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The New York Environmental Lawyer

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

Message from the Outgoing Chair

Ah, but a man's reach should exceed his grasp, or what's a heaven for?

Robert Browning

Far and away the best prize that life has to offer is the chance to work hard at work worth doing.

Theodore Roosevelt[1]

Barry R. Kogut

When I began my term as Chair, I wanted to try some things that had not been done in an effort to embellish the historical role of the Environmental Law Section as a forum for discussion and resolution of critical environmental

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Message from the Incoming Chair

Philip H. Dixon

It is a great pleasure and honor to serve as the thirty-first Chair of the Environmental Law Section. Looking over the list of past Chairs on the Section's website is daunting. Among the names are pioneers in the field of environmental law, prominent practitioners in the public and private sector, and many individuals with whom I have enjoyed working on Section affairs and from whom I have learned much. I will do my best to make sure that the coming year is interesting, productive, and enjoyable for Section members.

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Inside

NYSBA

Message from the Outgoing Chair

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issues. I thought that I had been given a unique opportunity to do this given that 2010 marked the 30th anniversary of the Section and the 40th anniversary of the New York State Department of Environmental Conservation (NYSDEC). It turned out to be a wild ride that required an extraordinary amount of time and effort, but I enjoyed it and the Section made progress.

Summer of 2010

We planned CLE programs at all 9 NYSDEC Regions with luncheons, speakers, and field trips with welcoming remarks by the respective Regional Directors, a logistical triumph that would not have been possible without the enthusiastic support of NYSDEC. I attended each of the programs that were presented and gave the ethics talk (which was prepared by the Section's Ethics Committee Co-Chairs, Randy Young and Yvonne Hennessey) at Regions 9, 2, and 3. A number of the settings for the CLE programs were extraordinary—

- The Syracuse Center of Excellence Headquarters Building[2] for the Region 7 presentation on the renaissance of Onondaga Lake. It started with a historical review of the glory that was Onondaga Lake by a representative of the Onondaga Historical Association and continued through substantive presentations on a myriad number of legal issues concerning the remediation effort at the Lake. It ended with the poignant and thoughtful observations of Dr. Cornelius Murphy, now the President of the SUNY College of Environmental Science and Forestry, but at one point, a young research scientist given the task of venturing out on a lake that was suffering from an extended period of industrial and municipal use associated with the demands of an urban community; and
- The Beacon Institute Center for Environmental Innovation and Education at Denning's Point[3] for the Region 3 program on SEQRA that was moderated by Joan Leary Matthews, whose passion for the subject matter made the panel discussion and audience participation exceptional.

Some of the field trips were extraordinary in their emotional impact. For example, standing on the top of a closed landfill cell at the Seneca Meadows Landfill was impressive in terms of both a view of the range of clockwork activities down below (which includes the use of falcons to control the presence of unwanted birds) to the impact on the surrounding landscape.

However, the view of the Hudson River from the deck of the sloop *Clearwater* will remain for me the highlight of the Regional Programs. I did the sail on the lower Hudson that offered the view of the majestic Manhattan skyline (Region 2 program) and the sail out of Beacon, New York (Region 3 program) that provided a view of Storm King Mountain where some say modern environmental law had its beginnings.

The remarks of the luncheon speakers were all inspiring and I was particularly pleased to have had the good fortune to hear Peggy Shepard, the executive director and co-founder of WE ACT for Environmental Justice, who spoke at the Region 2 program. Ms. Shepard's remarks were printed in the 2011 Winter edition of *The New York Environmental Lawyer* through the efforts of Lou Alexander.

Fall Section Meeting in Cooperstown, New York (October 1-3, 2010)

I read a story about an interview of a baseball pitcher who was reported to have said, "One word describes baseball—you never know." That story may have been apocryphal, but I wondered how successful our Fall meeting would be given that we had to maneuver between the Scylla and Charybdis of an economic recession and the dramatic impact on the NYSDEC work force associated with Governor Paterson's budget cutting. This left an air of uncertainty that was unusual for an event planned in the jewel called Cooperstown at the majestic Otesaga. Luckily, the Fall meeting was a success in terms of both numbers and the quality of the speakers, which was evident at both the Friday afternoon CLE that was designed for the younger practitioners and the main event CLE on Saturday morning.

The list of those whose contributions made this meeting special is long, but a special set of kudos goes out to:

- Section member Janice Dean, a native of Cooperstown, who was instrumental in securing the Friday dinner speaker, Hugh MacDougall, the Cooperstown Village Historian, who spoke on the Early Days of Cooperstown;
- NYSBA President Steve Younger, who was at the Otesaga for another Bar Association event, but made an appearance at our Friday dinner to offer his perspective from the "Big Bar" and provide an additional layer of elegance to the proceedings; and
- Former Section Chair Walter Mugdan, who arranged for our Saturday dinner speaker, James Moorman. Mr. Moorman served as Assistant Attorney General for Lands and Natural Resources at the U.S. Department of Justice and then worked on the private side as a partner at Cad-

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Message from the Incoming Chair

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At the outset, I want to thank Barry Kogut for his incredible energy and initiative over the past year. In addition to our usual Fall and January programs and Spring Legislative Forum, Barry undertook special programs over the summer of 2010 in the various Department of Environmental Conservation regions commemorating the fortieth anniversary of the agency and the thirtieth anniversary of the Section. I cannot hope to surpass Barry's effort. He has provided a great example of vigorous and effective leadership, as have the other Chairs with whom I have served as a Section officer: Alan Knauf, Joan Leary Matthews, and Lou Alexander.

