual herdsman performs a two-factor balancing analysis. *Id.* "The positive component [of the analysis] is the increment of one animal. Since the herdsman receives all the proceeds from the sale of the additional animal, the positive utility [from adding the additional animal] is nearly +1." *Id.* "The negative component [of the analysis] is a function of the additional overgrazing [of the common pasture] created by one more animal. Since, however, the effects of overgrazing are shared by all of the herdsmen, the negative utility for any particular decision-making herdsman is *only a fraction of -1*." *Id.* (emphasis added). In a similar vein, with regard to problems of pollution, the short-term cost-benefit analysis leads the rational individual to dispose of his waste into the collective commons, for it will be cheaper to do so in comparison to treating the waste with his own individual resources. See *id.*
22. See Hardin, *supra* note 17, at 1244.
23. *Id.*
24. See *id.* at 1245-46.
25. See *id.* at 1247.
26. See *id.* at 1245-46. "That morality is system-sensitive escaped the attention of most codifiers of ethics in the past. . . . The laws of our society . . . are poorly suited to governing a complex, crowded, changeable world. . . . Our epicyclic solution is to augment statutory law with administrative law." *Id.* at 1245.
27. See *id.* at 1246.
28. See *id.*
29. *Id.* at 1245-56.
30. See *supra* p. 12.
31. See *infra* p. 14.
32. See *supra* p. 12.
33. See *id.*
34. See, e.g., *Westway*, *supra* note 4, at 344 ("Vertical fragmentation refers to the division of regulatory turf among layers of political actors and regulators. . . . [I]n most complex regulatory settings, federal, state and local officials play roles, with each further handing authority down to administrative agencies and sometimes citizens.").
35. See *id.* at 347.
36. See 40 C.F.R. § 63 (2006).
37. See N.Y. COMP. CODES R. & REGS. tit. 6, §§ 232.14, .16 (2006).
38. The NYSDEC has instituted a "Third Party" inspection system whereby non-departmental inspectors are certified to conduct the mandatory annual inspections of permitted dry cleaners. *Id.*
39. The Westchester County Department of Health has instituted an annual dry cleaner permitting and inspection program pursuant to WESTCHESTER COUNTY, N.Y., SANITARY CODE ch. 873, art. XIII, § 873.1306.1, as amended in 1993.
40. The City of Yonkers, N.Y., Zoning Code provides as follows:
 - (1) Any on-site dry-cleaning establishment shall adhere to the following requirements: (a) Such processes shall be conducted within an enclosed building. (b) Such uses

shall provide mechanical ventilation to minimize any solvent buildup in the customer area and to control any minor solvent leakage, provide a supply of make-up air and locate exhaust ventilation stacks in accordance with Department of Health standards, the recommendations of the National Automatic Laundry and Cleaning Council or the American Conference of Governmental Industrial Hygienists. This exhaust ventilation shall be provided on a continuous basis while the establishment is open for business. The fan motor wiring shall be such that the dry-cleaning equipment cannot be operated unless the fan system is in operation.

- (2) No such establishment shall be permitted in any building containing residential uses.

See YONKERS, N.Y., ZONING CODE ch. 43, art. VI, § 43-36(H) (2000 & Supp. 2007), available at <http://www.generalcode.com/webcode2.html#newy>. See also YONKERS, N.Y., FIRE CODE ch. 59, art. XIII, §§ 59-238, 239 (1995 & Supp. 2007), available at <http://www.generalcode.com/webcode2.html#newy>. “It shall be unlawful to operate a dry-cleaning . . . establishment without first having obtained a permit from the Commissioner.” *Id.* § 59-238. “Dry-cleaning . . . which include[s] the use of flammable liquid solvent above twenty-five (25) in the Underwriter’s Laboratories, Inc., schedule is hereafter prohibited in the City of Yonkers.” *Id.* § 59-239(A). “No change shall be made in the solvent used in the equipment to a solvent in a more hazardous class.” *Id.* § 59-239(B).

41. See *Regulatory Commons*, *supra* note 4, at 21-23 (“[A] single government regulator seldom exists. In settings of regulatory fragmentation, mismatch, and overlap, regulatory commons dynamics will exist.”).
42. See *id.* at 23.
43. *Id.* at 22.
44. See *id.* “A regulatory opportunity is itself the resource to be harvested or capitalized on through regulatory action, much as a fish or a pasture is the resource in the usual commons tale.” *Id.*
45. See *supra* text accompanying note 44.
46. See *id.*
47. See *Regulatory Commons*, *supra* note 4, at 37-42 (“[A] vast body of literature, mostly growing out of early public choice scholarship, . . . posits excessive and imprudent regulation.”).
48. See *Westway*, *supra* note 4, at 323-24.
49. *Id.* at 324 (“At one end of the spectrum, regulatory fragmentation will create incentives for regulatory inattention and inaction, or perhaps parochial or myopic views failing to look at social welfare. . . .”).
50. See *Regulatory Commons*, *supra* note 4, at 22 (emphasis added).
51. *Id.* at 30-37.
52. See *supra* p. 14.
53. See Avima M. Ruder, Elizabeth M. Ward & David P. Brown, *Mortality in Dry-Cleaning Workers: An Update*, 39 AM. J. INDUS. MED. 121, 130 (2001) (“[Perc] is used now by over 90% of all dry-cleaning plants, by other industries as a degreaser, and as a solvent in the manufacture of rubber solutions, paint removers, and printing inks.”). Several million people worldwide are estimated to work in the dry cleaning industry. Thomas L. Vaughn et al., *Work in Dry Cleaning and the Incidence of Cancer of the Oral Cavity, Larynx, and Oesophagus*, 54 OCCUPATIONAL ENVTL. MED. 692, 692 (1997).
54. See Michael J. McDermott et al., *Tetrachloroethylene (PCE, Perc) Levels in Residential Dry Cleaner Buildings in Diverse Communities in New York City*, 113 ENVTL. HEALTH PERSPECTIVES 1336, 1339 tbl.2 (2005), available at <http://www.ehponline.org/members/2005/7414/7414.pdf> (measuring residential perc indoor air concentrations in 12 of 24 apartment buildings with dry cleaner facilities in New York City at a range of 194 ug/m³ to 5,000 ug/m³).

55. See Memorandum from Mike Heaney, E. Research Group, Inc., to Rhea Jones, U.S. EPA, Estimating the Fraction of Dry Cleaning Facilities that are Collocated (Mar. 11, 2004), available at <http://www.epa.gov/air/drycleaningrule/pdfs/11-14-05background.pdf>. “This memorandum summarizes information on the fraction of area-source dry cleaning facilities that are *collocated* in the same building as residences or other businesses.” *Id.* (emphasis added).
56. See *supra* note 54.
57. See generally Ruder, *supra* note 53, at 121.
58. See Aggozzotti, *supra* note 6, at 133.
59. *Id.*
60. See Kimberly H. Thompson & John S. Evans, *Worker’s Breath as a Source of Perchloroethylene (Perc) in the Home*, 3 J. EXPOSURE ANALYSIS & ENVTL. EPIDEMIOLOGY 417, 419 (1993).
61. See Lash, *supra* note 6, at 162.
62. Clean Air Act Amendments of 1990, 42 U.S.C. § 112(b) (2006).
63. See *id.* § 112(c), (d).
64. See National Emission Standards for Hazardous Air Pollutants for Source Categories: Perchloroethylene Dry Cleaning Facilities, 58 Fed. Reg. 49,354, 49,372 (Sept. 22, 1993) (to be codified at 40 C.F.R. pts. 9, 63) (“Today’s rule, while targeted primarily at reducing PCE contamination of *outdoor air*, may reduce indoor air contamination in some locations”) (emphasis added).
65. See *id.*
66. See National Emission Standards for Hazardous Air Pollutants for Source Categories: Perchloroethylene Dry Cleaning Facilities, 58 Fed. Reg. at 49,365-66 (discussing why the agency chose not to implement “Maximum Available Control Technology” standards for area source dry cleaners, the type most likely to co-locate with residences in the mixed-use urban environment).
67. *Id.*
68. See 40 C.F.R. § 63.322 (2006).
69. See National Emission Standards for Hazardous Air Pollutants for Source Categories: Perchloroethylene Dry Cleaning Facilities, 58 Fed. Reg. at 49,372 (“In order to gain additional insight and understanding into the issues of indoor air pollution . . . associated with dry cleaning facilities, the EPA will convene a public meeting The objective of this public meeting will be to gather additional information and solicit public comment on the magnitude and severity of the problems highlighted by the [New York co-location study]”).
70. See, e.g., Judith S. Schreiber et al., *An Investigation of Indoor Air Contamination in Residences Above Dry Cleaners*, 13 RISK ANALYSIS 335 (1993); Gary Garetano & Michael Gochfeld, *Factors Influencing Tetrachloroethylene Concentrations in Residences Above Dry-Cleaning Establishments*, 55 ARCHIVES OF ENVTL. HEALTH 59 (2000).
71. See Garetano & Gochfeld, *supra* note 70, at 63 tbl.1.
72. See Schreiber et al., *supra* note 70, at 343 (discussing K. Reinhard, W. Dulson & M. Exner, *Concentrations of Tetrachloroethylene in Indoor-Air and Food in Apartments in the Vicinity of Dry Cleaning Shops*, 189 ZENTRALBL. HYG. UMWELTMED 111 (1989)).
73. See generally *id.*
74. See *id.* at 336.
75. See *id.*
76. See *id.* at 343.
77. See Garetano & Gochfeld, *supra* note 70, at 63 tbl.1.
78. See Judith S. Schreiber et al., *Apartment Residents’ and Day Care Workers’ Exposures to Tetrachloroethylene and Deficits in Visual Contrast Sensitivity*, 110 ENVTL. HEALTH PERSPECTIVES 655, 656 (2002).
79. See McDermott et al., *supra* note 54, at 1339 tbl.2.

80. Conversation with Stanley M. Byer, Research Scientist III, N.Y. State Dep't of Env'tl. Conservation, Bureau of Stationary Sources, & Daniel P. Sharron, Pub. Health Specialist II, N.Y. State Dep't of Health, Bureau of Toxic Substance Assessment, in Westchester County, N.Y. (Apr. 5, 2005).
81. See Garetano & Gochfeld, *supra* note 70, at 66.
82. See Schreiber et al., *supra* note 70, at 340.
83. See *id.* at 343.
84. See Garetano & Gochfeld, *supra* note 70, at 66.
85. See McDermott et al., *supra* note 54, at 1341.
86. See Garetano & Gochfeld, *supra* note 70, at 66.
87. *Id.*
88. See Thompson, *supra* note 60, at 417.
89. See *id.*
90. *Id.*
91. *Id.*
92. See National Emission Standards for Hazardous Air Pollutants for Source Categories: Perchloroethylene Dry Cleaning Facilities, 58 Fed. Reg. at 49,370. Commenters on the proposed rule suggested that installation of vapor barriers around the dry cleaning machine equipment, and all floors, walls, and ceilings should be required to prevent the migration of fugitive perc emissions from the facility into adjacent residences and food-service establishments. *Id.* Commenters also recommended including ventilation standards to facilitate air exchange in the dry cleaner facility, which would reduce the amount of perc available for migration into co-located residences. See *id.* The EPA determined that any ameliorative measures, such as vapor barriers and ventilation requirements, would be best addressed on a site-specific basis at the local level. See *id.*
93. See *id.*
94. See *id.* at 49,374 ("While the EPA conducts follow-up activities related to dry cleaners, the EPA notes that there are opportunities for State and local governments to take action as well. For example, State and local governments may wish to investigate whether indoor air . . . in their jurisdictions is being contaminated with PCE [perc] from dry cleaning. If a State or local government finds an indoor air pollution problem, for example, the government may wish to consider whether collocation of a dry cleaner in the same building with residences is appropriate.").
95. See *id.* at 49,373.
96. See *supra* note 7.
97. See generally N.Y. COMP. CODES R. & REGS. tit. 6, § 232 (2007). The NYSDEC regulations fill in many of the regulatory gaps left open by the federal dry cleaner NESHAP. For example, compared to the NESHAP, NYSDEC part 232 standards that establish which types of dry cleaner machine may be used in a facility are more focused on maximum-control technology implementation. See *id.* §§ 232.4, .5, .6. Part 232 also places primary emphasis on dry cleaner collocation by scaling the machine control equipment standards according to the degree of public health hazard posed by the dry cleaner's location. See *id.* § 232.6(b). The regulations create a hierarchy of control equipment stringency: The requirements for mixed-use facilities are clearly more stringent than standards for stand-alone facilities, and the mixed-use residential subcategory is more strictly controlled than the mixed-use commercial subcategory. See *id.*
98. *Id.* § 232.6(b)(4).
99. See generally *id.* Nowhere do the rules specify a Maximum Contaminant Level (MCL) for perc that would trigger enforcement actions to reduce or eliminate perc exposure in co-located residences.
100. See N.Y. STATE DEP'T OF HEALTH, FACT SHEET: TETRACHLOROETHENE (PERC) IN INDOOR AND OUTDOOR AIR 5 (2003), http://www.health.state.ny.us/nysdoh/environ/btsa/fs_perc.pdf.
101. *Id.*
102. See Memorandum from Nancy K. Kim, Dir., Div. of Env'tl. Health Assessment, N.Y. Dep't of Health, to Reg'l Dirs., Dist. Dirs. & City & County Comm'rs/Pub. Health Dirs. 1 (Aug. 19, 1997) (on file with author) (Agreement concerning Part 232 N.Y.S. Dep't of Env'tl. Conservation Regulation).
103. *Id.* at app. 3 (emphasis added).
104. See *infra* text accompanying note 132.
105. See *supra* p. 14.
106. See *supra* p. 14.
107. See *supra* pp. 15-16.
108. See generally National Perchloroethylene Air Emission Standards for Dry Cleaning Facilities, 71 Fed. Reg. 42,724 (July 27, 2006) (to be codified at 40 C.F.R. pt. 63).
109. See *supra* p. 16.
110. National Perchloroethylene Air Emission Standards for Dry Cleaning Facilities, 71 Fed. Reg. at 42,735-36 ("We are requiring existing sources to discontinue the use of PCE machines no later than December 21, 2020. In addition, our consideration of the relevant factors leads us to prohibit additional PCE-using machines from being installed.").
111. See *supra* p. 14.
112. The EPA has estimated there are 1,007 dry cleaners co-located with residential facilities in New York State, whereas only 299 of such facilities occur nationally outside of New York State. See Memorandum from Mike Heaney, E. Research Group, Inc., to Rhea Jones, U.S. EPA, Cost of NESHAP Revisions for New Co-residential Perchloroethylene Dry Cleaning Facilities (Oct. 5, 2005), available at <http://www.epa.gov/air/drycleaningrule/pdfs/11-14-05background.pdf>.
113. See New York State Department of Health, New York State Local Health Departments, <http://www.health.state.ny.us/nysdoh/lhu/map.htm> (last visited Mar. 2, 2007). A survey of the web sites of local health departments in New York State reveals environmental protection programs that expand the health department's involvement in the environmental field well beyond what most perceive to be its traditional restaurant inspection role. These programs run the gamut from watershed and drinking water protection, to sewage pollution prevention, acid rain monitoring, solid-waste management and inspection, petroleum bulk-storage regulation, indoor and outdoor air monitoring, and bioterrorism response, just to name a few. See, e.g., Albany County Department of Health, http://www.albanycounty.com/departments/health/programs_services.asp?id=250 (last visited Mar. 2, 2007) (programs for public water supply protection, realty subdivision, toxic exposures and indoor air, and chemical emergencies); Broome County Health Department, <http://www.gobroomecounty.com/hd/HasHealthDept.php> (last visited Mar. 2, 2007) (programs to assist in implementation of groundwater protection ordinance, review and monitor hazardous waste site investigation and cleanup, and inspect solid waste facilities); Westchester County Department of Health, <http://www.westchestergov.com/health/HealthTopicsWebpageDirectory.htm> (last visited Mar. 2, 2007) (programs for natural water body pollution investigation, dry cleaner and auto body facility permitting and inspection, hazardous materials spill response, bioterrorism response, public water supply protection, indoor and outdoor air quality, and solid waste facility management).
114. See generally Westway, *supra* note 4.
115. See *id.* at 362-63 (emphasis added).
116. See *Regulatory Commons*, *supra* note 4, at 64.

117. *Id.* at 62.
118. *Id.* at 63.
119. Professor Buzbee also recognizes the importance of regulatory leadership, which he terms “primacy,” but seems to limit its application to the notion of a single lead agency. *See Regulatory Commons*, *supra* note 4, at 22 (“If a social ill is juxtaposed against a fragmented or overlapping legal or political setting . . . the social ill is less likely to be addressed by regulatory action than in settings where a particular institution is viewed by all as having regulatory primacy.”) (emphasis added). In the author’s view, primacy is a term only somewhat synonymous with leadership. The term primacy connotes a scenario in which one agency is designated the principal boss, issuing orders to agencies lower on the regulatory ladder and to whom these lesser agencies report to and look to for decision-making guidance. On the other hand, the term leadership better incorporates the notion that several agencies, regardless of positional hierarchy, may be suited to take control of the different initiatives that exist in a regulatory program.
120. *See supra* note 119.
121. *See id.*
122. *See supra* p. 17.
123. *Id.*
124. *See id.*
125. *See infra* text accompanying note 132.
126. Many counties, especially in sparsely populated rural areas, may not have dry cleaner facilities that are co-located with apartments or other residential structures because there is enough land available to disfavor this zoning practice.
127. *See supra* p. 16.
128. *See supra* p. 15.
129. *See supra* p. 16 and text accompanying notes 92 & 94.
130. *See supra* p. 12.
131. For example, during the Westchester County Department of Health’s 2005 annual dry cleaning inspection program, the Building Inspector for the Village of Pelham, N.Y., stated he had never been informed that dry cleaner co-location posed any particular public health concerns. Telephone Interview with Leonard M. Russo, Bldg. Inspector & Code Enforcement Official, Vill. of Pelham, N.Y., in Westchester County, N.Y. (Aug. 5, 2005).
132. *See supra* note 80. As of 2005, the Westchester County, through its Department of Health, was the only county in the state to conduct annual dry cleaner compliance inspections that incorporated an assessment of dry cleaner facility impact on co-located residences, by measuring perc indoor air concentrations in these residences via infrared spectroscopy and correlating the results with dry cleaner facility conditions. However, no attempt was made to encourage local zoning authorities to place limitations on, or altogether prohibit, dry cleaner co-location in mixed-use districts. *Id.*
133. *See supra* text accompanying note 110.

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Drowning Polar Bears Push EPA's Greenhouse Gas Policies onto Thin Ice:

What Do the Endangered Species Act and the Marine Mammal Protection Act Require EPA to Do About GHGs in Order to Protect Polar Bears and Other Species from Global Warming?

By Patrick Donnelly

[M]arine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem.

Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1361(6) (2006)

Congress finds and declares that . . . species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value . . . The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act. . . .

Introduction

The polar bear (*Ursus maritimus*) is a marine mammal¹ that is “of esthetic, ecological, educational, historical, recreational, and scientific value.”² The importance of polar bears can be seen throughout American society from Coca-Cola³ and Klondike bar⁴ advertisements to articles in major periodicals⁵ and expeditions to photograph the bears.⁶

Unfortunately, polar bears are threatened with extinction because sea ice, the marine ecosystem upon which they depend, is melting away due to global warming.⁷ One of many consequences of the ice melting is that polar bears are drowning in greater numbers than ever previously observed.⁸ Some scientists say that the Arctic Ocean may be essentially free of ice in the summer by 2040⁹ and that polar bears *will* be extinct by the end of the century.¹⁰

The U.S. Fish and Wildlife Service (FWS), in its recent proposal to list polar bears as threatened under the Endangered Species Act (ESA), stated that potentially significant changes are occurring to the landscape in the Arctic “as a consequence of climate change” and that the Arctic is being disproportionately affected.¹¹ FWS further stated that the changes in the Arctic include “diminishing sea ice.”¹² Ironically, while FWS was proposing to list polar bears as threatened due to global warming, the Environmental Protection Agency (EPA) was refusing to regulate carbon dioxide (CO₂) and other greenhouse gases (GHGs), which are causing global warming.¹³

In *Massachusetts v. EPA*, EPA argued it did not have the authority to regulate GHGs and even if it did, it would not exercise that authority because of policy con-

Endangered Species Act (ESA) § 2, 16 U.S.C. § 1531 (2006)

siderations.¹⁴ The U.S. Supreme Court held that EPA does have the authority to regulate GHGs¹⁵ and stated that a “well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related. For when carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy. . . .”¹⁶ The Court also stated that “[t]he harms associated with climate change are serious and well recognized” and include “the global retreat of the mountain glaciers, reduction in snow-cover extent, the earlier spring melting of rivers and lakes. . . .”¹⁷ The Court noted that EPA “does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming.”¹⁸

One of the authorities cited by the Supreme Court in *Massachusetts v. EPA* was the Intergovernmental Panel on Climate Change (IPCC), which is a multinational scientific body organized by the United Nations¹⁹ and the most respected authority on global warming. In a recent report, the IPCC stated that the global atmospheric concentrations of GHGs, such as carbon dioxide, methane, and nitrous oxide, have increased significantly “as a result of human activities.”²⁰ The IPCC found that the increase in carbon dioxide was due primarily to fossil fuel use and land-use change and that the increases in methane and nitrous oxide were primarily due to agriculture.²¹ The IPCC further stated that it has “very high confidence,” which means it is at least 90 percent certain, that human activities are causing global warming.²²

The United States is by far the largest contributor to global warming of any country in the world²³ and is re-

sponsible for about 25 percent of the world's total greenhouse gas emissions.²⁴ According to the U.S. Department of Energy (DOE), in 2004, the United States emitted about 5,912.21 million metric tons (MMT) of carbon dioxide from the consumption and flaring of fossil fuels.²⁵ The next largest emitters were China (4,707.28 MMT), Russia (1,684.84 MMT), Japan (1,262.10 MMT), India (1,112.84 MMT), and Germany (862.23 MMT).²⁶

In 2005, about 83 percent of U.S. GHG emissions consisted of carbon dioxide from the combustion and nonfuel use of fossil fuels such as coal, petroleum, and natural gas.²⁷ Other U.S. GHG emissions included methane (8.6 percent) and nitrous oxide (5.1 percent).²⁸ U.S. emissions of methane and nitrous oxide are caused by "the biological decomposition of various waste streams and fertilizer; fugitive emissions from chemical processes; fossil fuel production, transmission, and combustion; and many smaller sources."²⁹

Despite the threats from global warming to polar bears and numerous other marine mammals and endangered species³⁰ and despite the United States' significant involvement in causing global warming,³¹ the U.S. government has done relatively little to curb man-made GHGs.³² Despite the commands of the Marine Mammal Protection Act (MMPA) that "marine mammals . . . should be protected and encouraged to develop to the greatest extent feasible"³³ and the commands of the ESA that "all Federal departments and agencies *shall seek* to conserve endangered species and threatened species and *shall utilize* their authorities in furtherance of the purposes of this Act,"³⁴ EPA has refused to regulate "the most important" GHG, carbon dioxide,³⁵ and has offered as an excuse a "parsimonious construction of the Clean Air Act."³⁶

This article focuses on EPA, its failures to control GHGs under the Clean Air Act (CAA),³⁷ and its mandatory duties under the ESA³⁸ and the MMPA³⁹ to control GHGs in order to protect polar bears. Part I further explains why polar bears may become extinct due to global warming. Part II describes efforts to place polar bears on the Endangered Species List. Part III presents some EPA policies that have been too weak on GHGs, and includes a discussion of *Massachusetts v. EPA*.⁴⁰ Part IV examines what EPA is required to do about GHGs under the ESA to protect polar bears. Part V examines this same issue under the MMPA. Part VI focuses on what states and citizen can do under the ESA and the MMPA to force EPA to take action on GHGs. However, similar uses of the ESA and the MMPA should be explored.⁴¹

I. Polar Bears May Become Extinct Due to Global Warming

Critics of efforts to place polar bears on the Endangered Species List argue that polar bears will adapt and will not go extinct. Critics say that the bears will adapt to land⁴² and "that it is possible, even with the total loss of summer sea ice, that a small number of polar bears would

survive semi-indefinitely" as long as "there is still some ice cover during the winter and marine mammals" continue to be available as prey or carrion.⁴³ The following discusses these issues and draws heavily on the science on which FWS has relied.⁴⁴

The polar bear is considered a marine mammal because "its primary habitat is the sea ice," and "it is evolutionarily adapted to life on sea ice."⁴⁵ These adaptations include teeth specialized for a carnivorous rather than an omnivorous diet and paddle-like feet with suction cups for increased traction.⁴⁶ Polar bears depend on sea ice for a number of purposes, including hunting, mating, and denning and as a substrate on which to make long-distance movements.⁴⁷

A. Impacts of Global Warming on Population and Distribution

The total population of polar bears worldwide is about 20,000 to 25,000.⁴⁸ However, polar bears are not evenly distributed throughout the Arctic and are comprised of 19 relatively discrete populations.⁴⁹ The boundaries of each population are based on behavioral and ecological factors and were developed from "decades of intensive scientific studies."⁵⁰ A couple populations inhabit parts of the United States in the Chukchi and Beaufort Seas.⁵¹ There are about 2,000 bears in the Chukchi Sea and 2,700 in the Beaufort Sea.⁵² The Beaufort Sea population is known to be declining, and "it is likely that most populations will exhibit declines in the future."⁵³

An example of the dramatic declines that can occur due to global warming can be seen in the Western Hudson Bay. Between 1987 and 2004, the polar bear population in that area declined from 1,194 to 935, a reduction of about 22 percent.⁵⁴ The cause of this decline appears to be progressively earlier sea ice breakup.⁵⁵

Polar bears are generally limited to areas where ice covers the sea for much of the year.⁵⁶ They are most abundant near shore and in areas where currents and ocean upwelling increase marine productivity and keep the sea ice from becoming too solid.⁵⁷ Many polar bears, including those around Alaska remain on the sea ice all year, even in the summer.⁵⁸ However, during the summer much of the remaining sea ice in the Arctic is now positioned away from more productive continental shelf waters and over deeper, less productive waters.⁵⁹

Habitat selection may involve trade-offs such as selecting between habitats with abundant prey availability and habitats with more access to suitable dens.⁶⁰ Polar bears exhibit a strong preference for sea ice but will abandon it for land once ice concentration drops below a certain level.⁶¹ One reason is that hunting success decreases as the ice disperses.⁶² Females that use terrestrial habitat for maternity denning must adjust their movements so they can access land at the appropriate time.⁶³ As a result, the polar bear distribution varies seasonally with the sea ice.⁶⁴

In winter, the sea ice may extend 248 miles south of the Bering Strait, and some polar bears will extend their range to the southernmost reaches of the ice.⁶⁵ In summer, the sea ice recedes, and some bears move as much as 621 miles to stay with it.⁶⁶ However, polar bears do not wander aimlessly on the ice, nor are they carried passively with the currents.⁶⁷ They show strong fidelity to certain areas.⁶⁸ Sea ice in the Arctic circulates in a clockwise direction, and the bears walk against this movement to maintain a position near preferred habitat.⁶⁹ As sea ice diminishes and moves faster, polar bears will need to exert more energy to maintain this position.⁷⁰

For pregnant females that return each year to specific denning areas on land, the sea ice must drift close enough to allow access to these areas by early November.⁷¹ As the distance increases between the ice and the coast, it will become more difficult for females to access “the most important denning areas,” in places such as “the Arctic National Wildlife Refuge.”⁷²

If the extent of open water continues to increase, male and female polar bears will have to travel further, swim more, and exert more energy.⁷³ The consequences will be reduced weight, birth rates, and survival.⁷⁴ As the movement of sea ice increases, polar bears may drift into unsuitable habitat and not be able to return, as is already occurring in some areas.⁷⁵ One scientist has observed “one exhausted and one apparently dead polar bear apparently stranded at sea.”⁷⁶

Open water presents a significant drowning hazard to polar bears swimming long distances.⁷⁷ In September 2004, the Department of the Interior (DOI) observed that four polar bears had drowned while swimming between the shore and distant ice in the Beaufort Sea.⁷⁸ “Despite offshore surveys extending back to 1987, similar observations had not previously been recorded.”⁷⁹ DOI thinks that around 36 bears may have been swimming in the area where the four bears were observed and that a total of 27 bears may have drowned at that time.⁸⁰ The cause of these drownings was probably rough seas and high winds due to extensive areas of open water.⁸¹ Since wave height increases⁸² and the severity of storms may increase⁸³ as the amount of open water increases, polar bear drownings are likely to increase in the future.⁸⁴

In addition to the energy costs and drownings that will result from swimming longer distances in increasingly difficult conditions, polar bears, particularly young cubs, may die from hypothermia from the more extensive exposure to water.⁸⁵ Cubs below a certain age are unable to survive immersion in icy water for more than about 10 minutes.⁸⁶

In recent years, the distribution of polar bears has changed in areas such as the Beaufort Sea, where greater numbers of bears are being found on shore during the open water season “than recorded at any previous time.”⁸⁷ Generally, as the distance between land and sea

ice habitat has increased, the number of bears on shore has increased.⁸⁸ As a result, more bears appear to be using land where villages are located and where oil and gas production is occurring,⁸⁹ which is likely to lead to more conflicts between bears and people.⁹⁰

B. Impacts of Global Warming on Food

Polar bears are an apex predator of the Arctic marine ecosystem.⁹¹ They prey on ringed seals and other marine mammals, although ringed seals are their primary prey.⁹² Since polar bears hunt marine mammals at breathing holes and rarely succeed at capturing them in open water, increased open water will probably decrease hunting success, and it is unlikely that the bears will be able to compensate for the loss of their preferred hunting methods.⁹³

Furthermore, since marine mammals in the Arctic depend on sea ice for activities such as pupping, foraging, molting, and resting, decreased sea ice will mean decreased survival of marine mammals such as ringed, bearded, ribbon, spotted, harp, and hooded seals as well as walrus.⁹⁴ According to FWS, any significant decline in ringed seals will probably affect the survival of polar bears, and it is “unlikely that increased take of other species . . . , even where they are available, could compensate for reduced availability of ringed seals.”⁹⁵

Polar bears may rely on other food sources such as beached whales, plants, and human garbage,⁹⁶ especially when they are starving.⁹⁷ However, as more bears scavenge for food at places such as garbage dumps, there will be more conflicts with humans.⁹⁸ In general, the prolonged use of terrestrial habitat is a concern for polar bears.⁹⁹ Although they might consume food such as blueberries, snow geese, and reindeer, these probably cannot provide sufficient energy.¹⁰⁰ Polar bears are inefficient at moving on land and expend more energy when walking than other mammals.¹⁰¹ This inefficiency may explain why polar bears are not known to hunt musk oxen or snow geese since the energy needed to kill such prey would probably exceed the energy the prey would provide.¹⁰² Consequently, FWS has stated that “adaptive behaviors of using terrestrial habitat instead of sea ice will not offset energy losses from decreased seal consumption, and nutritional stress will result.”¹⁰³

C. Impacts of Global Warming on Dens and Reproduction

Polar bear reproduction is characterized by late sexual maturity, small litter sizes, and extended parental investment, and when food is scarce, polar bears may defer reproduction.¹⁰⁴ These factors contribute to a low reproductive rate and indicate it will be difficult for the species to rebound.¹⁰⁵ If global warming continues to cause polar bears to be malnourished, then they may stop reproducing entirely.¹⁰⁶ Scientists project that by 2012 most females in the Western Hudson Bay will be unable to reach the minimum body mass required to reproduce.¹⁰⁷

Global warming also impacts the quality and quantity of snow available for denning.¹⁰⁸ Polar bears require sufficient snow accumulations for den construction, and changes in the amount and timing of snowfall can affect their survival.¹⁰⁹ Global warming is also likely to increase rainfall in the Arctic and cause polar bear and ringed seal dens to collapse.¹¹⁰ In the Beaufort Sea, a den collapse after a warming period caused the death of a mother bear and her two cubs.¹¹¹ Therefore, even if polar bears adapt to different foods, they may not be able to adapt to changes in denning.

D. Summary of Impacts

Global warming will have serious consequences for polar bears, including “adverse effects on denning, food chain disruption, prey availability,” and “reproduction.”¹¹² Polar bears in certain areas have already started to decline.¹¹³ The best science available seems to indicate that polar bears will not be able to adapt to the rapidly changing environment, and it is likely the species will disappear with the sea ice. To delay action based on a possibility that some bears might adapt or survive in patches appears risky and would violate the MMPA and the ESA.

The MMPA requires that marine mammals be “protected and encouraged to develop to the greatest extent feasible.”¹¹⁴ The ESA requires the protection of “any species which is in danger of extinction throughout all or a significant portion of its range”¹¹⁵ and the conservation of “the ecosystems” upon which the species depends¹¹⁶ at the time it is listed.¹¹⁷ The ESA certainly does not call for protection of only habitat that might be occupied in the future and does not require a finding that the species absolutely will go extinct.¹¹⁸ It is sufficient if the species is likely to become in danger of extinction in a significant portion of its range.¹¹⁹

II. Efforts to Put Polar Bears on the Endangered Species List

Under section 4(a)(1) of the ESA, the Secretary of the Interior shall determine whether a species is threatened or endangered due to “any of the following factors: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or man-made factors affecting its continued existence.”¹²⁰

Section 4(b)(1)(A) states, “The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available. . . .”¹²¹ Economic factors may not be considered when determining whether to list a species.¹²² The Secretary may however consider economic impacts when designating critical habitat for a species, “unless he determines, based on the best scientific and commercial data available, that

the failure to designate such area as critical habitat will result in the extinction of the species concerned.”¹²³

Under section 3(5) of the ESA,¹²⁴ “critical habitat” for a threatened or endangered species means the areas “occupied by the species, at the time it is listed . . . , on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection” and areas not occupied by the species that the Secretary determines “are essential for the conservation of the species.” The term “endangered species” means “any species which is in danger of extinction throughout all or a significant portion of its range.”¹²⁵ The term “threatened species” means “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”¹²⁶ For vertebrates, including polar bears, a Distinct Population Segment instead of the entire species can be designated as threatened.¹²⁷ The ESA does not define the term “foreseeable future,”¹²⁸ but DOI has determined that it is 45 years for the polar bear.¹²⁹

Pursuant to section 4(b) of the ESA,¹³⁰ the Center for Biological Diversity (CBD) in February 2005 petitioned DOI to list either the polar bear species or the separate populations of polar bears as threatened or endangered.¹³¹ On July 1, 2005, in response to this petition, FWS informed CBD that “due to funding constraints . . . , and the need to comply with court orders and settlement agreements, [it] would not be able to begin processing the petition at that time.”¹³² On July 5, 2005, the Natural Resources Defense Council (NRDC) and Greenpeace joined CBD in the petition,¹³³ and on December 15, 2005, they sued FWS for failing to issue a 90-day finding in response to the petition, which was required under section 4(b)(3) of the ESA.¹³⁴ On February 7, 2006, FWS made the 90-day finding, which stated the petition presented substantial scientific information indicating that listing the polar bear may be warranted.¹³⁵ In a settlement resulting from the lawsuit, FWS agreed to publish a 12-month finding by December 27, 2006.¹³⁶ On January 9, 2007, FWS published the 12-month finding and stated: “we find that listing the polar bear as a threatened species under the Act is warranted”¹³⁷ and “the entire species meets the definition of a threatened species.”¹³⁸ FWS then proposed to list the polar bear as threatened throughout its range but also stated that critical habitat “is not determinable at this time.”¹³⁹

Section 4(a)(3) of the ESA requires FWS “to the maximum extent prudent and determinable” to “designate any habitat” which is considered to be critical at the time when it determines a species is threatened or endangered.¹⁴⁰ In other words, FWS must designate as much habitat as it can determine at the time it decides to list a species unless doing so would not be prudent. FWS does not have to wait for all of the critical habitats to be identified before it designates any critical habitat.¹⁴¹ Such an interpretation would be absurd and would defeat the pur-

pose of the ESA. It would also be absurd to not designate critical habitat because that habitat might be reduced or destroyed and because “the future values of these habitats may change in a rapidly changing environment.”¹⁴² The whole purpose of designating habitat as critical is to conserve that habitat.

Since studies of polar bears and their distribution have been conducted by the federal government since at least 1919,¹⁴³ it is likely that there is sufficient evidence to identify at least some habitat as critical. The issue then is whether it would be prudent to identify this habitat. FWS, in support of its proposal not to designate habitat, cites 50 C.F.R. § 424.12 (2007). Under subsection (a)(1) of 50 C.F.R. § 424.12, designating critical habitat is not prudent when the following situations exist: “(i) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species, or (ii) Such designation of critical habitat would not be beneficial to the species.”¹⁴⁴ It is unlikely that designation of habitat will increase the threat to polar bears, and it is clear they would benefit from having critical habitat protected from such threats as oil drilling and global warming.¹⁴⁵ Furthermore, FWS must give an explanation in the proposed rule of why it would not be prudent to designate critical habitat,¹⁴⁶ but it has provided no such explanation.¹⁴⁷ Thus, it seems that FWS is being as parsimonious with the ESA as EPA has been with the CAA.¹⁴⁸

FWS accepted comments on the proposed rule up until April 9, 2007, and it is likely that many comments were received on the failure to designate habitat.¹⁴⁹ It is also likely that NRDC and others will challenge any final rule that does not designate any habitat.¹⁵⁰ In addition, FWS has only 12 months from the time the final rule is issued to designate critical habitat “to the maximum extent prudent.”¹⁵¹ The term “determinable” is conspicuously missing from the ESA and the regulations at this point.¹⁵² Therefore, FWS will probably be forced to designate critical habitat within the next few years, if it does not do so in the final rule.

By January 9, 2008, FWS must issue the final listing determination for the polar bear, which will either grant official protection under the ESA or withdraw the proposal.¹⁵³ However, any withdrawal must be made “upon a finding that available evidence does not justify the action proposed. . . .”¹⁵⁴ Therefore, it remains to be seen whether the proposed rule will be amended, whether polar bears will be placed on the Endangered Species List, and whether sea ice upon which the bears depend will be designated as critical habitat.

There are signs that the administration is feeling the heat on this issue. FWS recently issued internal memos basically saying that scientists attending meetings abroad should not discuss “climate change, polar bears, and sea ice,” at least when the media is present.¹⁵⁵

III. EPA’s Policies on GHGs Have Been Too Weak

EPA has failed to do anything significant about GHGs, and at least one of its policies to not regulate GHGs has fallen through any thin ice that supported it. This article examines three major EPA policies on GHGs, which are its policy not to regulate CO₂ from (1) motor vehicles and (2) power plants and (3) its weak policies on animal feeding operation (AFO) emissions.

A. Motor Vehicles and Power Plants

Massachusetts v. EPA began in 1999 with a petition to EPA to regulate GHGs from new motor vehicles and a denial of that petition in 2003.¹⁵⁶ The issues before the Supreme Court were whether the CAA¹⁵⁷ provides EPA with the authority to regulate CO₂ and other GHGs from motor vehicles and whether EPA may decline to exercise that authority based on policy.¹⁵⁸ The Court held that EPA was authorized to regulate CO₂ and rejected EPA’s policy argument that even if it has the authority to regulate greenhouse gases, it would be unwise to do so at this time.¹⁵⁹

The Court found that all EPA had offered was an irrelevant “laundry list of reasons not to regulate.”¹⁶⁰ Reasons on the list were: “voluntary executive branch programs already provide an effective response to the threat of global warming”; “regulating greenhouse gases might impair the President’s ability to negotiate with key developing nations to reduce emissions”; “curtailing motor-vehicle emissions would reflect an inefficient, piecemeal approach to address” climate change;¹⁶¹ and that uncertainty surrounds climate change.¹⁶²

The Court held that while the CAA “does condition the exercise of EPA’s authority on its formation of a judgment . . . that judgment must relate to whether an air pollutant cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.”¹⁶³ When EPA responds to a petition to regulate GHGs, EPA “can avoid taking further action only if it determines that [GHGs] do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.”¹⁶⁴ It is irrelevant that EPA would prefer not to regulate because of some uncertainty.¹⁶⁵ The question is whether sufficient information exists to make an endangerment finding, and EPA “must ground its reasons for action or inaction in the statute.”¹⁶⁶

In *Massachusetts v. EPA*, the Supreme Court may have left a small window for EPA to decide not to regulate GHGs from motor vehicles. However, this article posits that EPA must consider the ESA and MMPA before making such a decision.

Cases around the country, including a challenge to EPA’s refusal to regulate CO₂ emissions from power plants, were stayed to await the decision in *Massachusetts v. EPA*.¹⁶⁷ Given the Supreme Court’s decision, it will be

difficult for EPA to continue to make such refusals, but the ESA and the MMPA put additional pressure on EPA to regulate GHGs.

Although motor vehicles and power plants are among the most significant sources of GHGs, agriculture is also a significant source,¹⁶⁸ and AFOs constitute one of the more controversial agricultural sources. Therefore, this article examines whether the ESA can also be used to force regulation of agricultural sources and uses AFOs as a model.

B. Animal Feeding Operations (AFOs)

AFOs are farms that raise hundreds to millions of animals in confinement and emit substantial air pollution.¹⁶⁹ There are about 450,000 AFOs in the United States.¹⁷⁰ The pollutants emitted by AFOs include nitrous oxide and methane,¹⁷¹ which are significant GHGs.¹⁷²

EPA's efforts to regulate emissions from AFOs have been relatively weak recently.¹⁷³ Instead of aggressively pursuing regulation,¹⁷⁴ EPA created the Air Compliance Agreement in 2006,¹⁷⁵ which essentially delays regulation and, at least temporarily, shields AFOs from CAA litigation.¹⁷⁶ The Agreement sets forth a program in which emissions from certain AFOs will be monitored for a two-year period starting in 2006.¹⁷⁷ EPA justifies the program by using the all-too-familiar argument that the current science is unclear and more studies are needed.¹⁷⁸ Meanwhile others argue the science is clear and that EPA should already be regulating emissions from AFOs.¹⁷⁹

Ironically, drowning polar bears and petitions on inefficient cars may force EPA to regulate AFO emissions. The ESA, the MMPA, and *Massachusetts v. EPA* put greater pressure on EPA to regulate emissions from all significant sources of GHGs.

IV. What Does the Endangered Species Act Require EPA to Do About GHGs?

The ESA was passed by a nearly unanimous Congress¹⁸⁰ and is one of the strongest of the federal environmental laws and a powerful tool for species protection.¹⁸¹ The major substantive and procedural requirements of the ESA are set out in sections 4, 7, 9, 10, and 11.¹⁸² Section 4 provides for the listing of species as threatened or endangered, for designating critical habitat, and for preparing recovery plans.¹⁸³ Section 7 requires federal agencies to consult with DOI or the Department of Commerce to ensure that agency actions do not harm listed species or critical habitat.¹⁸⁴ Section 9 prohibits the "taking" of any endangered species,¹⁸⁵ and DOI has extended this to threatened species under its purview,¹⁸⁶ which would include polar bears.¹⁸⁷ Section 10 provides exemptions.¹⁸⁸ Section 11 authorizes enforcement and citizen suits.¹⁸⁹

If polar bears are listed as threatened or endangered, sections 7, 9, and 11 will be the most powerful tools in the ESA for forcing action by EPA on GHGs. Section 4 may

also be useful. Sections 7, 9, and 4 are discussed here, and section 11 is discussed in Part VI of this article.

A. Section 7—Agency Conservation Obligations and Consultation

1. Section 7(a)(1)—Conservation Obligations

Section 7(a)(1)¹⁹⁰ creates a duty for all federal agencies that is separate and distinct from Section 7(a)(2)¹⁹¹ consultation requirements.¹⁹² It provides that all federal agencies "shall, in consultation with and with the assistance of the Secretary [of the Interior or Commerce], utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species."¹⁹³

Most courts have held section 7(a)(1) creates some mandatory, affirmative duties,¹⁹⁴ but it is still not clear what those duties are.¹⁹⁵ Under section 7(a)(1), all agencies may be required to develop and initiate programs to protect and conserve species,¹⁹⁶ or agencies may only be required to consider ways their primary activities can be supplemented with additional species conservations measures that are consistent with the primary obligations of the agency.¹⁹⁷ Either interpretation requires EPA to actively seek to protect listed species from global warming when making decisions on regulating GHGs under the CAA.

2. Section 7(a)(2)—Consultation Regarding Listed Species

Section 7(a)(2) of the ESA requires all federal agencies to consult with the Secretary of the Interior or Commerce to insure that "any action authorized, funded, or carried out" by each agency "is not likely to jeopardize the continued existence" of any listed species "or result in the destruction or adverse modification of habitat of such species" unless the agency has been granted an exemption.¹⁹⁸ In fulfilling the requirements of this section each agency must use "the best scientific and commercial data available."¹⁹⁹

"Action" is defined by 50 C.F.R. § 402.02 (2007) as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas," and under 50 C.F.R. § 402.03 (2007), the agency must have some "discretionary" involvement or control in the action.²⁰⁰ Courts have held that "action" is a term that is given "a very broad scope,"²⁰¹ and even ongoing or continuing actions can trigger consultation under the ESA.²⁰² Examples of agency actions include "the promulgation of regulations; . . . the granting of licenses . . . ; or . . . actions directly or indirectly causing modifications to the land, water, or air."²⁰³ "Indirect effects" of an agency action are defined in 50 C.F.R. § 402.02 as "those that are caused by the proposed action and are later in time, but still are reasonably certain to occur."

In *National Wildlife Federation v. Coleman*, the court held that the Department of Transportation (DOT) had violated the ESA by failing to consider the indirect effects on sandhill cranes of future private development, which was likely to result from the construction of a highway funded by DOT.²⁰⁴ In *Turtle Island Restoration Network v. National Marine Fisheries Service* (NMFS), the Ninth Circuit held that NMFS's issuance of permits, which allowed a form of fishing that might harm endangered sea turtles, clearly constituted agency action sufficient to trigger ESA consultation.²⁰⁵ In *Washington Toxics Coalition v. EPA*, EPA's approval of pesticides that had the potential to harm threatened salmon in the Northwest was agency action that required consultation under the ESA.²⁰⁶ In *Pacific Legal Foundation v. Watt*, the award of a Clean Water Act construction grant and the issuance of a discharge permit by EPA were both held to be agency actions that could harm endangered birds and that must conform to the requirements of the ESA.²⁰⁷ In *Center for Food Safety v. Johanns*, the court held that the Department of Agriculture violated the ESA by failing to obtain information about listed species and critical habitats from FWS and NMFS before it issued permits allowing companies to plant corn that had been genetically modified.²⁰⁸ Such cases support the argument that EPA should consult the Secretary of the Interior or Commerce when it takes actions, such as issuing permits to power plants and setting emission regulations for cars, which may increase global warming and thereby jeopardize the continued existence of listed species.

The key issue then is whether there is a sufficient connection between EPA's actions, global warming, and the resulting harm to listed species. Given *Massachusetts v. EPA*,²⁰⁹ the IPCC's recent report,²¹⁰ and FWS's findings in its proposal to list polar bears,²¹¹ it will be difficult for EPA to argue that no sufficient connection exists to trigger ESA consultation.²¹²

3. Section 7(a)(4)—Consultation Regarding Species Proposed for Listing

Section 7(a)(4) of the ESA states, "Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed . . . or result in the destruction or adverse modification of critical habitat proposed to be designated." Although section 7(a)(4) requires less formal consultation than section 7(a)(2),²¹³ it could be used to pressure EPA to take action even before polar bears are listed.

B. Section 9—Regulatory "Takings"

Section 9 of the ESA²¹⁴ may provide powerful tools for forcing EPA to take action on GHGs. Under section 9(a)(1), it is unlawful for any person subject to the jurisdiction of the United States to take any endangered or threatened species within the United States, the territorial sea of the United States, or upon the high seas.²¹⁵ Sec-

tion 3(13) of the ESA defines "person" as "an individual, corporation, . . . or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, . . . or any other entity subject to the jurisdiction of the United States."²¹⁶ Section 3(19) states that the term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."²¹⁷ And Congress intended that "take" be "defined in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife."²¹⁸ Section 9(g) adds, "It is unlawful for any person subject to the jurisdiction of the United States to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in this section."²¹⁹ DOI regulations have extended all these section 9 prohibitions to threatened species under the purview of DOI,²²⁰ which would include polar bears.²²¹ Therefore, EPA can be held responsible for violating the ESA when it causes an activity to be committed which harasses or harms a threatened or endangered species.

The terms "harass" and "harm" have been further defined by regulations and case law. 50 C.F.R. § 17.3 (2007) defines "harass" as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." 50 C.F.R. § 17.3 defines "harm" as "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." Habitat modification alone may amount to a "take" which harms or harasses listed species.²²² Therefore, emission of GHGs that cause global warming and modify the habitat of listed species could constitute a taking, and EPA could be held responsible for authorizing such emissions.

Generally, an agency, such as EPA, pursuant to whose authority an actor exacts a taking of an endangered species, may be deemed to have violated the provisions of the ESA.²²³ In *Defenders of Wildlife v. EPA*, environmental organizations sued EPA in order to prohibit the use of pesticides containing strychnine.²²⁴ The court held that EPA's decision to register the pesticides or to continue such registrations constituted a taking. The court noted the endangered species had died from ingesting the strychnine, "either directly or indirectly," and the strychnine could only be distributed pursuant to EPA's registration scheme.²²⁵ The court further noted that "[t]he relationship between the registration decision and the deaths of endangered species is clear."²²⁶

The Supreme Court has held an action does not constitute a taking unless it is the proximate cause of the harm to a listed species.²²⁷ The issue then is whether there is such a relationship between EPA's decisions to not reg-

ulate GHGs and the harm to polar bears from drowning, cannibalism, den collapses, and other circumstances. Given *Massachusetts v. EPA*,²²⁸ the IPCC's recent report,²²⁹ and the findings of FWS in its proposal to list polar bears,²³⁰ it will be difficult for EPA to argue that no such relationship exists.

Therefore, EPA may be violating the ESA and may be responsible for "taking" species threatened by global warming when, for example, it issues permits to power plants without including sufficient limits on GHGs. Ironically, this argument is supported by a recent statement made by an oil trade group, in which the group's deputy director stated that the listing of polar bears²³¹ "likely will force anyone in America whose business requires the emission of greenhouse gases to go through an additional layer of consultation with the [FWS]. . . ."

C. Section 4(f)—Recovery Plan

Environmental groups, such as NRDC, argue that once the polar bear is listed, DOI will have to develop a recovery plan for the polar bear pursuant to section 4(f) of the ESA²³² and that such a plan will be a useful tool in forcing more action on GHGs.²³³ Section 4(f)(1) states "The Secretary shall develop and implement . . . recovery plans . . . for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species."²³⁴ Examples of reasons why a plan will not promote such conservation include situations in which existing state management plans substitute for recovery plans or the species is not found in the wild or is probably extinct.²³⁵ None of these examples applies to the polar bear, and it is likely that DOI will have to develop a recovery plan for polar bears. However, at least some courts have held that recovery plans are not documents with the "force of law"²³⁶ and do not mandate agency action,²³⁷ and courts may not be willing to second-guess agency decisions on whether and when to implement a recovery plan.²³⁸

Still, the Secretary of the Interior is required to report to Congress every two years on efforts to develop and implement recovery plans for all listed species,²³⁹ and at least one court has held that section 4(f) "imposes a clear duty" on DOI to fulfill its statutory commands to the fullest extent "feasible or possible."²⁴⁰ Therefore, section 4(f) may provide a useful political and legal tool for forcing DOI and EPA to do more about GHGs in order to protect polar bears.

V. What Does the Marine Mammal Protection Act Require EPA to Do About GHGs?

The MMPA might not be as useful as the ESA for forcing action on GHGs, particularly since it lacks a citizen suit provision.²⁴¹ However, the MMPA calls for government agencies to protect and encourage the development of marine mammals, such as the polar bear, to "the

greatest extent feasible,"²⁴² and as discussed in Part VI, violations of the MMPA may be challenged under the Administrative Procedure Act (APA).²⁴³ Therefore, the MMPA may be useful for forcing FWS to list polar bears and forcing EPA to regulate GHGs, especially if polar bears are not listed.

Section 1361(2) of the MMPA states that marine mammals should not be allowed "to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part" or "below their optimum sustainable population" and that "efforts should be made to protect essential habitats, including the rookeries, mating grounds, and areas of similar significance. . . ."²⁴⁴ Section 1362(9) defines "optimum sustainable population" as "any population stock, the number of animals which will result in the *maximum* productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of [the species'] ecosystem. . . ."²⁴⁵ Section 1361(6) further supports the notion that the MMPA calls for vigorous protection of marine mammals by stating that they "should be protected and encouraged to develop to *the greatest extent feasible* . . . and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem."²⁴⁶

Sections 1423–1423h contain the provisions of the MMPA that specifically pertain to polar bears.²⁴⁷ Under section 1423a(a), it is unlawful for any person subject to the jurisdiction of the United States or in waters or on lands under the jurisdiction of the United States "to take any polar bear in violation of the Agreement" or in violation of restrictions adopted "pursuant to the Agreement."²⁴⁸ "Person" is as broadly defined in the MMPA as it is in the ESA,²⁴⁹ and like the ESA, the MMPA states it is unlawful "to attempt to commit, solicit another person to commit, or cause to be committed, any offense under this subsection."²⁵⁰

The term "taking" with regards to polar bears is defined in the Agreement Between the Government of the United States of America and the Government of the Russian Federation on the Conservation and Management of the Alaska-Chukotka Polar Bear Population.²⁵¹ The Agreement seems to provide a more narrow definition of taking than sections 1362(13) of the MMPA²⁵² and 3(19) of the ESA.²⁵³ The Agreement defines "taking" as "hunting, killing or capturing,"²⁵⁴ while section 1362(13) of the MMPA defines "take" as "*harass, hunt, capture, or kill.*"²⁵⁵ Therefore, it may be more difficult to argue that emission of GHGs constitutes a taking of polar bears under the MMPA than it would be under the ESA or for other marine mammals.

However, Article IV of the Agreement also states that Russia and the United States "shall undertake all efforts necessary to conserve polar bear habitats, with particular attention to denning areas and areas of concentration of

polar bears during feeding and migration,” and “they shall take steps necessary to prevent loss or degradation of such habitats that results in, or is likely to result in, mortality to polar bears or reduced productivity or long-term decline in the Alaska-Chukotka polar bear population.”²⁵⁶ Therefore, the MMPA, at the very least, provides options for applying pressure to the U.S. government to do more about GHGs.

VI. Who Can Sue EPA under the ESA or the MMPA?

Who has Standing to Protect Polar Bears?

The ESA authorizes citizen suits²⁵⁷ and the APA²⁵⁸ may provide plaintiffs some relief for violations of the MMPA,²⁵⁹ but plaintiffs must still demonstrate standing, which could be a slippery issue with regards to polar bears. The following demonstrates there are many potential plaintiffs and discusses methods that may be used by these plaintiffs to force agencies, such as EPA, to take greater action on GHGs.

A. ESA—Citizen Suits

If polar bears are listed as threatened or endangered, it will be possible to protect them by bringing citizen suits under Section 11(g) of the ESA, which states that “any person may commence a civil suit on his own behalf” to enjoin any “governmental instrumentality or agency” who is alleged to be in violation of “any provision” of the ESA or any regulation issued under it.²⁶⁰ Courts are authorized to award the costs of litigating citizen suits²⁶¹ and may enjoin potential violations without waiting until a species is actually harmed.²⁶²

The U.S. Supreme Court has characterized section 11(g) as “an authorization of remarkable breadth,”²⁶³ and citizen suits have been successfully brought under section 11(g) against EPA. For example, in *Defenders of Wildlife v. EPA*, environmental groups used the ESA citizen suit provision to enjoin EPA from authorizing the use of a pesticide that had the potential to harm listed species.²⁶⁴ Therefore, if polar bears are listed, citizen suits could be brought, for example, to enjoin EPA from issuing permits to power plants without including sufficient controls on GHGs. If polar bears are not listed, relief might still be obtained under the MMPA.