In that regard, I also want to introduce the members of the Section Cabinet for the coming year:

- Vice-Chair: Carl R. Howard, U.S. Environmental Protection Agency, New York City.
- Treasurer: Kevin A. Reilly, Appellate Division, First Department, New York City.
- Secretary: Terresa M. Bakner, Whiteman Osterman & Hanna LLP, Albany.
- Section Council Representative: Miriam E. Villani, Sahn Ward Coschignano & Baker, PLLC, Uniondale.
- Section Delegate to the NYSBA House of Delegates: Howard M. Tollin, AON Risk Services Northeast, Inc., Jericho.

As in the past, the Cabinet will be having monthly conference calls, generally on the third Thursday of each month, to deal with business that arises between our regular Section meetings. If anyone has anything that they would like to put before the Cabinet, please let me or any of the other Cabinet members know.

The Section will be having a busy year, with our first major event being the Section's Fall Meeting. It will be held at the Gideon Putnam Hotel in Saratoga Springs from Friday, October 21, to Sunday, October 23, as a joint meeting with the Municipal Law Section. The Gideon Putnam is located in the beautiful Saratoga Spa State Park. The Section's Program Co-Chairs, Ginny Robbins and Kevin Ryan, have done a wonderful job with their Municipal Law Section counterparts in coming up with an exciting program.

The program will include a welcoming barbeque on Friday, a half-day CLE program on Saturday morning and optional sightseeing and recreational activities (including a bike ride on Saturday afternoon). The Saturday CLE program will offer an update on SEQRA, including a discussion of the new Environmental Assessment Form, by DEC representatives and private practitioners, an overview of the new ethics rules, and a review of "hot topics" such as a development of natural gas deposits in the Marcellus Shale, trends in green buildings law, and recent land use cases.

The Section's dinner on Saturday night will feature as speaker Michael Relyea, President of the Luther Forest Technology Campus Economic Development Corporation, who will discuss the challenges and successes of regional high-tech economic development. The nearby Luther Forest Technology Campus is where Global Foundries is constructing a chip-fab plant that is described as the largest commercial capital expansion project currently under way in the United States. On Sunday morning, there will be a one-hour CLE program introducing the new endangered species regulations, followed by a meeting of the Section's Executive Committee. Continuing the Section's efforts over the past several years to attract younger attorneys to Section activities, the SEQRA, endangered species, and ethics presentations will provide CLE credit to both newly admitted and experienced attorneys.

In looking ahead to the coming year, one of my goals will be to expand the Section's membership, especially by drawing in younger attorneys and increasing the diversity of our membership in all respects. Over the coming year, the Section will be taking part in the Diversity Challenge initiated by Vincent Doyle, the new State Bar Association President. We have designated the Co-Chairs of the Section's Membership Committee, Rob Stout and Jason Kaplan, as co-coordinators of our Section's initiative. The Section's commitment to diversity, however, is nothing new. For instance, the Section has co-sponsored a fellowship program for minority law students to spend summers working for government agencies or public interest organizations for nearly twenty years.

With respect to our Section in particular, it is also important to foster diversity of interests and to ensure active participants in Section activities by attorneys for government agencies and public interest organizations. One of the things that attracted me to the Section in the early 1980s was the sense of shared community that I observed. Now more than ever it is important to nurture that sense of community and professional respect for others engaged in this field. In this regard, over the past several years various ethical guidelines and restrictions have been imposed on State employees that make their participation in Section events more difficult. We will work with central Bar Association representatives to see if there is a way to bring more rationality to this area.

Also, I want to continue the work of my predecessors in striving to maintain the Section as a forum for the

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From the Editor-in-Chief

Miriam E. Villani

Hiking in the Olympic National Park in Washington State in early September put me in awe of this planet all over again. There were the cloudless blue skies (don't believe all those lies about constant rain in the Pacific Northwest), the panoramic views of the snow-capped Cascade and Olympic mountain ranges, the lakes and waterfalls in the National Park, and beautiful Puget Sound. Not to mention the eagle that soared past my nose. As we live and work in our city buildings, sometimes we lose sight, both figuratively and literally, of the natural beauty and wonder of our earth. It is an excellent idea to step outside—deep into the Great Outdoors—every once in a while to renew ourselves as well as our commitment to environmental protection.

We, as environmental lawyers, have an interest in the protection of the natural and wild parts of our planet. We do our part by proposing, supporting, enforcing, and recommending compliance with environmental laws. We educate with our articles, treatises, handbooks, and CLE programs. "Smart Growth," "Green Buildings," and "Sustainability," all have become part of our lexicon, but can we do more? Beveridge & Diamond and Harris Beach are doing more! In this issue of *The New York Environmental Lawyer* we recognize both of these law firms for their innovation and the commitment of their attorneys. They have committed to waste reduction and energy and resource conservation by participating in the Law Office Climate Challenge Program. Read more about the program and how these two firms have met the program challenge on page 64 of this issue. The Section applauds Beveridge & Diamond and Harris Beach and encourages the rest of its members to follow their lead. If you need some motivation, I recommend a hike on a wooded path, beside a lake, over a mountain, along a ridge, or simply through a park.

Let's get out and smell the Northern Wild Monkshood, and then let's take another step towards protecting it.

Miriam E. Villani

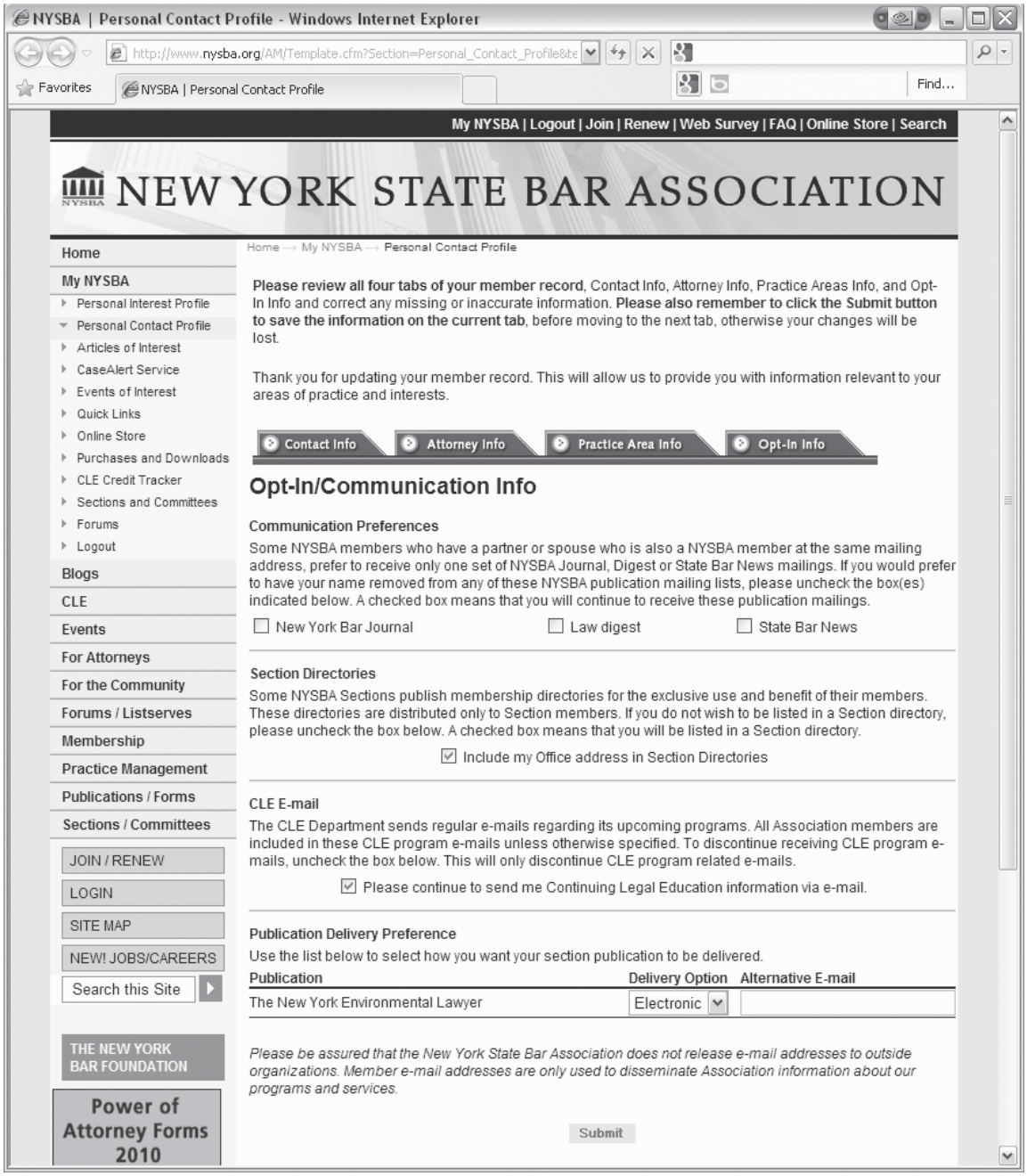
Errata

The following Albany Law School and St. John's School of Law students were unintentionally omitted from the list of Law Student Editorial Board members on page 87 of the Spring 2011 issue of *The New York Environmental Lawyer*: Krysten Kenney, Nikki Nielson, and Christopher Palmese. We apologize for the omission and any confusion it may have caused.

Electronic Opt-In Instructions

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

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



From the Issue Editor

Keith H. Hirokawa

Local governments have long been underappreciated in environmental law. However, local governments are proving grounds for a wide range of sustainability practices and experiments. Recognition of these opportunities in local governments reflects on the relevance of a sense of place to a particular locality and its relation to issues of national and global importance. As noted by the EPA:

> We live among, and are deeply connected to, the many streams, rivers, lakes, meadows, forests, wetlands, and mountains that compose our natural environment and make it the beautiful and livable place so many of us value. More and more often, human communities realize that the health and vibrancy of the natural environment affects the health and vibrancy of the community and vice versa. We value the land, air, and water available to us for material goods, beauty, solace, retreat, recreation, and habitat for all creatures. Throughout the nation, communities are engaging in efforts to protect these treasured natural resources and the quality of life they provide.[1]

Sustainability is, of course, a local issue. When considered in a local, community-driven context, sustainability links economic, environmental, and social concerns into the fabric of community character and identity. In the context of communities, sustainability has meaning in ways that are distinct from the values we attribute to wilderness. In addition, "[t]he battle for sustainable development will almost certainly be decided in cities…[w]e need cities in good shape, wisely using their resources in an innovative and sustainable way, cities for all, for us today and for future generations."[2]

In many ways, the State of New York has served leadership and innovation to reduce greenhouse gas emissions, promote community health and safety, and otherwise meet the environmental challenges of our times. The New York experience with watershed investments continues to serve as a model for ecosystem investments around the globe. An emerging partnership between four New York state agencies—the Department of Environmental Conservation (DEC), the Energy Research and Development Authority (NYSERDA), the Department of State, and the Public Service Commission—is lending incentive and guidance to communities in the Climate Smart Communities (CSC) program. Nevertheless, many New York communities remain uninspired and disengaged from the environmental elements of community building. The project of environmental law and environmental lawyers should be to advance the connection between environmental quality and quality of life in our homes and communities, where is it felt most acutely.