B. The MMPA and the APA

The MMPA does not contain a citizen suit provision,²⁶⁵ but violations of the MMPA by a federal agency may be reviewable under the APA.²⁶⁶ In *Glacier Park Foundation v. Watt*, the court stated, “Regardless whether a statute implies a private right of action, administrative actions thereunder may be challenged under the APA. . . .”²⁶⁷ This clearly means that citizens can use the APA to challenge actions taken by DOI under the MMPA. However, a key issue is whether the APA can be used to hold EPA accountable for taking an action under the CAA that

violates the MMPA. For example, if EPA decides to not regulate GHGs under the CAA, can it still be forced under the APA to regulate them as a requirement of the MMPA?

Section 706 of the APA states that a reviewing court shall “compel agency action unlawfully withheld” and “set aside agency action, findings, and conclusions found to be . . . not in accordance with law.”²⁶⁸ Section 1361(1) of the MMPA states that marine mammals “should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem” or “below their optimum sustainable population.”²⁶⁹ Therefore, if EPA decides not to regulate CO₂, which would result in the significant diminishment of polar bears, then at least arguably, EPA’s decision could be set aside as not being in accordance with the law. The following are examples that support the use of the APA for such “collateral review” of actions taken under one law that violate another.²⁷⁰

In *Chrysler Corp. v. Brown*,²⁷¹ the Department of Defense (DOD) disclosed information about Chrysler in response to a Freedom of Information Act (FOIA)²⁷² request, and Chrysler argued that the action violated the Trade Secrets Act (TSA).²⁷³ The Supreme Court held that although neither statute provided for citizen suits, Chrysler could still challenge DOD’s action as “not in accordance with law” under the APA because the action allegedly violated the TSA.²⁷⁴

In *Sierra Club v. Peterson*,²⁷⁵ the Sierra Club argued that the U.S. Forest Service had violated an executive order and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)²⁷⁶ when it sprayed herbicides as part of its duties under the Forest and Rangeland Renewable Resources Planning Act of 1974.²⁷⁷ The court held that the Sierra Club had the right to bring the action under the APA and ordered the Forest Service to comply with state standards established pursuant to FIFRA or to secure a presidential exemption.²⁷⁸

In *Citizens Against Toxic Sprays, Inc. v. Bergland*,²⁷⁹ the court suggested that citizen groups with members who lived near an area where eagles could have been affected by the spraying of herbicides could use the APA and the Bald and Golden Eagles Act (Eagles Act)²⁸⁰—which does not expressly provide for citizen suits—to challenge the Forest Service’s actions taken under forest management statutes. The claim was that spraying herbicides tends to disturb eagles where they feed and nest and, thus, the spraying constituted a prohibited taking under the Eagles Act.²⁸¹ The holding, though, stated there was insufficient evidence to show the spraying occurred close enough to suspected nesting sites or that any eagle suffered from or had been exposed to significant amounts of the herbicides.²⁸² This should not be the holding in a case involving polar bears where there is sufficient evidence that GHG emissions have harmed them.

On the other hand, in *Defenders of Wildlife v. EPA*, the plaintiffs were not allowed to use the APA in conjunction with the Eagles Act to challenge actions of EPA taken under FIFRA.²⁸³ The court held that since EPA acted under FIFRA, the plaintiffs could use the APA to seek review of that action as a violation of only FIFRA, not the Eagles Act.²⁸⁴ In other words, although EPA's registration of an herbicide may have violated the Eagles Act, the plaintiffs could not obtain relief for that violation because the action had not been taken under the Eagles Act.²⁸⁵ However, this holding conflicts with the Supreme Court's decision in *Chrysler Corp. v. Brown* and the other previously mentioned cases.

In *Chrysler Corp.*, the statutes had different limits on the disclosure of information, and the plaintiffs were allowed to have the more stringent limits of the TSA applied to decisions made under FOIA.²⁸⁶ Similarly, the Eagles Act and FIFRA had different standards for protection of the environment, and the plaintiffs in *Defenders of Wildlife* should have been allowed to obtain enforcement of the stricter standard. Furthermore, it is not clear that even the *Defenders of Wildlife* court would have reached the same decision if APA review had already been exhausted under FIFRA and the action still violated the Eagles Act.²⁸⁷ It is also not clear that this court would have reached the same conclusion with a case involving the CAA and the MMPA.

Given these cases, it seems that at least some courts would look favorably on efforts to use the APA to challenge violations of the MMPA resulting from EPA decisions made under the CAA. Therefore, the MMPA may be a powerful tool if polar bears are not listed or if citizens want to take action before they are listed.

C. Standing

In *Lujan v. Defenders of Wildlife*,²⁸⁸ the Supreme Court set out the test for standing that is frequently cited in environmental cases.²⁸⁹ Under *Lujan*, to have standing, a plaintiff must show that he or she has an actual or imminent, concrete and particularized injury that is fairly traceable to the defendant and that a favorable decision will likely redress that injury.²⁹⁰ These elements are generally summarized as injury in fact, causation, and redressibility.²⁹¹

1. Imminent Injury, Causation, and Redressibility

Causation, redressibility, and the imminence of the injury are parts of the standing test that may be particularly difficult for plaintiffs to show when seeking to redress an injury caused by global warming. However, the decision in *Massachusetts v. EPA* will make this much easier.²⁹²

In *Massachusetts v. EPA*, even though motor vehicles in America only "contribute about . . . 4 percent of global greenhouse gas emissions,"²⁹³ the Supreme Court held that there was a sufficient causal connection between these emissions and Massachusetts' loss of coastal line.²⁹⁴

The Court also held that the risk to Massachusetts from rising sea levels, "though remote, is nevertheless real" and that the risk "would be reduced to some extent if petitioners received the relief they seek."²⁹⁵ The Court stated, "While it may be true that regulating motor-vehicle emissions will not by itself reverse global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to slow or reduce it."²⁹⁶ Therefore, it should not be that difficult to show that GHG emissions from motor vehicles, power plants, etc. are causing some harm to polar bears, and regulation of such emissions by EPA would at least slow the harm to some extent. The issue then is who is injured when the polar bear is injured.

2. *Massachusetts v. EPA* and Others

In *Massachusetts v. EPA*, the Supreme Court held that it is easier for states to demonstrate standing, particularly in situations where global warming is causing harm to a state in general and to the citizens of that state.²⁹⁷ Therefore, it may be easier for Alaska to demonstrate an injury with regards to polar bears than for private parties, and it might be worthwhile to put pressure on the state to bring an action against EPA. However, it may be more productive for citizen groups and people who rely on polar bears for subsistence or tourism to consider how they can demonstrate standing. The following cases might be useful in this endeavor.

In *Defenders of Wildlife v. Hodel*, the court held that physical damage to a place which an individual personally visits or to animals that he or she actually observes is a type of injury sufficient to confer standing.²⁹⁸ In *Coalition for Sustainable Resources, Inc. v. U.S. Forest Service*,²⁹⁹ allegations that the Forest Service's failure to implement proper vegetation and snow management techniques caused one plaintiff's water rights restriction and jeopardized another's future viewing of endangered aquatic species were sufficient to satisfy the standing test. In *Palila v. Hawaii Department of Land and Natural Resources*,³⁰⁰ nonprofit organizations and scientists who studied an endangered bird had standing to bring a citizen suit to protect the bird whose habitat was threatened by sheep maintained by the state. In light of these cases, non-profit organizations, scientists, photographers, tourists, hunters, and people who live near or have any sufficient connection to polar bears should all consider suing EPA to do more about GHGs.

Conclusion

The late Steve Irwin, "The Crocodile Hunter," once said, "[W]hat a sad state of affairs, to live in a world without wildlife,"³⁰¹ and it will be truly sad if global warming causes polar bears to go extinct in the wild. EPA's policies on GHGs have been too weak. However, the ESA and the MMPA provide powerful tools for forcing EPA to take action on GHGs. *Massachusetts v. EPA* may finally cause

EPA to regulate GHGs, but the ESA and the MMPA may be still be useful in accelerating this process or preventing EPA from deciding not to regulate.

*Apex predators are right at the top of the food chain— animals like sharks, big cats, bears, snakes and crocodiles. . . . By conserving apex predators and their wilderness areas, our planet earth will have less polluted water, less ozone depletion, less habitat destruction and more trees. In essence, by securing these goals, we the human race will have oxygen to breathe, water to drink and a greater, healthier longevity.*³⁰²

Steve Irwin, “The Crocodile Hunter”

Endnotes

1. See, e.g., Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1362 (2006) (“‘marine mammal’ means any mammal which . . . primarily inhabits the marine environment (such as the polar bear)”).
2. Endangered Species Act (ESA) § 2, 16 U.S.C. § 1531 (2006).
3. See, e.g., Coca-Cola Store, <http://www.coca-colastore.com/> (click on polar bear toy) (last visited Apr. 23, 2007).
4. See, e.g., Klondike Frozen Novelties, <http://www.icecreamusa.com/klondike/> (last visited Apr. 23, 2007). It is uncertain what people will do for a Klondike bar, but we must do more for polar bears.
5. See, e.g., *Special Report: Global Warming*, TIME, Apr. 3, 2006, available at <http://www.time.com/time/covers/0,16641,20060403,00.html> (cover of magazine is picture of a polar bear).
6. See, e.g., Bear Trouble, <http://www.pbs.org/wnet/nature/polarbear/trouble2.html> (last visited Apr. 23, 2007) (“Today, bear watching is a multi-million dollar business. . .”).
7. See, e.g., Endangered and Threatened Wildlife and Plants, 12-Month Petition Finding and Proposed Rule To List the Polar Bear (*Ursus maritimus*) as Threatened Throughout Its Range, 72 Fed. Reg. 1064, 1064, 1080-1081 (Jan. 9, 2007) (to be codified at 50 C.F.R. pt. 17) (hereinafter Proposed Rule to List the Polar Bear); Kassie Siegel & Brendan Cummings, CENTER FOR BIOLOGICAL DIVERSITY, PETITION TO LIST THE POLAR BEAR (*URSUS MARITIMUS*) AS A THREATENED SPECIES UNDER THE ENDANGERED SPECIES ACT ii (2005), available at <http://www.biologicaldiversity.org/swcbd/species/polarbear/petition.pdf> (hereinafter PETITION TO LIST THE POLAR BEAR); cf. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC), CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, SUMMARY FOR POLICYMAKERS 8 (2007), available at <http://www.ipcc.ch/>.
8. Proposed Rule to List the Polar Bear, *supra* note 7, at 1077; Al Gore, AN INCONVENIENT TRUTH: THE PLANETARY EMERGENCY OF GLOBAL WARMING AND WHAT WE CAN DO ABOUT IT 146-147 (2006).
9. See Natural Resources Defense Council, Global Warming Threatens Polar Bears with Extinction!, <http://www.polarbearsos.org/> (last visited Mar. 18, 2007); presentation on the Impacts of Climate Change in the Arctic by Dr. Robert Corell, <http://www.biologicaldiversity.org/swcbd/species/polarbear/Arctic-climate-change-Bob-Corell.html> (32 minutes into presentation) (last visited Mar. 19, 2007) (hereinafter Presentation on Climate Change); Proposed Rule to List the Polar Bear, *supra* note 7, at 1068. Compounding the problem is that as the sea ice melts, less sunlight is reflected back into space by it, and the Arctic heats up faster and faster. This is called “the albedo effect” and may play a large role in the sea ice disappearing in the summer as early as 2040. See Proposed Rule to List the Polar Bear, *supra* note 7, at 1071.
10. Presentation on Climate Change, *supra* note 9, at 38 minutes.
11. Proposed Rule to List the Polar Bear, *supra* note 7, at 1071.
12. *Id.*
13. See, e.g., *Massachusetts v. EPA*, 549 U. S. ____ (2007) (pp. 1-2 of Justice Stevens’ majority opinion), available at <http://www.supremecourtus.gov/opinions/06pdf/05-1120.pdf> (hereinafter *Massachusetts v. EPA* (majority opinion)).
14. *Massachusetts v. EPA* (majority opinion), *supra* note 13, at 1-2, 10.
15. *Id.* at 29-30.
16. *Id.* at 1.
17. *Id.* at 18.
18. *Id.* at 20.
19. *Id.* at 5.
20. IPCC, *supra* note 7, at 2.
21. *Id.*
22. *Id.* at 5.
23. See, e.g., GORE, *supra* note 8, at 250-253; ENERGY INFORMATION ADMINISTRATION, WORLD CARBON DIOXIDE EMISSIONS FROM THE CONSUMPTION AND FLARING OF FOSSIL FUELS, 1980-2004 (2006), available at <http://www.eia.doe.gov/pub/international/iealf/table1co2.xls> (hereinafter EIA, World Carbon Dioxide Emissions).
24. See, e.g., Letter from Kassie R. Siegel, Center for Biological Diversity et al. to Gale Norton, Secretary of the Interior, U.S. Department of the Interior & Rowan Gould, Regional Director, U.S. Fish & Wildlife Service (July 5, 2005), available at <http://www.biologicaldiversity.org/swcbd/species/polarbear/AdditionLetter.pdf> (hereinafter Letter from Center for Biological Diversity).
25. EIA, World Carbon Dioxide Emissions, *supra* note 23.
26. See *id.*
27. Energy Information Administration, Emissions of Greenhouse Gases in the United States 2005, at x (2006), available at <http://www.eia.doe.gov/oiaf/1605/ggrpt/pdf/057305.pdf>. (hereinafter EIA, Emissions of Greenhouse Gases).
28. *Id.*
29. *Id.*
30. See, e.g., Gore, *supra* note 8, at 1-329; Impacts of Changes in Sea Ice and Other Environmental Parameters in the Arctic: Final Report of the Marine Mammal Commission Workshop, Girdwood, Alaska, 15-17 February 2000 (Henry P. Huntington, ed., 2000), available at <http://mmc.gov/reports/workshop/seaice.html>; Steven C. Amstrup et al., *Polar Bears in Alaska*, in Edward T. LaRoe et al., Our Living Resources: A Report to the Nation on the Distribution, Abundance, and Health of U.S. Plants, Animals, and Ecosystems (1995), available at <http://biology.usgs.gov/s+t/noframe/s034.htm> (citing I. Stirling & A. Derocher, *Possible impacts of climatic warming on polar bears*, 46 Arctic 240 (1993)).
31. See, e.g., Gore, *supra* note 8, at 250; Letter from Center for Biological Diversity, *supra* note 24.
32. See, e.g., Gore, *supra* note 8; Petition to List the Polar Bear, *supra* note 7, at vii.
33. Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1361(6) (2006).
34. Endangered Species Act (ESA) § 2, 16 U.S.C. § 1531 (2006) (emphasis added).
35. *Massachusetts v. EPA* (majority opinion), *supra* note 13, at 1.
36. *Id.* at 24, n. 24.
37. Clean Air Act (CAA) §§ 101-618, 42 U.S.C. §§ 7401-7671q (2006).
38. ESA §§ 2-18, 16 U.S.C. §§ 1531-1544.
39. MMPA, 16 U.S.C. §§ 1361-1407.

40. *Massachusetts v. EPA* (majority opinion), *supra* note 13.
41. For example, the U.S. Department of Transportation (DOT) is charged with improving the fuel efficiency of motor vehicles, *id.* at 29, and may be required to consider the impacts of its decisions on transportation policy under the ESA and the MMPA. *See generally Fla. Marine Contrs. v. Williams*, 378 F. Supp. 2d 1353 (M.D. Fla. 2005) (permits to build docks sought under Clean Water Act denied under MMPA because of risk posed to manatees by fast-moving boats). Note that EPA is required to regulate GHG emissions from motor vehicles, which is an obligation that coexists with DOT's obligations. *See Massachusetts v. EPA* (majority opinion), *supra* note 13, at 29.
42. Dan Joling, *Critics Take Aim at Polar Bear Listing*, THE ASSOCIATED PRESS, Mar. 2, 2007, available at <http://abcnews.go.com/Technology/wireStory?id=2919773>.
43. Proposed Rule to List the Polar Bear, *supra* note 7, at 1081.
44. *See generally id.* at 1064–1099; Scott Schliebe et al., RANGE-WIDE STATUS REVIEW OF THE POLAR BEAR (*URSUS MARITIMUS*) 2006, available at http://alaska.fws.gov/fisheries/mmm/polarbear/pdf/Polar_Bear_%20Status_Assessment.pdf.
45. Proposed Rule to List the Polar Bear, *supra* note 7, at 1065.
46. *Id.* at 1066.
47. *Id.* at 1067.
48. *Id.* at 1068.
49. *Id.*
50. *Id.*
51. Proposed Rule to List the Polar Bear, *supra* note 7, at 1070.
52. *Id.*
53. *Id.*
54. *Id.* at 1073.
55. *Id.*
56. *Id.* at 1066.
57. Proposed Rule to List the Polar Bear, *supra* note 7, at 1066.
58. *See, e.g., id.*
59. *Id.* at 1072.
60. *See, e.g., id.* at 1067.
61. *Id.* at 1076–1077.
62. *Id.* at 1077.
63. Proposed Rule to List the Polar Bear, *supra* note 7, at 1067.
64. *Id.* at 1066.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. Proposed Rule to List the Polar Bear, *supra* note 7, at 1072.
70. *Id.*
71. *Id.* at 1077.
72. *Id.* at 1077–1078.
73. *See, e.g., id.* at 1080.
74. *Id.* at 1072.
75. Proposed Rule to List the Polar Bear, *supra* note 7, at 1072–1073.
76. *Id.* at 1077.
77. *Id.* at 1076–1077.
78. *Id.* at 1076; Charles Monnett et al., POTENTIAL EFFECTS OF DIMINISHED SEA ICE ON OPEN-WATER SWIMMING, MORTALITY, AND DISTRIBUTION OF POLAR BEARS DURING FALL IN THE ALASKAN BEAUFORT SEA (2005), available at <http://www.mms.gov/alaska/ess/Poster%20Presentations/MarineMammalConference-Dec2005.pdf>.
79. Proposed Rule to List the Polar Bear, *supra* note 7, at 1076; *see also* Charles Monnett et al., *supra* note 78.
80. Proposed Rule to List the Polar Bear, *supra* note 7, at 1077; Charles Monnett et al., *supra* note 78.
81. *Id.*
82. Proposed Rule to List the Polar Bear, *supra* note 7, at 1077.
83. *See, e.g.,* Presentation on Climate Change, *supra* note 9, at 35–36 minutes.
84. *Id.*
85. Proposed Rule to List the Polar Bear, *supra* note 7, at 1075.
86. *See id.*
87. *Id.* at 1066.
88. *Id.* at 1073.
89. *Id.* at 1079.
90. *Id.* at 1073.
91. *See, e.g.,* Proposed Rule to List the Polar Bear, *supra* note 7, at 1066.
92. *Id.*
93. *See, e.g., id.* at 1076–1077.
94. *Id.* at 1074.
95. *Id.* at 1074–1075.
96. *See, e.g., id.* at 1066.
97. *See, e.g.,* Proposed Rule to List the Polar Bear, *supra* note 7, at 1085.
98. *Id.*
99. *Id.* at 1074.
100. *Id.*
101. *Id.* at 1072.
102. *Id.* at 1074.
103. Proposed Rule to List the Polar Bear, *supra* note 7, at 1074.
104. *Id.* at 1067–1068.
105. *See id.*
106. *Id.* at 1075 (“Declines in fat reserves during critical times in the polar bear life cycle are likely to lead to an array of impacts including a delay in the age of first reproduction, decrease in the proportion of females with adequate fat stores to complete successful denning, decline in litter sizes. . .”).
107. *Id.* at 1075–1076.
108. *See id.* at 1067.
109. *See* Proposed Rule to List the Polar Bear, *supra* note 7, at 1067.
110. *See id.* at 1079.
111. *Id.*
112. *Id.* at 1072.
113. *Id.* at 1072; Presentation on Climate Change, *supra* note 9, at 38 minutes.
114. Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1361(6) (2006).
115. Endangered Species Act (ESA) § 3, 16 U.S.C. § 1532(6) (2006) (emphasis added).
116. *Id.* § 1531.
117. *See id.* §§ 1532(5), 1533.
118. *See id.* §§ 1532, 1533; *Defenders of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001).
119. *See* ESA, 16 U.S.C. §§ 1532, 1533; *Defenders of Wildlife*, 258 F.3d 1136.
120. ESA § 4(a)(1), 16 U.S.C. § 1533(a)(1) (emphasis added).