Keith H. Hirokawa

Endnotes

1. U.S. EPA, Office of Water, Community Culture and the Environment: A Guide to Understanding a Sense of Place 2 (EPA 842-B-01-003) (2002), available at: http://www.epa.gov/care/library/community_culture.pdf.
2. EurActiv.com, Sustainable Cities, http://www.euractiv.com/en/sustainability/sustainable-cities/article-175936.

From the Student Editorial Board

Thank you from the 2010-11 Student Editorial Board

It has been two years since the formation of the Student Editorial Board for *The New York Environmental Lawyer*. This past spring, as the outgoing Board navigated the process of recruiting new student leaders for this task, I began to reflect on the numerous benefits I have accrued through this opportunity.

First, environmental lawyers must be current in both their legal and environmental literacy. Of course, we learned the importance of "shepardizing" cases during the first year of law school, but we have yet to see an app (you know… the software on your phone that allows you to do virtually anything from playing games to checking the weather) that sends updates on case and regulatory developments. Being active in the Section is an effective, efficient, and rewarding way to stay up-to-date on procedural and substantive changes in both state and federal environmental laws.

Second, the networking opportunity that students receive in this project is invaluable. Particularly in environmental law, in which there are so many specialty areas—whether you practice in air or water quality, wetlands, biodiversity, hazardous waste, air quality, energy, agriculture, land use, or any of the other practice areas that contribute to the legal regulation of the environment—it is inspiring to see that members of the Environmental Section are so eager to share their knowledge in this forum, learn from a broad and deep network of experts, and mentor young attorneys.

Last, the practical skills that students develop through the rigorous research, writing, and editing demanded of this publication form a critical component of a young attorney's professional development. The practical circumstance of legal education is that law schools offer very few courses that require independent research and writing. This opportunity has allowed a surprising number of law students to sharpen their lawyering skills and to aid in the delivery of an informative publication.

We are cognizant of the opportunity we have been given. And while the experience has boosted our self-confidence and enabled us to develop our skills, we will continue to rely on the Section for support as we begin our careers. We appreciate the opportunity to serve on the Student Editorial Board to work with the Editors, develop our role within the journal, and participate in the Section. We would like to especially thank Miriam Villani, Justin Birzon, Aaron Gershonowitz and Professor Hirokawa for welcoming us and giving us the inspiration and discretion to make part of this publication our own. On behalf of the alumni of the Student Editorial Board, we look forward to joining you as practitioners!

Genevieve Trigg
Executive Editor, 2010-11 Student Editorial Board
Albany Law School '11

If You Don't Use It…Do You Lose It?

The old adage may be coming true. If you don't use it, you will lose it—at least concerning your oil or gas interest in the Allegany State Park. According to a bill that recently passed both the Senate and Assembly in June, An Act to Amend the Real Property Law in Relation to Lapse of Oil and Gas Interests in Allegany State Park, unused oil and gas interests will be lost if they are unused.

Since its inception dating back to the early 1900s, the Allegany Park has been a four-season haven for a vast array of outdoor enthusiasts including: walkers, hikers, bikers, skiers, campers, hunters, fishermen, bird watchers, and my personal favorite, snowmobilers. At the same time, the park has also been, for lack of a better term, a thorn in the side of those charged with regulating its nearly 65,000 acres. The specific problem in the Allegany Park pertains to the difficult task of identifying private oil and gas rights, many of which were severed from the state and placed in the hands of individuals prior to or contemporaneous with the founding of the Park. State legislators have recognized that many of these interests have gone unused for the entirety of their existence and pose a threat to the natural beauty, public enjoyment, and purpose of the Allegany Park.

As an answer to this dilemma, S.2779 / A.409 will provide for the lapse of unused oil and gas interests in the Allegany State Park. Specifically, interests that have been unused for twenty years prior to the enactment of this new legislation will be considered dormant, and thereby lapse back to the State. The legislation, however, does grant interest owners—at least those who know they hold an interest—the opportunity to assert their claims and protect their interest. Upon notice of this bill's enactment, private claim holders will be allowed to assert their claims within a fair and reasonable period of two years. Any interest holders who do not come forward will be stripped of their interest.

Speaking as an individual, and if they don't mind, on behalf of my fellow members on *The New York Environmental Lawyer* Student Editorial Board, this bill, if signed by Governor Cuomo, will be a sizable step in the right direction toward protecting our state's natural resources. Dare I say, at the risk of obliterating any opportunity I may have at achieving in-house counsel status at ExxonMobil or BP, that losing rights is not always so bad? In this situation, I think so.

In an attempt to stir New York's fresh pot of hydro-fracking controversy, I feel it necessary to point out that this bill has the potential to significantly limit the implications of natural gas well drilling in the Allegany Park. In the event that hydro-fracking is approved by the State, there will at least be a smaller market for it in the Allegany Park as a result of the unused oil and gas interests lapsing. Regardless of personal viewpoint, those opposed to and in support of hydro-fracking should acknowledge the importance of this legislation. After all, I think I speak for many when I say that our State Parks would be more thoroughly enjoyed in the absence of drilling rigs and wellheads.

Daniel Ellis, II
Executive Editor, 2011-12 Student Editorial Board
Albany Law School '12

EPA Update

[As submitted on 8/16/11—Includes news from 2/16/11–8/12/11]

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

The strongest democracies flourish from frequent and lively debate, but they endure when people of every background and belief find a way to set aside smaller differences in service of a greater purpose.