121. Endangered Species Act (ESA) § 4(b)(1)(A), 16 U.S.C. § 1533(b)(1)(A) (2006) (emphasis added).
122. See 16 U.S.C. § 1533; J. Michael Scott et al., eds., *THE ENDANGERED SPECIES ACT AT THIRTY: CONSERVING BIODIVERSITY IN HUMAN-DOMINATED LANDSCAPES*, VOLUME 2, at 100 (2006) (“In 1982, Congress amended the Endangered Species Act to require that listing decisions be based ‘solely’ on the best available scientific data.”); Tony A. Sullins, *BASIC PRACTICE SERIES: ESA ENDANGERED SPECIES ACT 13* (2001) (same).
123. See ESA, 16 U.S.C. § 1533(b)(2).
124. *Id.* § 1532(5).
125. *Id.* § 1532(6).
126. *Id.* § 1532(20).
127. See Proposed Rule to List the Polar Bear, *supra* note 7, at 1070; Sullins, *supra* note 122, at 8, 153.
128. Proposed Rule to List the Polar Bear, *supra* note 7, at 1070.
129. *Id.* at 1071.
130. Endangered Species Act (ESA) § 4(b), 16 U.S.C. § 1533(b) (2006).
131. *Id.* at 1065; PETITION TO LIST THE POLAR BEAR, *supra* note 7, at ix.
132. Proposed Rule to List the Polar Bear, *supra* note 7, at 1065.
133. *Id.*; Letter from Kassie R. Siegel, Center for Biological Diversity, *supra* note 24.
134. Proposed Rule to List the Polar Bear, *supra* note 7, at 1065; see generally ESA § 4(b)(3), 16 U.S.C. § 1533(b)(3).
135. Proposed Rule to List the Polar Bear, *supra* note 7, at 1065.
136. *Id.*
137. *Id.* at 1064.
138. *Id.* at 1071.
139. *Id.* at 1064. Interestingly, an area that might be critical is the Arctic National Wildlife Refuge. See *id.* at 1077.
140. Endangered Species Act (ESA) § 4(a)(3), 16 U.S.C. § 1533(a)(3) (2006) (emphasis added).
141. Cf. 50 C.F.R. § 424.12(a)(2) (2007) (emphasis added) (“Critical habitat is not determinable when . . . [t]he biological needs of the species are not sufficiently well known to permit identification of an area as critical. . . .”); 50 C.F.R. § 424.12(d) (“When several habitats, each satisfying the requirements for designation as critical habitat, are located in proximity to one another, an inclusive area may be designated as critical habitat.”); Scott et al., *supra* note 122, at 99 (FWS often designates critical habitat based on “where the species is most commonly seen”).
142. See Proposed Rule to List the Polar Bear, *supra* note 7, at 1077.
143. See Amstrup et al., *supra* note 30 (citing E. Leffingwell, *THE CANNING RIVER REGION, NORTHERN ALASKA*, U.S. GEOLOGICAL SURVEY PROFESSIONAL PAPER 109, 247 (1919)).
144. 50 C.F.R. § 424.12(a)(1).
145. See Proposed Rule to List the Polar Bear, *supra* note 7, at 1079.
146. See 50 C.F.R. § 424.12(a).
147. See Proposed Rule to List the Polar Bear, *supra* note 7.
148. Clean Air Act (CAA) §§ 101-618, 42 U.S.C. §§ 7401-7671q (2006); see generally *Massachusetts v. EPA* (majority opinion), *supra* note 13, at 24, n. 24.
149. See Take Action, Tell the Bush Administration to Protect Polar Bears and their Critical Habitat, http://www.nrdconline.org/campaign/polarbearsos_0207 (last visited Apr. 7, 2007).
150. Cf. *id.*
151. See ESA, 16 U.S.C. § 1533(b)(6)(C)(ii); 50 C.F.R. § 424.17(b)(2) (2007); SULLINS, *supra* note 122, at 28.
152. See ESA, 16 U.S.C. § 1533(b)(6)(C)(ii); 50 C.F.R. § 424.17(b)(2).
153. Center for Biological Diversity (CBD) & Natural Resources Defense Council (NRDC), Questions & Answers Regarding the Submission of Comments to the U.S. Fish and Wildlife Service on the Proposal to List Polar Bears under the U.S. Endangered Species Act, <http://www.biologicaldiversity.org/swcbd/species/polarbear/Comment-Fact-Sheet.pdf> (last visited Apr. 7, 2007).
154. 50 C.F.R. § 424.17(a)(1)(iii); SULLINS, *supra* note 122, at 23.
155. See, e.g., Deborah Zabarenko, “Don’t Discuss Polar Bears: Memo to Scientists,” REUTERS, Mar. 9, 2007, available at <http://abcnews.go.com/Technology/wireStory?id=2935828>.
156. *Massachusetts v. EPA* (majority opinion), *supra* note 13, at 6–8; Channing J. Martin, *Supreme Court Preview*, TRENDS, Jan./Feb. 2007, at 8; cf. Notice of denial of petition for rulemaking, 68 Fed. Reg. 52,922 (Sept. 8, 2003).
157. Clean Air Act (CAA) §§ 101–618, 42 U.S.C. §§ 7401–7671q (2006).
158. See, e.g., Martin, *supra* note 156, at 8.
159. *Massachusetts v. EPA* (majority opinion), *supra* note 13, at 30.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Massachusetts v. EPA* (majority opinion), *supra* note 13, at 30.
166. *Id.*
167. See, e.g., Linda Greenhouse, *Justices Say E.P.A. Has Power to Act on Harmful Gases*, N.Y. TIMES, Apr. 3, 2007, Late Edition, at A1.
168. See IPCC, *supra* note 7, at 2; EIA, Emissions of Greenhouse Gases, *supra* note 27, at x.
169. Sarah C. Wilson, Comment, Hogwash! Why Industrial Animal Agriculture is Not Beyond the Scope of Clean Air Act Regulation, PACE ENVTL. L. REV. (forthcoming 2007) (citing Claudia Copeland, Air Quality Issues and Animal Agriculture: A Primer (Cong. Res. Serv., CRS Report for Cong., June 10, 2005)).
170. U.S. Env’tl. Prot. Agency (EPA), Animal Feeding Operations Frequently Asked Questions, http://cfpub.epa.gov/npdcs/faqs.cfm?program_id=7 (last visited Apr. 14, 2007); see also Wilson, *supra* note 169.
171. Wilson, *supra* note 169.
172. See IPCC, *supra* note 7, at 2; EIA, Emissions of Greenhouse Gases, *supra* note 27, at x.
173. See Wilson, *supra* note 169.
174. Wilson, *supra* note 169.
175. U.S. Env’tl. Prot. Agency, Animal Feeding Operations Air Quality Compliance Agreement Fact Sheet, <http://www.epa.gov/compliance/resources/agreements/caa/cafo-fcsht-0501.html#nationwide> (last visited Apr. 14, 2007) (hereinafter AFOs Fact Sheet); Wilson, *supra* note 169.
176. Wilson, *supra* note 169.
177. AFOs Fact Sheet, *supra* note 175; Wilson, *supra* note 169.
178. Wilson, *supra* note 169.
179. *Id.*
180. Dale D. Goble et al., eds., *THE ENDANGERED SPECIES ACT AT THIRTY: RENEWING THE CONSERVATION PROMISE*, VOLUME 1, at 7 (2006).
181. See, e.g., Scott et al., *supra* note 122, at 100; Sullins, *supra* note 122, at 3.
182. Goble et al., *supra* note 180, at 7-8.
183. See Endangered Species Act (ESA) § 4, 16 U.S.C. § 1533 (2006); Goble et al., *supra* note 180, at 7; Roger W. Findley & Daniel A. Farber, ENVIRONMENTAL LAW IN A NUTSHELL 292 (5th ed. 2000).

184. See, e.g., ESA, 16 U.S.C. § 1536; Goble et al., *supra* note 180, at 7; SULLINS, *supra* note 122, at 3.
185. See, e.g., ESA, 16 U.S.C. § 1538; Findley & Farber, *supra* note 183, at 292.
186. See, e.g., 50 C.F.R. § 17.31(a) (2007); Proposed Rule to List the Polar Bear, *supra* note 7, at 1097.
187. See, e.g., PETITION TO LIST THE POLAR BEAR, *supra* note 7.
188. See, e.g., ESA, 16 U.S.C. § 1539; GOBLE ET AL., *supra* note 180, at 7.
189. See, e.g., Endangered Species Act (ESA) § 11, 16 U.S.C. § 1540 (2006); GOBLE ET AL., *supra* note 180, at 7.
190. ESA, 16 U.S.C. § 1536(a)(1).
191. 16 U.S.C. § 1536(a)(2).
192. Sullins, *supra* note 122, at 31-32.
193. ESA, 16 U.S.C. § 1536(a)(1).
194. Sullins, *supra* note 122, at 32-33; see also *Pyramid Lake Paiute Tribe of Indians v. Dep't of Navy*, 898 F.2d 1410, 1416-17 (9th Cir. 1990) (recognizing that agencies have "affirmative obligations" under section 7(a)(1)). Two courts have found that section 7(a)(1) calls for voluntary action, but the agency in each case had already taken steps to fulfill its section 7(a)(1) obligations. See SULLINS, *supra* note 122, at 33; *Strahan v. Linnon*, 967 F. Supp. 581 (D. Mass. 1995); *Hawksbill Sea Turtle v. FEMA*, 11 F. Supp. 2d 529 (D.V.I. 1998). Thus, the issue was not whether the agencies must do something to conserve species, but whether they had done enough. Sullins, *supra* note 122, at 33.
195. Sullins, *supra* note 122, at 32-33.
196. *Id.*; see also *Sierra Club v. Glickman*, 156 F.3d 606, 618 (5th Cir. 1998).
197. Sullins, *supra* note 122, at 32-33.
198. Endangered Species Act (ESA) § 7(a)(2), 16 U.S.C. § 1536(a)(2) (2006).
199. *Id.* The consultation procedures can be found at 50 C.F.R. §§ 402.10-402.16 (2007). See generally Proposed Rule to List the Polar Bear, *supra* note 7, at 1097; Sullins, *supra* note 122, at 61-62.
200. See also SULLINS, *supra* note 122, at 62-63; *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1074 (9th Cir. 1996) ("When an agency 'lacks the discretion to influence the private action' there is no 'agency action.'" Consultation is not required when an agency provides advice on how lumber companies can avoid "taking" spotted owls.); *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27 (D.C. Cir. 1992) (ESA consultation was not required because FERC was only allowed to change an existing license with the consent of the licensee and could not unilaterally add environmental controls until it issued a new license.).
201. *North Slope Borough v. Andrus*, 486 F. Supp. 332, 351 (D.D.C. 1980); see, e.g., *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978).
202. Sullins, *supra* note 122, at 62; see also *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994) (Forest Service required to consult on its existing land management plans whenever a species is listed that may be affected by such plans; the plans constituted "continuing agency action requiring consultation").
203. 50 C.F.R. § 402.02 (2007).
204. 529 F.2d 359 (5th Cir. 1976).
205. 340 F.3d 969 (9th Cir. 2003).
206. 413 F.3d 1024, 1033 (9th Cir. 2005).
207. 539 F. Supp. 841 (C.D. Cal. 1982).
208. 451 F. Supp. 2d 1165 (D. Haw. 2006).
209. *Massachusetts v. EPA* (majority opinion), *supra* note 13.
210. IPCC, *supra* note 7.
211. Proposed Rule to List the Polar Bear, *supra* note 7.
212. See generally Endangered Species Act (ESA) § 7, 16 U.S.C. § 1536 (2006).
213. See, e.g., 50 C.F.R. § 402.10 (2007); Proposed Rule to List the Polar Bear, *supra* note 7, at 1097.
214. ESA § 9, 16 U.S.C. § 1538.
215. *Id.* § 9(a)(1).
216. *Id.* § 3(13).
217. Endangered Species Act (ESA) § 3(19), 16 U.S.C. § 1532(19) (2006).
218. See S. Rep. No. 93-307 (1973), reprinted in 1973 U.S.C.C.A.N. 2995; SULLINS, *supra* note 122, at 44 (stating this is frequently cited statement from ESA's legislative history); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995) (citing Senate and House Reports indicating that "take" is defined broadly).
219. ESA § 9(g), 16 U.S.C. § 1538(g).
220. See, e.g., 50 C.F.R. § 17.31(a) (2007); SULLINS, *supra* note 122, at 42, 157, 173.
221. See, e.g., PETITION TO LIST THE POLAR BEAR, *supra* note 7.
222. See, e.g., *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995); *Palila v. Hawaii Dep't of Land and Nat. Res. (Palila I)*, 639 F.2d 495 (9th Cir. 1981); Sullins, *supra* note 122, at 45-46.
223. See *Strahan v. Cox*, 127 F.3d 155, 163 (1st Cir. 1997) (state licensing of fishing and lobstering equipment which resulted in entanglement of whales in the equipment constituted a taking in violation of the ESA by the state); see also *Loggerhead Turtle v. County Council of Volusia County*, 148 F.3d 1231, 1237 (11th Cir. 1998) (county's inadequate regulation of beachfront lighting constituted a taking of listed sea turtles in violation of the ESA); *Sierra Club v. Yeutter*, 926 F.2d 429, 438-39 (5th Cir. 1991) (Forest Service's management of timber stands constituted a taking of the red-cockaded woodpecker in violation of the ESA); *Palila I*, 639 F.2d at 497-98 (practice of maintaining feral goats and sheep in palila bird's habitat constituted a taking, particularly because the goats and sheep ate food on which the palila relied; state ordered to remove the goats and sheep); *Palila v. Hawaii Dep't of Land & Natural Resources (Palila II)*, 649 F. Supp. 1070 (D. Haw. 1986) (same result as *Palila I* even though new takings regulations issued by FWS); *Nat'l Wildlife Fed'n v. Hodel*, 23 Env't Rep. Cas. (BNA) 1089 (E.D. Cal. 1985) (FWS authorized use of lead shot, which resulted in poisoning of bald eagles; FWS authorization constituted a taking); see also SULLINS, *supra* note 122, at 39-54.
224. 882 F.2d 1294, 1301 (8th Cir. 1989).
225. *Id.*
226. *Id.*
227. See SULLINS, *supra* note 122, at 50; see generally *Babbitt*, 515 U.S. at 711 (O'Connor, J., concurring) ("Proximate causation is not a concept susceptible of precise definition. . .").
228. *Massachusetts v. EPA* (majority opinion), *supra* note 13.
229. IPCC, *supra* note 7.
230. Proposed Rule to List the Polar Bear, *supra* note 7.
231. Dan Joling, *supra* note 42 (quoting Marilyn Crockett, deputy director of the Alaska Oil and Gas Association).
232. Endangered Species Act (ESA) § 4(f), 16 U.S.C. § 1533(f) (2006).
233. See, e.g., Natural Resources Defense Council (NRDC), NRDC Advances Polar Bear S.O.S. Campaign, <http://72.32.110.154/naturesvoice/success1.asp> (last visited Apr. 15, 2007).
234. ESA, § 4(f)(1), 16 U.S.C. § 1533(f)(1).
235. Sullins, *supra* note 122, at 34.
236. *Id.* at 36-37; see also *Fund for Animals v. Rice*, 85 F.3d 535, 548 (11th Cir. 1996).
237. Sullins, *supra* note 122, at 36-37; see also *Or. Natural Resource Council v. Turner*, 863 F. Supp. 1277, 1284 (D. Or. 1994).
238. See Sullins, *supra* note 122, at 35; *Nat'l Wildlife Fed'n v. Nat'l Park Serv.*, 669 F. Supp. 384 (D. Wyo. 1987).