Pres. Barack Obama, press conference, Feb. 9, 2009

I. Introduction

Chris Saporita

Marla E. Wieder

Joseph A. Siegel

While we breathed a collective sigh of relief when we received confirmation that the federal government would not be "closed for business" in early April, the extent of EPA's budget cuts was still unclear. Once the dust settled on the continuing resolution for Fiscal Year 2011, it was apparent that EPA was spared some of the deepest budget cuts. About $1.19 billion (or three quarters) of the cuts to the Agency's budget were to come from State and Tribal Assistance Grants, which mostly fund state plans to comply with new federal regulations and water infrastructure upgrades. The budget deal also included a $191 million cut to regional programs, such as the Great Lakes Restoration Initiative. EPA's science and regulatory programs took a hit, as did funding for hazardous waste cleanups (about $23 million) and climate change; however, the House-approved riders to stop greenhouse gas regulations and reporting rules were ultimately stripped from the bill.[2]

Not surprisingly, the FY 2012 budget battle heated up quicker than the ambient air temperature. While we were prepared for months of harmful emissions from Congress, it was not long before some prayed for rapid but isolated sea level rise. The debt ceiling debates wore on and the budget ax hacked through EPA's proposed funding as more and more insidious riders were attached to the funding bills. In late July, the House of Representatives began consideration of the Interior, Environment, and Related Agencies Appropriations Act, FY 2012 (H.R. 2584), which, unfortunately, included many anti-environmental amendments and riders that would significantly erode protections for clean air, clean water, wilderness lands, and wildlife. The bill would also reduce EPA's FY 2012 funding by about $1.5 billion, which is an 18% decrease from FY2011 (which you will note is a 16% decrease from FY 2010 levels).[3] Additionally, the bill would reduce funding levels of the Clean Water and Drinking Water State Revolving Funds, by 55% and 14% respectively. Other programs, such as The Great Lakes Restoration Initiative, are targeted for cuts of $50 million (or 17%).[4] It is difficult to predict where the rest of the belt-tightening will occur and which of the riders and amendments will survive, but obviously EPA is preparing for severe cuts, and like our state counterparts, we will continue to face fiscal challenges in the near term. With that said we'll continue to do more with less and apologize to our grandchildren for Congress' short-sightedness later.

II. In Water News…

During the first half of 2011, EPA was very active in continuing to enhance the protection of surface and drinking water under the CWA and SDWA. In April of this year, the Obama Administration reaffirmed its commitment to clean water.[5] Recognizing the importance of clean water and healthy watersheds to our economy, environment, and communities, the administration released a national clean water framework that showcases its comprehensive commitment to protecting the health of America's waters. The framework emphasizes the importance of partnerships and coordination with states, local communities, stakeholders, and the public to protect public health and water quality and promote the nation's energy and economic security. In particular, the framework focuses on the following priorities:

1. Promoting partnerships with states, tribes, local governments and other stakeholders on innovative approaches to restore urban waters, promote sustainable water supplies, and develop new incentives for farmers to protect clean water.

2. Enhancing communities and economies by restoring important water bodies, including the Chesapeake Bay, California Bay-Delta, Great Lakes, Gulf of Mexico and Everglades.

3. Innovating for more water efficient communities through 21st century water management policies and technology.

4. Ensuring clean drinking water by updating drinking water standards, protecting drinking water sources, modernizing the tools available to communities to meet their clean water requirements, and providing affordable clean water services in rural communities.

5. Enhancing the use and enjoyment of our waters by expanding access to waterways for recreation, protecting rural landscapes, and promoting public access to private lands for hunting, fishing, and other recreational activities.

6. Updating the guidance on CWA jurisdiction to protect waters that many communities depend upon for drinking, swimming, and fishing, and provide clearer, more predictable guidelines for determining which water bodies are protected from pollution.

7. Supporting science to improve water policies and programs and identify and address emerging pollution challenges.

The following highlights illustrate how the agency has been pursuing these priorities.

A. The Clean Water Act

1. Regulation and Guidance

EPA and Army Corps Clarify Waters Covered by the CWA

In May, EPA and the Army Corps of Engineers released the "Draft Guidance on Identifying Waters Protected by the Clean Water Act."[6] The guidance is intended to clarify how EPA and the Corps will identify "waters of the United States" that come under CWA jurisdiction, in light of the 2006 Supreme Court case *Rapanos v. United States* (547 U.S. 715 (2006)). In June, EPA extended the public comment period by 30 days for the draft guidance and, in response to requests from state and local officials, as well as other stakeholders, EPA and the Corps took additional comments until July 31, 2011. The draft guidance is available at: http://www.water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm.