239. Endangered Species Act (ESA) § 4(f)(3), 16 U.S.C. § 1533(f)(3) (2006); Sullins, *supra* note 122, at 35.
240. See Sullins, *supra* note 122, at 36; *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 107 (D.D.C. 1995).
241. Compare Marine Mammal Protection Act (MMPA), 16 U.S.C. §§ 1361–1407 (2006), with ESA §§ 2–18, 16 U.S.C. §§ 1531–1544.
242. See MMPA, 16 U.S.C. § 1361(6).
243. Administrative Procedure Act (APA), § 5 U.S.C. 553(3) (2006).
244. MMPA, 16 U.S.C. § 1361(2).
245. *Id.* § 1362(9).
246. See *id.* § 1361(6).
247. Marine Mammal Protection Act (MMPA), 16 U.S.C. §§ 1423–1423h (2006).
248. *Id.* § 1423a(a).
249. Compare *id.* § 1362(10), with Endangered Species Act (ESA) § 3(13), 16 U.S.C. § 1532(13) (2006).
250. Compare ESA § 9(g), 16 U.S.C. § 1538(g), with MMPA, 16 U.S.C. § 1423a(5). Section 1423b(c)(2) of the MMPA further adds, “Any gun, trap, net, or other equipment used, and any vessel, aircraft, or other means of transportation used, to aid in the violation or attempted violation of this title shall be subject to seizure and forfeiture. . . .” 16 U.S.C. § 1423b(c)(2). Therefore, an interesting question might be whether this could include a motor vehicle that causes a taking by emitting GHGs.
251. MMPA, 16 U.S.C. §§ 1423, 1423a.
252. *Id.* § 1362(13) (2006).
253. ESA § 3(19), 16 U.S.C. § 1532(19).
254. Agreement Between the Government of the United States of America and the Government of the Russian Federation on the Conservation and Management of the Alaska-Chukotka Polar Bear Population, S.-Russ., art. 4, Oct. 16, 2000, U.S. Treaty Doc. No. 107-10 (2002), available at <http://www.bearbiology.com/plrbear treaty.htm> (hereinafter Agreement on Polar Bear Population).
255. Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1362(13) (2006) (emphasis added).
256. Agreement on Polar Bear Population, *supra* note 254.
257. See Endangered Species Act (ESA) § 11, 16 U.S.C. § 1540(g) (2006).
258. See Administrative Procedures Act (APA), 5 U.S.C. §§ 702, 706 (2006).
259. MMPA, 16 U.S.C. §§ 1361-1407.
260. ESA § 11, 16 U.S.C. § 1540(g). Citizen suits can also be brought to compel DOI to perform certain duties required by sections 4 and 9 of the ESA. *Id.*
261. *Id.*
262. See, e.g., Sullins, *supra* note 122, at 150.
263. *Bennett v. Spear*, 520 U.S. 154, 164 (1997).
264. 882 F.2d 1294, 1301 (8th Cir. 1989).
265. See Marine Mammal Protection Act (MMPA), 16 U.S.C. §§ 1361–1407 (2006).
266. See, e.g., *Strahan v. Cox*, 127 F.3d 155, 160 (1st Cir. 1997).
267. 663 F.2d 882, 885 (9th Cir. 1981); see, e.g., *Or. Env'tl. Council v. Kunzman*, 714 F.2d 901, 903 (9th Cir. 1983) (plaintiff “need not establish a private right of action under a statute before it may sue under the APA”).
268. Administrative Procedures Act (APA), 5 U.S.C. § 706 (2006).
269. MMPA, 16 U.S.C. § 1361(1).
270. *Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8th Cir. 1989).
271. 441 U.S. 281 (1979), cited in *Glacier Park Found.*, 663 F.2d at 885.
272. See generally 5 U.S.C. § 552 (2006).
273. See generally 18 U.S.C. § 1905 (2006).
274. *Chrysler Corp.*, 441 U.S. at 285, 316–318.
275. 705 F.2d 1475 (9th Cir. 1983).
276. See generally 7 USCS § 136 (2006).
277. See generally 16 U.S.C. § 1604 (2006).
278. *Sierra Club*, 705 F.2d at 1479.
279. 428 F. Supp. 908 (D. Or. 1977).
280. See generally 16 U.S.C. § 668 (2006).
281. *Citizens Against Toxic Sprays*, 428 F. Supp. at 912.
282. *Id.* at 939.
283. See 882 F.2d 1294 (8th Cir. 1989).
284. *Id.*
285. See *id.*
286. See *Chrysler Corp.* 441 U.S. 281; *Chrysler Corp. v. Schlesinger*, 611 F.2d 439 (3d Cir. 1979).
287. See *Defenders of Wildlife*, 882 F.2d at 1299 (citing *Merrell v. Thomas*, 807 F.2d 776, 782 n.3 (9th Cir. 1986)) (“In a suit to force the EPA to comply with the National Environmental Policy Act before registering pesticides, the Ninth Circuit stated that if Merrell had sued to cancel a pesticide registration, Merrell would have failed to exhaust administrative remedies.”).
288. 504 U.S. 555 (1992).
289. See, e.g., *Massachusetts v. EPA* (majority opinion), *supra* note 13, at 11.
290. *Id.* at 560–561.
291. See, e.g., Sullins, *supra* note 122, at 145-149.
292. *Massachusetts v. EPA* (majority opinion), *supra* note 13.
293. *Massachusetts v. EPA*, 549 U. S. ____ (2007) (p. 10 of Chief Justice Roberts’ dissent), available at <http://www.supremecourt.us.gov/opinions/06pdf/05-1120.pdf>.
294. *Massachusetts v. EPA* (majority opinion), *supra* note 13, at 23.
295. *Id.*
296. *Id.* at 22.
297. *Id.* at 15–17.
298. 851 F.2d 1035 (8th Cir. 1988).
299. 48 F. Supp. 2d 1303 (D.C. Wyo. 1999).
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302. Steve Irwin, Steve’s Millennium 2000 Resolution: A New Age for the Apex Predator (January 1, 2000), http://www.crocodilehunter.com.au/crocodile_hunter/about_steve_terri/steve_say.html.

Patrick Donnelly tied for third place in the 2007 William R. Ginsberg Environmental Essay contest sponsored by the Environmental Law Section of the New York State Bar Association. Patrick is a student at Pace Law School.

Site Plan Review and Municipal Control

By Megan C. DiMiceli

Introduction

A site plan is a drawing of the subject property showing the property lines and any structures that currently exist on that land (house, garage, fence, etc.) and where the proposed addition, deck, porch, garage, fence, etc. is to be located. (<http://www.ci.minneapolis.mn.us/mdr/Permits/SitePlan.asp>). Site plan review is defined as the process by which a municipality reviews and makes determinations on site plan applications in regard to the health, safety and welfare of the community.

The question of site plan review has been one that has been discussed, interpreted and reviewed for many years. Most municipalities have a site plan review policy either informally through procedure or formally through practice and use of the village or town code. Most municipalities throughout the country now have zoning codes that were set in place during the development of Comprehensive Plans, which came into use in the 1960s and developed to a national procedure.

“Simply stated, the Comprehensive Plan depicts where a particular community has been, where it is presently, where it wants to go, and how it plans to get there.”

A land use plan is generally considered to be the most important aspect of a larger Comprehensive Plan. However, before the concept of a “land use plan” can be discussed, it is necessary to define the term “Comprehensive Plan.” The specific content, time frame, and actual use of the Comprehensive Plan may vary, but a review of pertinent literature on this subject suggests several recurring themes and perceptions.

First, the plan provides a broad overview of the physical development of the particular geographic area being studied, typically a political jurisdiction. In this sense, the plan reviews the past development patterns of an area which have led directly to present conditions. Second, the plan provides a long-range, futuristic view (usually ten to twenty-five years) of how the study area should develop or redevelop. In this respect, the plan examines past trends and utilizes various analytical planning techniques to determine desired future scenarios (it should be noted, however, that past trends do not necessarily dictate future goals). Simply stated, the Comprehensive Plan depicts where a particular community has been, where it is presently, where it wants to go, and how it plans to get there.

Site Plan Review in New York

A. Business/Commercial

In *Kamhi v. Yorktown*,¹ the plaintiffs owned a 43-acre parcel on which they intended to build a planned condominium development. Following the submission of revised site plans, the Town Board approved plaintiff’s plan on the condition that the plaintiff pay a “recreation fee” of \$47,550. The “recreation fee” was derived from Local Laws, 1982, No. 6 of Town of Yorktown, which provided that a developer on R-3 developments must provide a “suitably improved playground/play area,” as well as set aside ten percent (10%) of the site for park and/or recreational facilities. If 10% of the property could not be used for recreational purposes, then the developer was required to pay a recreation fee of \$350 per unit.²

The Court of Appeals held that permitting the defendant to supercede Town law § 274-a in its local application complied with New York Municipal Home Rule § 10.³ The court further stated that the

grant of summary judgment for defendant town because under the Municipal Home Rule Law, while defendant had the authority to adopt a local law that required the imposition of a recreation fee as a condition of site plan approval, the local law did not expressly amend or supercede the New York Town Law, leaving no way of knowing what law governed.⁴

The Court of Appeals decided that the Town of Yorktown’s requirement of a recreation fee in lieu of land as a condition of site plan approval was invalid, and the plaintiff was entitled to a refund.⁵

In *Kravetz v. Plenge*,⁶ the Fourth Department held that while an amendment of the zoning ordinance could be questionable in regard to a site plan review, in a debatable instance legislative judgment must be allowed to control. In this case, the developer proposed to operate a hotel on property zoned as a medium-high density historic district.⁷ After the submission of site plans, the Planning Commission and Preservation Board recommended denial of the application and the City Council voted to adopt a zoning amendment allowing hotels in existing structures within the historic district.⁸ The Town argued that zoning ordinances for the historic district were meant to promote the retention of existing structures but allowed for specially permitted uses. Therefore, it appears that both the Appellate Division as well as the Court of Appeals have long favored the strength the municipality has in determining its own course for site plan review.

B. Industrial

In *West Lane Properties v. Lombardi*,⁹ the plaintiff applied to the Town Board for site plan approval for an industrial building that was to be located in an “Industrial A” district. After the receipt of the application, the Town enacted a 90-day moratorium. The district was then rezoned from “Industrial A” to “Residential A.” Following the rezoning of the property, the Town denied plaintiff’s application for site plan approval.¹⁰ The court held that because the 90-day moratorium was put into effect during the site plan approval process, that time was not counted toward determining the 60-day limit for automatic approval of site plan applications. The court determined that the moratorium resolution enacted by the Town Board was a valid zoning measure and, thus, the moratorium period could not be counted in determining whether the developer’s application could be approved automatically.¹¹

The plaintiff in *Callanan Industries, Inc. v. Rourke*¹² applied for site plan approval from the Planning Commission for the relocation of an asphalt plant to a site within the South Troy Industrial Park. The Planning Commission requested that the plaintiff submit additional information, including a full environmental assessment form (“EAF”) and supplemental site plan information. Another industrial company, Fane, filed an application for an asphalt plant within the same industrial zone. The public hearings were held separately and Fane’s Asphalt Plant application was heard first. There was a negative declaration issued for Fane’s, immediately followed by a positive declaration on the South Troy Industrial Park.¹³ The plaintiff commenced an Article 78 proceeding to challenge the Planning Commission’s decision.¹⁴ The plaintiff alleges that the decision was “(1) unsupported by substantial evidence, (2) arbitrary and capricious by virtue of the prior determination reached in Fane’s application, and (3) unlawfully predicted on cumulative impact analysis.”¹⁵ The supreme court held that the Planning Commission’s determination was not arbitrary and capricious and dismissed the plaintiff’s petition.¹⁶ The Appellate Division held that while the decision on the Callahan application did not appear to be arbitrary and capricious, nevertheless, the case was remitted to the Planning Commission for an explanation of why the two asphalt plant applications were treated differently.¹⁷

Site Plan Review in Other Jurisdictions

A. Business/Commercial/Industrial

In *Palatine v. Planning Board of the Township of Montville*,¹⁸ the issue addressed was whether a municipal planning board is equitably estopped from denying final site plan approval and applying post-preliminary site plan approval zoning amendments to a developer whose preliminary site plan approval and construction permit have expired. In this case, the plaintiff applied to the Planning

Board for preliminary site plan approval for an office building.¹⁹ While the developer was obtaining multiple extensions and constructing the first part of the building, the Town changed the zoning requirements and reduced the square footage of the building that could be placed on the property. Thereafter, the Planning Board granted final site plan approval and certificate of occupancy for the portion of the building that had been completed but denied final site plan approval for Section II because the current plans did not comply with the current zoning regulations.²⁰

Furthermore, the Supreme Court of New Jersey held that a preliminary site plan approval does guarantee an applicant at least five years of protection. However, in the event of non-commencement of construction, the passage of a zoning code change after that five-year period would be upheld.²¹ In this case, the applicant Palatine initially applied to the Planning Board in 1982 and the case was decided by the Supreme Court of New Jersey in 1993. The court stated that “no amount of reliance could change the fact that for Palatine to act in reliance on its belief that its preliminary site-plan approval and its building permit would protect Palatine from zoning changes forever was unreasonable.”²²

In *Ballard v. City of Westbrook*,²³ the plaintiff sought to develop a 36-acre parcel into single-family homes. The plaintiff’s site plan was approved; however, the City subsequently adopted an amendment to its zoning ordinance that created a new R-3 zone affecting the area where the plaintiff’s land is located. The new zone eliminated multi-family zone use where the plaintiff had proposed to build a multi-family apartment building. When the plaintiff applied for a building permit, he was informed that the site plan approval for the rezoned lot had expired and he could no longer build a multi-family apartment building on that lot.²⁴ The court held that the plaintiff’s “grandfather” argument in terms of site plan approval did not apply because § 302 of the Maine State Code only required the plaintiff’s application be governed by the respective ordinances in effect at the time the application was filed.²⁵

Site Plan Review in Architectural Control

A. Municipal Review

The main issue regarding architectural review is whether municipalities can use their zoning requirements to limit design standards in order to regulate big-box retailers: e.g., “franchise architecture,” where all stores have a similar look to create a nationally recognized brand, and “formula businesses,” national or regional enterprises with similar building styles, appearances, product offerings, and/or modes of operation (i.e., McDonald’s, Starbucks, or Subway).

Further, the issue continues to the question of what is the breadth of Town Planning Board site plan review

power. There are several statutes that provide the authority for regulating these businesses. General Municipal Law § 96-a grants power to:

Provide by regulations, special conditions and restrictions for the protection, enhancement, perpetuation and use of places, districts, sites, buildings, structures, works of art, and other objects having a special character or special historical aesthetic interest or value . . . including appropriate and reasonable control of the use or appearance of neighboring private property within public view, or both.

However, according to General Municipal Law § 96-a, if an application relates to a place of special character or special historic aesthetic interest, it will have to submit a site plan to the County Planning Commission.

In addition, the State Environmental Quality Review Act (“SEQRA”) provides a mechanism for review of specific proposals in terms of the effect on the environment. When these methods are used together it provides a full range of authority for local action. Also, the Municipal Home Rule Law § 10 stretches the community’s powers to their maximum, even allowing supersession of state law in some land use contexts. It authorizes local laws for the “protection and enhancement of its physical and visual environment and provides a specific source for aesthetic-based regulations.” Further, the idea of a Comprehensive Plan in municipalities is to sufficiently address the legitimate state interest and provide a means to create and record a mechanism in order to determine how a proposed ordinance will meet the community’s goal.

The article, “A Guide to Regulating Big Box Stores, Franchise Architecture, and Formula Businesses,” that was featured in the January / February 2007 issue of *New York Zoning Law and Practice Report* (“the Report”), was written based on Sedona, Arizona and its current policy of enforcing architectural control on franchise merchants. The article states that efforts by larger merchants to resist the conforming efforts of the municipalities have largely been unsuccessful, which suggests that a properly implemented law and zoning decision based on a documented record will be upheld.

On the other hand, there may be some methods for resisting the zoning regulations. Possible solutions as resistance against municipal control are: 1) substantive due process, 2) equal protection, 3) dormant commerce clause claims, 4) First Amendment and Lanham Act claims, and 5) other possible state claims. The following discusses the possible solutions for fighting back against harsh regulations put forth by municipalities.

A substantive due process claim can arise as a solution for a developer as resistance against municipal control. In order to pursue this option, the developer must as-

sert that an enacted statute is void as arbitrary and capricious because it has no “substantial relation to the public health, safety, morals, or general welfare.”

In *Bower Associates v. Town of Pleasant Valley*,²⁶ a developer sought a permit to subdivide three acres in a town to create three homes and access roads. The town denied the permit, and the developer and the retailer (Home Depot), whose actions were joined by the court, sued the town. The supreme court directed approval of the subdivision and site plans, finding the town’s actions were arbitrary in that its decision was not based on environmental concerns but was driven largely by community pressure.²⁷

The Appellate Division affirmed and the developer filed a civil rights action pursuant to 42 U.S.C.S. § 1983 seeking damages, alleging a denial of substantive due process and equal protection. The supreme court denied the town’s motion to dismiss but the Appellate Division reversed and held that the action should be dismissed.²⁸ The Court of Appeals affirmed and found Home Depot had not established a cognizable property interest that would entitle it to substantive due process protection and further that the subject property for which it sought a permit was treated differently from other similarly situated properties.²⁹

However, the case set out the requirements for substantive due process claim: First, claimants must establish a cognizable property interest, meaning a vested property interest, or “more than a mere expectation or hope to retain the permit and continue their improvements; they must show that pursuant to State or local law, they had a legitimate claim of entitlement to continue construction.”³⁰ Second, claimants must show that the governmental action is wholly without legal justification.³¹ Assuming the requirements of substantive due process have been met, a claim will succeed and a franchise or formula business or anybody else will prevail over the regulations of the municipalities.

Equal protection clause claims arise when an ordinance would prohibit a particular type of business but permit other forms, usually competitors. According to *City of Cleburne v. Cleburne Living Center*,³² the “Equal Protection Clause of the Fourteenth Amendment language states that no State shall ‘deny to any person, within its jurisdiction the equal protection of the laws,’ is essentially a direction that all persons similarly situated shall be treated alike.” According to the *Report*, when there is an issue regarding the regulation of a franchise or formula business, the local regulation involves social and economic policy, and does not target either a suspect class nor impinge on a fundamental right, the rational basis standard is applied. Thus, a substantive due process claim against a municipal government that is enforcing extreme control over site plan review is not likely to prevail because when a court employs the rational basis test, it usually upholds the constitutionality of the law, and the test gives great deference to the legislative branch.

In *Dennis v. Higgins*,³³ the dormant or negative Commerce Clause limits the power of states to erect barriers against interstate trade even where Congress has not acted. Generally, a two-part test is used for the Dormant Commerce Clause. First, state or local regulations that discriminate on their face against out-of-state entities are almost always deemed *per se* unconstitutional.³⁴ Second, an ordinance will be evaluated to determine if the burden it imposes on interstate trade is “clearly excessive in relation to the putative local benefits.”³⁵ *Exxon Corp. v. Governor of Maryland*³⁶ declares that the “Commerce Clause protects the interstate markets, not particular firms, from prohibitive or burdensome regulations.” Therefore, Dormant Commerce Clause claims against a municipality are not likely to succeed as the discrimination is not often specifically against out-of-state entities.

Many restrictions on franchise architecture focus particularly on signage. Many of these restrictions have been upheld by the courts against First Amendment challenges. Thus, the federal District Court denied a preliminary injunction that would have restrained a zoning board from enforcing certain zoning regulations on a Gateway Computers sign.³⁷ This decision was based on a Lanham Act case brought by a Blockbuster Video store in Arizona.

The Lanham Act prohibits states or municipalities from requiring alteration of a registered mark. In *Blockbuster Videos, Inc. v. City of Tempe*,³⁸ the plaintiffs argued that a city zoning ordinance violated the Lanham Act because it required one Blockbuster Video store to change the color of the lettering in its registered service mark, and prohibited the other from displaying its mark. The defendant argued that the statute did not preclude it from enforcing the ordinance. According to the *Report*, while there is an argument under the First Amendment, the majority of decisions state that the zoning board can enforce certain zoning regulations with respect to signs.

Regarding other state claims, New York’s Donnelly Act or Section 340 of the New York State General Business Law, makes illegal and void any contract, arrangement or agreement that restrains competition in any business or unlawfully interferes with the free exercise of any activity in the conduct of any business. However, in the *Great Atlantic & Pacific Tea Co., Inc. v. Town of East Hampton*,³⁹ a federal court rejected a claim that a ban on large supermarkets allegedly made at the request of existing supermarkets violates New York’s Donnelly Act. In this case, the Town Board of East Hampton passed a moratorium, thereby stalling the supermarket’s application while concurrently adopting a “Superstore Law” to restrict the establishment of large retail stores in the Town of East Hampton.⁴⁰ While this may be a viable option as for franchise and formula business owners, the federal court rejection may stand up against a claim under the Donnelly Act.

It appears that if a municipality has investigated, supported, and enacted local regulations to deal with many of the potential negative impacts of commercial and industrial businesses it will be upheld as constitutionally protected. In *Bower Associates v. Town of Pleasant Valley*,⁴¹ the Town Board denied the site plan approval based, *inter alia*, on their finding that the proposed development was out of character with the surrounding area. In this case, a housing developer and a retailer sought review of the orders from the Appellate Division which denied them damages against the town under 42 U.S.C. § 1983 for construction delays due to the alleged deprivation of their constitutionally protected civil rights and ruled that their complaint should be dismissed.⁴² According to the appellants, the plans ignored “the carefully planned, attractive ‘campus-style’ development that characterized much of the . . . OB-5 Zoning District.” The court held that the record indicated the project would bring about “a noticeable change in the visual character” of the area and, further, the change would be irreversible.⁴³

“The Report concludes that while a valid showing of arbitrary and capricious behavior may get an applicant to a higher court, it may ultimately result in the same decision favoring the municipality.”

Conclusion

The information provided appears to show that site plan issues are determined strongly in favor of the municipality. The *Report* states that in New York, New Jersey and Maine, the courts tend to favor Town and Planning Board decisions unless those decisions can be shown to be arbitrary and capricious. While there are some differences in determining how the issues are approached, it appears that in business, commercial and industrial sites, site plan approval is often issued mainly on the terms of the municipalities. The *Report* concludes that while a valid showing of arbitrary and capricious behavior may get an applicant to a higher court, it may ultimately result in the same decision favoring the municipality.

Further, while issues of architectural control in site plan reviews are also debatable and plaintiffs may have an opportunity in court, it appears the courts mainly will favor the municipalities. Courts give almost complete control to municipalities in determining how to determine and issue site plan approval in terms of architectural control or general site plan approval for businesses. However, according to the *Report*, as much control as the municipalities are given, it appears that many courts will not stand up for a complete disregard to the process. Due process rights cannot be disregarded and a valid § 1983 claim will likely at least get an applicant the chance to be heard in federal court.

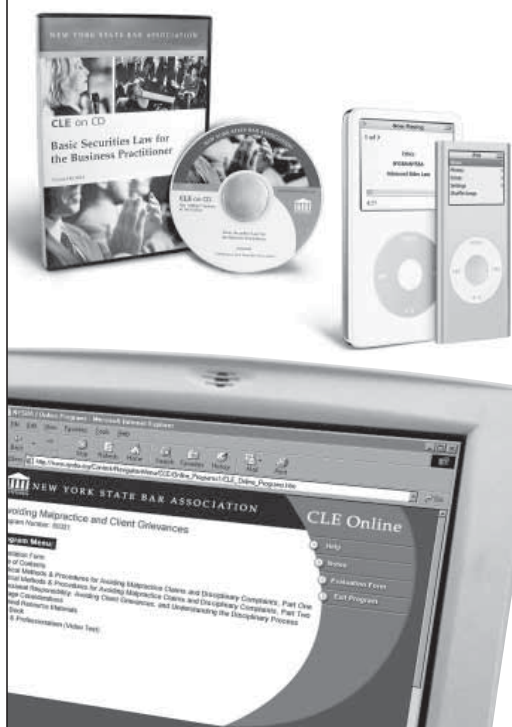
Endnotes

1. 74 N.Y.2d 423 (1989).
2. *Id.* at 427.
3. *Id.*
4. *Id.*
5. *Id.* at 435.
6. 84 A.D.2d 422 (4th Dep't 1982).
7. *Id.* at 424.
8. *Id.*
9. 139 A.D.2d 748 (2d Dep't 1988).
10. *Id.*
11. *Id.* at 749.
12. 187 A.D.2d 781 (3d Dep't 1992).
13. *Id.* at 782.
14. *Id.* at 781.
15. *Id.* at 782.
16. *Id.*
17. *Id.* at 784.
18. 133 N.J. 546 (1993).
19. *Id.* at 550.
20. *Id.* at 552.
21. *Id.* at 553.
22. *Id.* at 564.
23. 502 A.2d 476 (1985).
24. *Id.* at 478.
25. *Id.* at 484.
26. 2 N.Y.3d 617 (2004).
27. *Id.* at 623.
28. *Id.*
29. *Id.* at 632.
30. *Citing Town of Orangetown v. Magee*, 88 N.Y. 2d. 41 at 52 (1996).
31. *Id.* at 53.
32. 473 U.S. 432 (1985).
33. 498 U.S.439 (1991).
34. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).
35. *Pike v. Bruce Church*, 397 U.S. 137 (1970).
36. 437 U.S. 117 (1978).
37. *Gateway 2000 Country Stores, Inc. v. Norwalk Zoning Bd. of Appeals*, 13 F. Supp. 2d 247 (D.C. 1998).
38. 141 F.3d 1295 (9th Cir. 1998).
39. 997 F. Supp. 340 (E.D.N.Y. 1998).
40. *Id.* at 345.
41. 2 N.Y.3d 617 (2004).
42. *Id.* at 623.
43. *Id.* at 632.

Megan C. DiMiceli graduated from Touro Law Center in May 2008. She was the President of the Environmental Law Society at Touro and recently participated in the 2008 National Environmental Law Moot Court Competition held at Pace Law School.

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Recipients of Environmental Law Minority Fellowships Named

Four law students were awarded Minority Fellowships in Environmental Law at the February 1, 2008 NYSBA Environmental Law Section meeting. The fellowship recipients include:

Osafo Barker, who is a second-year law student at the University of Maryland School of Law. Mr. Barker is a graduate of Hartwick College where he received a Bachelor of Science in Chemistry;

Andrew T. Jhun, who is a second-year law student at Hofstra University School of Law. Mr. Jhun graduated from the University of Pennsylvania where he majored in environmental studies and the humanities, and also has received a Master of Public Administration in environmental science and policy from Columbia University's School of International and Public Affairs;

Kyu-Ah Julia Kang, who is a second-year law student at Brooklyn Law School. Ms. Kang is a graduate of Rutgers University where she double-majored in criminal justice and psychology; and

Erika Selli, a first-year law student at St. John's University School of Law. She is a graduate of Union College where she majored in neuroscience and environmental studies.

The Minority Fellowship Program was established in 1992 as a joint project of the environmental law committees of the New York State Bar Association and the Association of the Bar of the City of New York. The Program seeks to provide opportunities to minority law students in the environmental legal field. Past fellowship

recipients have worked at the Region II Office of the U.S. Environmental Protection Agency, the New York State Department of Environmental Conservation, the New York State Department of Law, and such environmental organizations as Environmental Defense and the Natural Resources Defense Council.

This year's applications were reviewed by a panel of judges that included the chairs of the NYSBA Environmental Law Section's Environmental Justice Committee (Peter M. Casper, Jean M. McCarroll, and Luis G. Martinez), and Christine A. Fazio and Desiree Giler Mann (from the City Bar's environmental committee). The four fellowship winners will receive stipends to spend the summer of 2008 working in environmental positions with governmental agencies or with environmental interest organizations.

The Fellowship recipients will also participate in meetings of the New York State Bar Association and the Association of the City Bar of New York's environmental law committees during the year, and will be assigned a mentor from the environmental bar for the summer.

A list of present and past fellowship recipients may be accessed from the Environmental Law Section's homepage (www.nysba.org/Environmental) on the New York State Bar Association's website.

Louis A. Alexander
Peter M. Casper
Jean M. McCarroll
Luis G. Martinez



Recent Decisions in Environmental Law

Student Editor: Jamie Thomas

Prepared by students from the Environmental Law Society of St. John's University School of Law

***Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F.Supp.2d 295**

Facts

In 2004 California adopted a comprehensive set of greenhouse gas (GHG) emissions regulations for new motor vehicles, which would be applicable to major car manufacturers starting in 2009.¹ In 2005 Vermont adopted the same regulations for new cars sold within its boundaries, as was allowed by statute.² These regulations would force most new automobiles sold after 2009 to have considerably decreased GHG emissions.³ Plaintiffs are a group of motor vehicle dealers, automobile manufacturers and associations of automobile manufacturers, who seek declaratory and injunctive relief from the regulations adopted by Vermont. As these regulations going into effect relied upon the EPA granting California a waiver of federal preemption under the Clean Air Act ("CAA"),⁴ and the fact that it would take years of lead time for the plaintiffs to comply with the regulations, the case went forward on the assumption that the EPA would grant California's waiver application. If it did not then the CAA, regardless of the outcome, would preempt Vermont's regulation.⁵

Issues

The issue, addressed by the United States District Court, Vermont, was whether states had the power to regulate automobile GHG emissions. Specifically, if the EPA granted a waiver of preemption under Section 209(a) of the CAA, would the regulations become "other motor vehicle standards of the government" under section 502 of the Energy Policy and Conservation Act (EPCA)⁶? If so then a "federal" preemption problem would not arise. If not, are they preempted by section 509(a) of the EPCA, which says that the state requirement must be identical to the EPCA requirement?⁷

Reasoning

The court began by analyzing the congressional intent of Section 209(b) of the CAA and EPCA, in order to decide if there was a conflict between them, and ultimately whether the regulations become "other motor vehicle standards of the government." Section 209(b) specifically

allowed California to avoid preemption, as long as its standards for GHG emissions will be equal to or greater than the equivalent federal standards. This was not only because California had a severe air pollution problem, but also because "California had led the nation in establishing motor vehicle emission control requirements" and there were "potential benefits for the nation in allowing California to continue to experiment and innovate in the field of emissions control."⁸ Once the EPA grants a waiver for an emissions standard for California, it therefore becomes a motor vehicle standard for the government, and Congress would not have intended for an EPA-approved regulation not to have the same strength of any other federal regulation. For these reasons federal preemption would not apply.

Next the court went on to discuss express preemption. In order for the EPCA's preemption provision to nullify Vermont's GHG rules, Congress would have had to manifest a clear purpose to do so. While the plaintiffs argued Vermont's GHG standards were "essentially de facto fuel economy standards," the court did not find that to be the case.⁹ This was for two reasons. First, Vermont's regulation did not just measure miles per gallon, but "carbon dioxide equivalents," which gave certain hydrocarbons different weights, according to their effect on overall global warming. That made it possible for manufacturers to remove certain ones while leaving others, and still reduce their emissions. Second there were numerous other ways for manufacturers to comply with the standard besides improving their fleet's fuel economy, including the use of alternative fuels (which provided for upstream emission adjustments) or plug-in hybrid vehicles.

When deciding the issue of field preemption, the court relied on *Massachusetts v. EPA*, which stated that regulation of emissions from automobiles was not exclusively the power of the Department of Transportation.¹⁰ The EPA also had a duty to keep people healthy from air pollution, which includes emissions from automobiles. Because of this, the court reasoned the EPA-approved state action could not be precluded. The fact that this was not a narrowly defined field or an area where states traditionally have not regulated was also a factor in the decision.

The plaintiffs made their most substantial case when arguing that the Vermont regulations should be preempted by conflicted preemption. The court was quick to point out that “the mere fact of ‘tension’ between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power.”¹¹ The court also relied on the *Geier v. Am. Honda Motor Co.*,¹² where it declared “a finding of conflict preemption turns on the identification of actual conflict and a court should not find preemption too readily in the absence of clear evidence of a conflict.”¹³ The plaintiffs made two main arguments for conflict preemption. The first was that the Vermont regulations frustrated the congressional intent to maintain a nationwide fuel economy standard. This was rejected because *Massachusetts v. EPA* made it clear there was no congressional action that conflicted with the regulation of greenhouse gases from motor vehicles. The second main argument for conflict preemption was it upset the balance that was set for maximum feasible average fuel economy by restricting consumer choice, reducing employment in the automobile industry, and decreasing traffic safety. Here the court looked at economic models drawn up by each side’s expert, and also the ways the industry could comply with the regulations. After extensive analysis of the many options, the court found the plaintiffs did not meet the burden of proving that the regulations were a barrier to the EPCA’s objectives, and therefore there was no conflict preemption.

Conclusion

While admitting that the GHG regulations would cause problems for automakers, the court believed the industry would be able to solve them. It pointed to the history of the industry “rising to the challenge,” and the numerous technological advances that were forthcoming or already upon them. Given that the plaintiffs were already invested in many of these technologies, and the lead time they would receive because of the waiver process, the court found it was not beyond their ability to comply with the regulations.

Carl Falotico, 2009

Endnotes

1. Cal. Admin. Code tit. 13, § 1961.1.
2. 42 U.S.C.A. § 7507.
3. See 13 CCR § 1961.1.
4. 42 U.S.C. §§ 7401–7671g.
5. 42 U.S.C.A. § 7543 specifically would preempt Vermont’s regulation.
6. 49 U.S.C.A. § 32902.
7. 49 U.S.C. § 32919.
8. *Green Mountain Chrysler v. Crombie*, 508 F. Supp. 2d 295, 344.
9. *Id.* at 351.
10. 127 S. Ct. 1438 at 1462.

11. *Green Mountain Chrysler v. Crombie*, *supra* note 8 at 356.

12. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (U.S. 2000).

13. 529 U.S. 884.

* * *

New Jersey v. EPA, 2008 U.S. App. LEXIS 2797 (D.C. Cir. 2008)

Facts

In 1970, Congress amended the Clean Air Act (“CAA”) with the addition of section 112.¹ Originally, section 112 required the Environmental Protection Agency (“EPA”) to list hazardous air pollutants (“HAPs”) that should be regulated because they could “cause, or contribute to, an increase in mortality or an increase in serious irreversible or incapacitating reversible illness.”² In 1990 though, Congress, in response to the slow pace of regulating HAPs, changed section 112 by eliminating much of the EPA’s discretion in the process.³ Congress also limited the opportunities for the EPA and others to intervene in the regulation of HAP sources. In addition, Congress directed that the Administrator may only remove a source category from the section 112(c)(1) list if it is determined that “emissions from no source in the category or subcategory concerned . . . exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source.”⁴ Furthermore, before listing electric utility steam generating units (“EGUs”) as an HAP source under section 112(c)(1), Congress required the Administrator to evaluate regulatory options with care and to meet certain conditions.

In 2000, the EPA, based on a study mandated by section 112(n)(1)(A) and subsequent information and consideration of alternative feasible control strategies, concluded that it was “appropriate and necessary” to regulate mercury emissions from coal- and oil-fired power plants. Therefore, these EGUs were listed as sources of HAPs regulated under section 112. However, in 2005, without making any specific findings, the EPA, by means of the Delisting Rule, purported to remove these EGUs from the section 112 list. The EPA also promulgated CAMR under section 111, which allowed the EPA to regulate mercury emissions from coal-fired EGUs.

The EPA, believing it had the authority to do so, justified its decision to delist these EGUs. The EPA explained it “reasonably” interpreted section 112(n)(1)(A) as providing it with the authority to remove coal- and oil-fired units from the section 112(c) list at any time that it made a negative appropriate and necessary finding under the section.⁵ Furthermore, the potential mercury emissions reductions achievable under CAMR figured prominently in EPA’s explanation of its delisting of coal-fired EGUs.⁶

New Jersey and fourteen additional states, the Michigan Department of Environmental Quality, the Pennsylvania Department of Environmental Protection, the City

of Baltimore (“Government Petitioners”) and various environmental organizations (“Environmental Petitioners”) sought review of both the Delisting Rule⁷ and CAMR.⁸ Both the Government and Environmental Petitioners assert the EPA violated Section 112’s plain text and structure when it did not comply with the requirements of section 112(c)(9) in delisting EGUs. The EPA and certain interveners, however, justify the Delisting Rule based on their reliance of section 112(n), which sets special conditions before EGUs can be regulated under section 112. The United States Courts of Appeals for the District of Columbia Circuit, entrusted to review these two rules, held the delisting was unlawful, thus requiring the vacation of CAMR’s regulations for both new and existing EGUs.

Issue

The issue is whether EPA’s promulgation of these rules was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the CAA.

Reasoning

In reviewing EPA’s interpretation of the CAA, the court used the two-pronged test of *Chevron*.⁹ Under step one of this test, the court asks whether or not Congress has directly spoken to the issue.¹⁰ If Congress’ intent is clear, then the court, as well as the agency, must give effect to the unambiguous intent of Congress.¹¹ However, if the court determines Congress has not directly addressed the issue, then the court must move to step two of the *Chevron* test. Under step two, the court must ask if the agency’s answer is based on a permissible construction of the statute.¹²

The court determined that EPA’s purported removal of EGUs from the section 112(c)(1) list violated the CAA’s plain text and must be rejected under step one of *Chevron* because the EPA never made the findings required under section 112(c)(9). The court also rejected all of EPA’s arguments in an attempt to evade section 112(c)(9)’s plain text.¹³

The EPA, in a final attempt, argued it had previously removed sources listed under section 112(c) without satisfying the requirements of section 112(c)(9). The court however did “not see how merely applying an unreasonable statutory interpretation for several years can transform it into a reasonable interpretation.”¹⁴

The court vacated the Delisting Rule in view of the plain text and structure of section 112. As a result, CAMR’s regulations for both new and existing EGUs were also vacated because EPA promulgated the CAMR regulations for existing EGUs under section 111(d). This is because under EPA’s own interpretation of the section, it cannot be utilized in the regulation of sources listed under section 112. Therefore, EPA admitted that if EGUs

remain listed under section 112, as this court held, then CAMR regulations for existing sources must fail.

Conclusion

The United States Court of Appeals held that because coal-fired EGUs are listed sources under section 112, regulation of existing coal-fired EGUs’ mercury emissions under section 111 is prohibited, thus invalidating CAMR’s regulatory approach. Therefore, the court granted the petitions and vacated both rules.