EPA Issues Final Guidance to Protect Water Quality in Appalachian Communities from Impacts of Mountaintop Mining

In July, EPA released final guidance on Appalachian surface coal mining, designed to ensure more consistent, effective, and timely review of surface coal mining permits under the CWA and other statutes. The guidance, which replaces the interim-final guidance issued by EPA on April 1, 2010, is based on the best available science and promotes a balanced approach that protects communities from harmful pollution associated with coal mining. EPA will apply the guidance flexibly, taking into account site-specific information and additional science to arrive at the best decisions on a case-by-case basis.[7]

EPA Announces Public Comment Period on Proposal to Ban Dumping Sewage from Boats into Jamaica Bay

In August, EPA published its tentative determination that there are adequate facilities in Jamaica Bay for boats to pump out their sewage. If, after public comment, EPA makes a final affirmative determination, New York State will be allowed, under CWA Section 312(f)(3), to establish a "no discharge zone" for the approximately 20,000-acre area. A no-discharge zone means that boats are completely banned from discharging sewage into the water. Boaters must instead dispose of their sewage at specially designated pump-out stations. This action is part of a joint EPA / New York State strategy to eliminate the discharge of sewage from boats into the state's waterways; such sewage contains pathogens and chemicals such as formaldehyde, phenols, and chlorine, which can have a negative impact on water quality and pose a risk to people's health and impair marine life.[8]

2. Compliance and Enforcement

Arch Coal Pays $5 Million to Settle CWA Violations

In March, Arch Coal, the second largest coal supplier in the United States, agreed to pay a $4 million penalty for alleged violations of the CWA in Virginia, West Virginia, and Kentucky.[9] Under the settlement, Arch Coal will implement changes to its mining operations in Virginia, West Virginia, and Kentucky to ensure compliance with the CWA. Arch Coal also agreed to take measures that will prevent an estimated 2 million pounds of pollution from entering the nation's waters each year. Arch will implement a treatment system to reduce discharges of selenium, a pollutant found in mine discharges that can build up in streams and have an adverse impact on aquatic organisms. During that same month, EPA negotiated a settlement with Consol Energy to pay $5.5 million for CWA violations at six of its mines in West Virginia. In addition to the penalty, Consol will spend an estimated $200 million in pollution controls that will reduce discharges of harmful mining wastewater into Appalachian streams and rivers.[10]

Vice President and Two Managers of Waste Treatment Facility Sentenced for Criminal Violations of the CWA

In April, three officials of Ecological Systems, Inc. (ESI), an oil reclamation company that operated a centralized waste treatment facility in Indianapolis, Indiana, were sentenced for felony violations of the CWA. The prosecution stemmed from ESI's intentional discharges of untreated wastewater and stormwater from its facility directly into the Indianapolis sewer system. ESI hid its noncompliance by "cherry picking" the discharge data it submitted to EPA, collected samples only after rainfalls, resulting in diluted samples, and grossly overstated its capacity to handle oil spills.[11]

Jersey City, New Jersey to Upgrade and Repair Sewer System to Resolve CWA Violations

In July, a settlement between the United States and the Jersey City, N.J. Municipal Utilities Authority (JCMUA) was reached to resolve CWA violations. JCMUA failed to properly operate and maintain its combined sewer system. JCMUA violations included releases of untreated sewage into the Hackensack River, Hudson River, Newark Bay, and Penhorn Creek. JCMUA will invest more than $52 million in repairs and upgrades to its existing infrastructure and pay a civil penalty of $375,000.[12] Under the settlement, JCMUA is required to comply with its CWA permit and will conduct evaluations to identify the problems within the system that led to releases of untreated sewage. JCMUA will also complete repairs to approximately 25,000 feet of sewer lines over the next eight years. Finally, JCMUA will invest $550,000 into a supplemental environmental project that will remove privately owned sewers from homes in several neighborhoods in Jersey City and replace them with direct sewer connections, creating better wastewater collection in those areas.

National Home Builder to Pay Penalty, Preserve New Jersey Forest and Farmland Under Settlement with EPA

Also in July, EPA reached a settlement with the national homebuilder D.R. Horton, LLC for violations of the CWA construction stormwater regulations at its residential construction sites in Whippany and Mount Laurel, New Jersey. Under the agreement, D.R. Horton will pay a $99,000 penalty and pay $104,420 to The Land Conservancy of New Jersey to partially fund the acquisition and preservation of 212 acres of undeveloped forest and farmland near the Raritan River in Mount Olive, New Jersey. The preservation site is part of the Highlands, which provides drinking water to more than 1 million New Jersey residents.

Metropolitan St. Louis Sewer District in Missouri to Pay $4.7 Billion to Cut Sewer Overflows

The Metropolitan St. Louis Sewer District (MSD) agreed to make extensive improvements to its sewer systems and treatment plants, at an estimated cost of $4.7 billion over 23 years, to eliminate illegal overflows of untreated raw sewage, including basement backups, and to reduce pollution levels in urban rivers and streams. The settlement reached between the United States, the Missouri Coalition for the Environment Foundation and MSD, requires MSD to install a variety of pollution controls, including the construction of three large storage tunnels ranging from approximately two miles to nine miles in length, and to expand capacity at two treatment plants. These controls and similar controls that MSD has already implemented will result in the reduction of almost 13 billion gallons per year of overflows into nearby streams and rivers.[13]

3. Science and Protection

EPA Seeks Information from Natural Gas Drilling Operations to Ensure Safety of Wastewater Disposal

Also during May, EPA directed six natural gas drillers to disclose how and where the companies dispose of or recycle drilling process water in the region. This action is among the ongoing steps EPA is taking to ensure drilling operations are protective of public health and the environment. Natural gas is a key part of our nation's energy future and EPA will continue to work with federal, state and local partners to ensure that public health and the environment are protected. EPA's action follows a request by the Pennsylvania Department of Environmental Protection (PADEP) to drillers to voluntarily stop taking wastewater to Pennsylvania wastewater treatment plants by May 19.[14]

EPA Receives Prestigious Award for Restoring the Passage of Fish to the Peconic River in Riverhead, New York