Jamie Thomas, 2008

Endnotes

1. Pub. L. No. 91-604, § 4(a), 84 Stat. 1676, 1685 (1970).
2. *Id.* at § 112(a)(1).
3. *New Jersey v. EPA*, 2008 U.S. App. LEXIS 2797 (D.C. Cir. 2008); see also, e.g., *Nat’l Lime Ass’n. V. EPA*, 344 U.S. App. D.C. 97, (D.C. Cir. 2000).
4. CAA § 112(c)(9).
5. Revision of December 2000 Regulatory Finding (“Delisting Rule”), 70 Fed. Reg. at 16,032.
6. *Id.* at 16,005.
7. The Delisting Rule removes coal- and oil-fired EGUs from the list of sources whose emissions are regulated under section 112 of the CAA.
8. CAMR sets performance standards pursuant to section 111 of the CAA for new coal-fired EGUs and establishes total mercury emissions limits for states and certain tribal areas, along with a voluntary cap-and-trade program for new and existing coal-fired EGUs.
9. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
10. *Id.* at 842.
11. *Id.* at 842–43.
12. *Id.* at 843.
13. The EPA attempted to reach step two of *Chevron* and obtain judicial deference to its interpretation by maintaining that section 112(n)(1) makes section 112(c)(9) ambiguous. The EPA’s reasoning was if the EPA makes a determination under section 112(n)(1) (A) that power plants should not be regulated at all under section 112, then that determination *ipso facto* results in the removal of power plants from the section 112(c) list. The court did not follow the EPA’s logic stating that section 112(n)(1) governs how the Administrator determines whether to list EGUs and does not mention anything about delisting them. Furthermore, the court stated that the plain text of section 112(c)(9) specifically indicates it applies to the delisting of “any source.” The EPA also argued it possessed the authority to remove EGUs from the section 112 list under the “fundamental principles of administrative law that an agency has inherent authority to reverse an earlier administrative determination or ruling where an agency has a principle basis for doing so.” The court rejected this argument as well because Congress had unambiguously limited the EPA’s discretion to removed sources, including EGUs, from the list once added.
14. *F.J. Vollmer Co. v. Magaw*, 322 U.S. App. D.C. 193 (D.C. Cir. 1996).

* * *

Facts

Since the 1970s, the United States has been involved in litigation regarding the U.S. military’s use of “Agent Orange” and related chemical defoliants to prosecute the war in Vietnam.¹ The decision in the instant appeal is but one of three decisions filed regarding 16 unconsolidated appeals before the United States Court of Appeals for the Second Circuit.

Agent Orange was one of several chemically similar herbicide defoliants used by the United States government during the Vietnam War.² The government purchased the defoliants from the defendants—appellees in the instant appeals pursuant to various government contracts, many of them subject to directives entered pursuant to the Defense Production Act of 1950³ and succeeding regulations. Delivery of Agent Orange was characterized as part of the prosecution of military action, which enabled defendants to procure otherwise scarce materials and equipment necessary to produce it.⁴ The Agent Orange delivered to the government was a mixture of two different herbicides: 2,4-D (2,4-Dichlorophenoxyacetic acid) and 2,4,5-T (2,4,5-Trichlorophenoxyacetic acid). The manufacture of 2,4,5-T produced trace elements of the toxic chemical dioxin (2,3,7,8-Tetrachlorodibenzo para dioxin (TCDD)) as a byproduct, which plaintiffs allege caused their injuries.

This appeal is the latest chapter in a 30-year struggle to bring to just legal closure the alleged consequences of Agent Orange use,⁵ beginning with *Agent Orange I* litigation, the veterans’ class action begun in the late 1970s and settled in 1984. Later claims brought by plaintiffs who opted out of that settlement were held barred by the military contractor defense.⁶ *Agent Orange II* class-action litigation was filed by plaintiffs who had been members of the original plaintiff class and therefore entitled to receive settlement payments, but whose injuries had manifested after their opportunity to opt out of the class action had expired.⁷ The district court barred these claims because plaintiffs were class members and the Court of Appeals affirmed.⁸ The third and instant series of lawsuits were brought by the Stephensons and Isaacsons, plaintiffs who had not been part of the original plaintiff class. These veterans and their families, two of the sixteen plaintiffs before the Court of Appeals in the instant appeal, alleged injuries that resulted from exposure to Agent Orange which did not manifest until after the 1994 cutoff date for filing settlement claims in the original actions. In a 2001 opinion, the Court of Appeals held the district court erred in deciding these plaintiffs’ claims were barred by the *Agent Orange I* settlement.⁹ On remand, the Stephensons and Isaacsons were joined by 14 other plaintiffs alleging Agent Orange injuries first discovered after the 1994 cut-

off date. The cases were not consolidated and the district court conducted simultaneous proceedings and applied rulings in the Stephenson and Isaacson cases to each of the other. Together, the plaintiffs raised three tort claims under various state laws: design defect, failure to warn and manufacturing defect.

Thereafter, defendants moved for summary judgment against the Stephenson and Isaacson plaintiffs, and the Stephenson plaintiffs moved to amend their complaint. The district court denied the Stephensons’ motion to amend their complaint and granted defendants’ motion for summary judgment. The district court concluded the government contractor defense barred both the design defect and failure-to-warn claims.¹⁰ As to the plaintiffs’ manufacturing defect claims, the district court concluded they were barred because defendants’ products conformed to the government’s specifications.¹¹ But in granting defendants’ motion for summary judgment, the district court recognized the difficulties in obtaining evidence for plaintiffs’ position in light of the passage of time between exposure and injury and therefore permitted discovery “to ensure due process.”¹² The district court then set a motion schedule for an anticipated motion for reconsideration based on the results of that discovery.¹³ Both parties appealed to the United States Court of Appeals for the Second Circuit.

Issues:

1. Whether the district court properly granted defendants’ motion for summary judgment as to plaintiffs’ design defect claim¹⁴ where the federal contract conflicts with state law and no reasonable jury could find that the government did not exercise sufficient discretion to have approved reasonably precise specifications for Agent Orange.
2. Whether the district court abused its discretion in denying the Stephenson plaintiffs’ request for additional discovery beyond documents produced in the MDL¹⁵ during the 1980s and six subsequent depositions.
3. Whether the district court abused its discretion in denying the Stephenson plaintiffs’ motion to amend their complaint to add additional defendants and several new causes of action.

Reasoning: Plaintiffs raise three issues on appeal. They first assert the district court erred in granting defendants’ motion for summary judgment and concluding that the government contractor defense—which protects government contractors from state tort liability under certain circumstances when they provide defective products to the government—applied to bar plaintiffs’ claims.¹⁶ They also contend the district court abused its discretion by limiting their discovery. The Court of Appeals disagreed and affirmed the district court’s rulings. Finally, plaintiffs appeal denial of their motion to amend. The

Court of Appeals found the denial erroneous but harmless.

1. Summary Judgment

In *Boyle v. United Technologies Corp.*,¹⁷ the Supreme Court recognized the government contractor defense.¹⁸ The *Boyle* Court concluded the “uniquely federal interest []” of “getting the Government’s work done” requires that, under some circumstances, independent contractors be protected from tort liability associated with their performance of government procurement contracts.¹⁹ The Federal Tort Claims Act²⁰ (“FTCA”) is also instructive.²¹ Under the FTCA, Congress waived governmental sovereign immunity in certain cases,²² but the Act’s discretionary function exception carved out “any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.”²³

The *Boyle* Court concluded that this protection for discretionary action by federal agencies and employees implies some measure of similar protection for government contractors, and noted specifically that the exercise of government discretion is inherent to military contractors,²⁴ stating, “It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production.”²⁵ The government contractor defense thus protects government contractors from the specter of liability when the operation of state tort law would significantly conflict with the government’s contracting interest.²⁶

The *Boyle* Court limited this displacement of state law to instances in which three requirements were met: (1) the United States approved reasonably precise specifications for the allegedly defective equipment; (2) the equipment conformed to those specifications and (3) the contractor who supplied the equipment warned the United States about the dangers in the use of the equipment that were known to the contractor but not to the United States.²⁷

Plaintiffs made three arguments²⁸ that defendants did not satisfy the first *Boyle* requirement. The Court of Appeals dispensed with all three arguments and found the first *Boyle* requirement—whether the United States approved reasonably precise specifications for the allegedly defective equipment—to be met.

The Court found that plaintiffs’ first argument misconceives the nature of the contracts in question and defined the alleged defective design too narrowly. Plaintiffs defined dioxin as the defect and asserted that because the contracts at issue contained no specifications with regard to dioxin, the government exercised no discretionary authority. However, the Court found that Agent Orange, not dioxin, was the alleged defect.

With respect to plaintiffs’ second argument, that the government merely rubber-stamped its approval of defendants’ suggested specifications, which were simply combinations of off-the-shelf commercially available herbicides, the Court noted *Boyle* explicitly contemplated government reliance on manufacturers’ expertise in making a fully informed decision as to what to order²⁹ and concluded no reasonable jury could find that the government did not exercise sufficient discretion to have “approved” specifications for the herbicides. The government was plainly the “agent[] of decision”³⁰ with respect to Agent Orange’s final contractually specified composition.

Plaintiffs’ third argument, whether the government made a discretionary determination regarding Agent Orange’s toxicity, strikes at the heart of the first *Boyle* requirement.³¹ Whether the conflict between the federal government’s interests and defendants’ state law duties necessary to invoke the government contractor defense exists. If there is a conflict, the first *Boyle* requirement is met; if not, the government contractor defense does not apply. Here, the Court considered whether the government approved of the toxicity levels present in Agent Orange in a manner that would create the necessary conflict with the alleged state law tort duty such that the latter must be displaced. Since the record indicates the government examined toxicology data and concluded that Agent Orange’s components—2,4,5-T and 2,4-D—posed “no health hazard” and continued to contract with defendants for purchase of the same and similar defoliating agents, the Court held it did. Because the imposition of liability under state law would constitute a significant conflict with the government’s decision that the defoliants used in Vietnam as they were produced by defendants posed no unacceptable hazard, the Court concluded the first *Boyle* requirement was met.

The Court held the second *Boyle* requirement for invocation of the government contractor defense—compliance with the contracts’ specifications—met as a matter of law since there is no allegation the government received Agent Orange with 2,4,5-T present in anything other than the proportions and purity levels called for by the terms of the contracts.³²

The Court found the final *Boyle* requirement for invocation of the government contractor defense—that the defendants demonstrate they “warned the United States about the dangers in the use of the equipment that were known to [them] but not to the United States”³³—met as a matter of law. The Court analyzed the types of risks that rise to the level of dangers that must be disclosed under pre-*Boyle* precedent and concluded a defendant may satisfy the third *Boyle* requirement if it demonstrates it fully informed the government about hazards related to the government’s exercise of discretion that were “substantial enough to influence the military decision” made.³⁴ Stating that the record is clear, the Court found the defendants did not fail to inform the government of “known

dangers” at the time of Agent Orange’s production of the type that would have impacted the military’s discretionary decision regarding Agent Orange’s toxicity, and therefore, established the third *Boyle* requirement.

2. Discovery Rulings

The district court’s February 9, 2004 government contractor defense opinion granted plaintiffs a six-month discovery period and permission to seek reconsideration of its summary judgment ruling. Thereafter, plaintiffs requested “the documents from all of the other litigation that these [defendants] have been involved in, involving the same pesticides and the same type of claims.”³⁵ The district court imposed discovery limitations which limited plaintiffs to documents produced in the MDL during the 1980s and six subsequent depositions,³⁶ which the Court of Appeals now reviews for abuse of discretion.³⁷

The Court relied on the Federal Rules of Civil Procedure, which permit parties to “obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party,”³⁸ but a district court may limit it within its discretion,³⁹ and found the district court’s discovery rulings did not constitute an abuse of discretion. Rather, the district court reasonably concluded the MDL files were likely the best source of the information plaintiffs sought—defendants’ knowledge of 2,4,5-T’s risks at the time of production—and plaintiffs’ motion was an unlimited and unfocused request made without any attempt to review what was already available or to tailor the request to materials reasonably expected to produce relevant, non-duplicative information, the district court’s limitations were well within its discretion under Rule 26.⁴⁰

3. Stephenson Plaintiffs’ Motion to Amend

The Court of Appeals found that under the abuse of discretion⁴¹ standard, the district court erred in denying the Stephensons’ motion to amend their complaint, but in light of the ruling on the government contractor defense issue, the error was harmless. Federal Rule of Civil Procedure 15(a), as in effect at the time of the court’s order, provided that “[a] party may amend the party’s pleading once as a matter of course at any time before a responsive pleading is served. . . .”⁴² Since at the time of the Stephensons’ motion, the defendants had not yet filed an answer to their complaint, and a motion is not a responsive pleading, the Stephensons were entitled to amend their complaint as a matter of right without leave of the district court. However, in light of the Court’s finding regarding the government contractor defense, the district court’s erroneous denial of the Stephensons’ motion was harmless.⁴³

Conclusion

The Court of Appeals for the Second Circuit affirmed the judgments of the district court. With regard to the first issue, the Court applied the *Boyle* requirements and

found the three elements of the government contractor defense were met, barring plaintiffs’ design-defect claims. With regard to the second issue, the Court found the district court’s discovery rulings were within its discretion. With regard to the third issue, the Court found the district court erred but the error was harmless in light of the Court’s decision with regard to the government contractor defense issue.

Samantha Chung, 2008

Endnotes

1. See generally *In re Agent Orange Prod. Liab. Litig.*, 304 F. Supp. 2d 404, 410–14 (E.D.N.Y. 2004) (“*Agent Orange III Gov. Contractor Def. Op.*”) (listing more than 100 Agent Orange-related decisions); see also *id.* at 407–23 (describing the history of Agent Orange litigation involving Vietnam veterans).
2. See *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 19 (E.D.N.Y. 2005).
3. See 50 U.S.C. § 2061.
4. *Agent Orange III Gov. Contractor Def. Op.*, 304 F. Supp. 2d at 424–25.
5. *Id.* at 410–14.
6. See *In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 187, 189 (2d Cir. 1987) (“*Agent Orange I Opt-Out Op.*”), cert. denied, 487 U.S. 1234, 108 S. Ct. 2898, 101 L. Ed. 2d 932 (1988).
7. *In re “Agent Orange” Prod. Liab. Litig.*, 996 F.2d 1425, 1439 (2d Cir. 1993) (“*Agent Orange II*”), overruled in part on other grounds by *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 34, 123 S. Ct. 366, 154 L. Ed. 2d 368 (2002).
8. *Id.*
9. *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 261 (2d Cir. 2001) (“*Agent Orange III*”).
10. *Agent Orange III Gov’t Contractor Def. Op.*, 304 F. Supp. 2d at 441–42.
11. *Id.* at 442.
12. *Id.*
13. *Id.*
14. The Court deemed plaintiffs’ failure-to-warn and manufacturing-defect claims abandoned because plaintiffs’ briefs made no arguments regarding the district court’s findings regarding them. See *Hughes v. Bricklayers & Allied Craftworkers Local # 45*, 386 F.3d 101, 104 n.1 (2d Cir. 2004).
15. During the pendency of *Agent Orange I* litigation, the Judicial Panel on Multidistrict Litigation designated the United States District Court for the Eastern District of New York as the Multidistrict Litigation (“MDL”) court for all federal Agent Orange-related cases brought by military veterans of various countries. *In re “Agent Orange” Prod. Liab. Litig.*, No. 05-1760-cv, 2008 U.S. App. LEXIS 3760, at *9 (2d Cir. Feb. 22, 2008).
16. *Id.* at *4.
17. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S. Ct. 2510, 101 L. Ed. 2d 552 (1988).
18. The defense is a federal common law doctrine referred to in case law as the “government contractor defense,” the “military contractor defense,” or simply the “contractor defense.” *Id.* at n. 18.
19. *Id.* at 504–05.
20. 28 U.S.C. § 2671.
21. *Boyle*, 487 U.S. at 509–12.

22. *Id.* at 511 (citing 28 U.S.C. § 1346(b), where Congress “authorized damages to be recovered against the United States for harm caused by the negligent or wrongful conduct of Government employees, to the extent that a private person would be liable under the law of the place where the conduct occurred.”)
23. *Id.* (quoting 28 U.S.C. § 2680 (a)).
24. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 511 (1988).
25. *Id.* at 511–12.
26. *Id.* at 507.
27. *Id.* at 512.
28. Plaintiffs argued that (1) Agent Orange procurement contracts contained no specifications regarding dioxin which plaintiffs identify as the complained-of defect; (2) there is at least a genuine issue of material fact regarding whether Agent Orange was a commercially available product whose specifications were created by the defendants rather than the government, whose involvement was minimal; and (3) the alleged defect was unrelated to the contractual specifications for 2,4,5-T because it was the defendants’ chosen manufacturing processes, with which the government was not involved and which were not integral to contract compliance—that caused dioxin to be present. *In re “Agent Orange” Prod. Liab. Litig.*, No. 05-1760-cv, 2008 U.S. App. LEXIS 3760, at *23 (2d Cir. Feb. 22, 2008).
29. *Boyle*, 487 U.S. at 513.
30. *In re Joint Eastern and Southern Dist. New York Asbestos Litig.*, 897 F.2d 626, 630 (2d Cir. 1990) (“*Grispo*”).
31. The first *Boyle* requirement is designed to ensure that “a conflict with state law exists.” *Lewis v. Babcock Indus., Inc.*, 985 F.2d 83, 86 (2d Cir.) *cert. denied*, 493 U.S. 935, 110 S. Ct. 326, 107 L. Ed. 2d 316 (1989).
32. *See Miller v. Diamond Shamrock Co.*, 275 F.3d 414, 420–21 (5th Cir. 2001) (rejecting the same argument made by civilian plaintiffs seeking compensation for injuries allegedly caused by Agent Orange.)
33. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 512 (1988).
34. *Agent Orange I Opt-Out Op.*, 818 F.2d at 193.
35. Tr. of Civil Conference Before The Hon. Joan M. Azrack at 10.
36. On March 2, 2004, Magistrate Judge Azrack ruled the plaintiffs first had to familiarize themselves with the MDL record before requesting additional documents, and on March 19, 2004, the district court granted plaintiffs access to six deposition transcripts from non-MDL cases. *In re “Agent Orange” Prod. Liab. Litig.*, No. 05-1760-cv, 2008 U.S. App. LEXIS 3760, at *66 (2d Cir. Feb. 22, 2008).
37. *Wood v. FBI*, 432 F.3d 78, 82 (2d Cir. 2005).
38. Fed. R. Civ. P. 26 (b)(1).
39. Fed. R. Civ. P. 26 (b)(2)(C).
40. Fed. R. Civ. P. 26 (b)(2)(C).
41. *See McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007).
42. Fed. R. Civ. P. 15(a).
43. *See Sinicropi v. Nassau County*, 601 F.2d 60, 62 (2d Cir. 1979) (concluding that an erroneous denial of a motion to amend is harmless where the proposed amendment would be barred by *res judicata*), *cert. denied*, 444 U.S. 983, 100 S. Ct. 488, 62 L. Ed. 2d 411 (1979); *cf. Unlaub Co, Inc. v. Sexton*, 568 F.2d 72, 78 (8th Cir. 1977) (concluding any abuse of discretion by the district court in failing to permit defendant to amend his answer was harmless because “[n]one of the matters set forth in the proposed amended answer would affect the result”).



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