EPA received an award from Coastal America, a unique partnership of government agencies, businesses and environmental organizations that work together to protect our nation's coasts, for its efforts in restoring a passage for fish on the Peconic River in Riverhead, New York. By replacing a dam in Grangebel Park in Riverhead with a rock ramp, the project will help return alewife, a type of herring, and American eels to their historic habitat and spawning areas on the Peconic River. The New York State Department of Environmental Conservation (NYSDEC) also played a major role in the project. The Peconic River is an estuary where water from the sea mixes with fresh water from the river and streams. Estuaries are renowned for their habitat value, supporting 80 percent of recreational fish species during some or all of their life stages, and are sometimes called the "nurseries of the sea" because their sheltered, fertile bays and tributaries provide ideal locations for spawning and juvenile growth.[15]

EPA Protects Rivers, Lakes and Streams by Plugging Abandoned Oil Wells in Western New York

Over the past six years, EPA has plugged 294 abandoned—and in some cases leaking—oil wells in Western New York in an effort to prevent any remaining oil that may be in the wells from reaching nearby lakes, rivers, and streams. The abandoned wells, many of which no longer have owners, have not been maintained for decades, and are gradually deteriorating to the point at which crude oil could leak from broken well casings, pipes, and storage tanks. To prevent future leaks, EPA has had the wells filled with concrete and a fine clay substance called bentonite to immobilize any remaining oil. The NYSDEC referred the abandoned oil wells to EPA for cleanup.[16]

B. The Safe Drinking Water Act

EPA Proposes Next Round of Safe Drinking Water Act Contaminant Monitoring

In March, EPA proposed to add 30 currently unregulated contaminants for monitoring by large public water systems. EPA is considering the public comments it re-

ceived, and expects to finalize the list in 2012, with sampling to be conducted from 2013 to 2015. Sampling will take place at all systems serving more than 10,000 people and at a representative sampling of systems serving less than 10,000 people.[17]

EPA Takes Action to Protect Groundwater from Petroleum Contamination

In May, EPA issued a complaint to the owners and operators of several upstate New York gasoline stations for violating federal regulations governing seventeen underground storage tanks. The complaint, which seeks $233,000 in penalties, was issued to Andrew B. Chase; Chase Services, Inc.; Chase Convenience Stores, Inc., and Chase Commercial Land Development, Inc. These companies owned or operated gas stations in the towns of Lyon Mountain, Plattsburgh, Peru, Redford, and Dannemora in upstate New York with underground storage tank violations.[18]

EPA Releases Searchable Website for Drinking Water Violations

Also in May, EPA announced improvements to the availability and usability of drinking water data in the Enforcement and Compliance History Online (ECHO) tool. ECHO now allows the public to search to see whether drinking water in their community meets the standards required under the Safe Drinking Water Act (SDWA), which is designed to safeguard the nation's drinking water and protect people's health. SDWA requires states to report drinking water information periodically to EPA. ECHO also includes a new feature identifying drinking water systems that have had serious noncompliance. The new Safe Drinking Water Act information on EPA's website provides the public with information about whether their drinking water has exceeded drinking water standards; a "serious violators" report that lists all water suppliers with serious noncompliance; and EPA's 2009 National Public Water Systems Compliance Report, which is a national summary of compliance and enforcement at public drinking water systems.[19]

III. Air and Climate Change Update

A. The Clean Air Act

1. EPA Establishes Clean Air Act Standards for Boilers and Incinerators

EPA finalized several rules on February 21, 2011, to control hazardous air pollutants from boilers and incinerators pursuant to §112 of the Clean Air Act.[20] The new final rules will reduce emissions of several toxic pollutants from large and small boilers, as well as solid waste and sewage sludge incinerators. A separate final rule was issued to clarify the definition of non-hazardous solid waste. EPA proposed these rules in April 2010 in response to a court order. After receiving 4,800 comments, EPA sought additional time from the court to finalize the rules, but was granted only a 30-day extension.[21] Upon issuing the final rules, EPA simultaneously announced that it will reconsider the final standards for boilers and incinerators, subject to more public review, because the final version differed significantly from the proposal. On May 16, EPA announced its reconsideration, and stayed the effective date of the final rule.[22] EPA accepted comments through July 15, 2011. On June 24, 2011, EPA filed a motion with the D.C. Circuit to hold the court case in abeyance until EPA concludes its reconsideration of the final rule. EPA indicated in its motion that it intends to sign a proposed rule by October 31, 2011, and a final rule by April 30, 2012.[23] More information on the standards can be found at: www.epa.gov/airquality/combustion/.

2. 1990 Clean Air Act Amendments Save Hundreds of Thousands of Lives and Trillions of Dollars Per Year

On March 1, EPA released a report on the benefits of reducing fine particulate matter and ground level ozone pollution under the 1990 Clean Air Act Amendments.[24] The report estimates that 160,000 premature deaths from ozone and particulate matter were avoided last year due to the 1990 Amendments, and $2 trillion will be saved by 2020 when 230,000 people per year will avoid early death. The report, which is required under the Clean Air Act, Section 312, 42 U.S.C § 7612, received independent review by a Congressionally established expert panel, and found that the benefits of avoiding early death, preventing heart attacks and asthma attacks, and reducing the number of sick days for employees, far exceed the costs of implementing clean air protections.[25] The benefits addressed in the report do not take into account the pre-1990 Clean Air Act protections which, when combined with the 1990 Amendments, have saved millions of lives.

More information and a copy of the summary report is available at: www.epa.gov/air/sect812/prospective2.html.

3. EPA Updates Electricity Generation Database on Air Pollution Health and Environmental Impacts

EPA announced on March 8 that it had updated its 2005 electricity generation database, known as the Emissions and Generation Integrated Resource Database (eGRID) and Power Profiler to include 2007 data.[26] EPA's eGRID is a comprehensive database of emissions from almost all electric power generated in the United States. It shows the impacts of electricity generation as well as the benefits from reduced electricity demand. eGRID contains emissions data for nitrogen oxides (NO_x), sulfur dioxide (SO_2), carbon dioxide (CO_2), methane (CH_4), and nitrous oxide (N_2O). Users can search the database by zip code and learn information about power plants in their areas including attributes such as emissions rates, net generation, and resource mix.[27] More information about eGRID is available at: www.epa.gov/egrid. More information about Power Profiler is available at: www.epa.gov/powerprofiler.

4. EPA Releases New Data on Air Toxics

On March 11, EPA released its fourth update of the National Air Toxics Assessment (NATA). The update demonstrates progress in reducing air toxics from 177 of the 187 toxic pollutants listed in Section 112 of the Clean Air Act.[28] Air toxics from stationary and mobile sources were reduced by 42 percent between 1990 and 2005. The NATA update also highlights the geographic areas that are most impacted by air toxics, and concludes that cancer and non-cancer risk is greatest in urban areas because of the larger number of mobile and industrial sources as well as secondary formation of air toxics. The NATA update also concludes that in 5% of the census tracts, there is more than a 100- in 1-million risk of cancer.[29] More information on NATA is available at: www.epa.gov/nata2005.

5. EPA Proposes First National Standards for Air Toxics from Power Plants

On March 16, EPA proposed the first-ever national standards for hazardous air pollutants, including mercury, from coal and oil power plants under Section 112 of the Clean Air Act.[30] Toxic air pollutants like mercury from coal-fired and oil-fired power plants have been shown to cause neurological damage, including lower IQ, in children exposed in the womb and during early development. This proposal responds to a February 2008 court decision vacating EPA's Bush-era Clean Air Mercury Rule (CAMR), in which the Agency decided that it was not appropriate or necessary to regulate power plants under Section 112. The March 16 Section 112 proposal was issued along with a proposal to enhance the existing Clean Air Act New Source Performance Standards (NSPS) for coal and oil power plants. Final rules, pursuant to a court-ordered consent decree, will be completed by November 2011. If finalized, the rules will prevent hundreds of thousands of illnesses and up to 17,000 premature deaths each year, and represent $140 billion in health and other economic benefits per year.[31]

6. EPA Issues Rules to Encourage Alternative Fuel Vehicle Conversions

On March 29, EPA updated its Clean Air Act rules to provide a clear pathway for manufacturers to obtain approval to sell fuel conversion systems.[32] In general, any change to the original configuration of a certified vehicle or engine, including alternative fuel conversion, is a potential violation of the prohibition against tampering in Clean Air Act Section 203(a)(3), 42 U.S.C. § 7522(a)(3).[33] The tampering prohibition is important because poorly designed modifications can increase emissions. However, EPA has established protocols through which conversion manufacturers may seek exemption from the prohibition. The revised procedures will vary based on the age of the vehicle or engine being converted. As opposed to a one-size fits all approach, EPA's process is now based on whether a vehicle or engine is new, intermediate age, or outside its expected useful life. While properly engineered conversion systems can reduce or at least not increase emissions, poorly designed systems can lead to much more pollution. EPA's rules will ensure that environmental safeguards will be maintained while encouraging alternative fuel vehicles.[34] More information is available at: www.epa.gov/otaq/consumer/fuels/altfuels/altfuels.htm.

7. EPA Issues Final Rules for New Source Review Permitting in Indian Country

On June 13, 2011, EPA finalized rules to ensure that Clean Air Act permitting requirements are applied consistently to facilities in Indian country to better protect the health of people living near those facilities.[35] The action will provide tribes with the tools they need to ensure that newly built or expanding facilities in nonattainment areas meet all requirements. While a prior rule addressed new source review in attainment areas under the Clean Air Act's Prevention of Significant Deterioration (PSD) Program, there was a regulatory gap for major sources in nonattainment areas. The final rule also addresses new and modified minor sources in Indian country, which also were not previously covered by EPA regulations. Under the new rules, a source owner or operator will need to apply for a permit before building a new facility or expanding an existing one if the facility increases emissions above any of the thresholds included in these rules. The permitting authority, either EPA or a tribe, will review the application and grant or deny the air permit. Permits will be open for public notice and comment as part of the review process.[36] Additional information is available at: http://www.epa.gov/nsr/actions.html#jun11.

8. EPA Proposes New Large Commercial Aircraft Engine Standards to Control Nitrogen Oxide Pollution

On July 6, EPA proposed to adopt new air pollution standards for large commercial aircraft engines, including engines in 737s, 747s, and 767s. The standards were previously agreed to by the United Nation's International Civil Aviation Organization (ICAO). The proposal would reduce ground-level nitrogen oxide emissions by an estimated 100,000 tons nationwide by 2030. Exposure to nitrogen oxide emissions can cause and aggravate lung diseases and increase susceptibility to respiratory infection. If adopted in the United States, the standards would be phased in over the next two years, applying to all new engines in 2013.[37] Additional information is available at: http://www.epa.gov/otaq/aviation.htm.

9. EPA Finalizes the Cross-State Air Pollution Rule, Successor to the Clean Air Interstate Rule

On July 6, EPA finalized its Clean Air Act interstate transport rule, known as the "Cross-State Air Pollution Rule" (CSAPR).[38] This rule replaces the Clean Air Interstate Rule (CAIR), which was remanded to EPA on December 23, 2008, by the D.C. Circuit. CAIR was left in place by the D.C. Circuit pending promulgation of the new rule. CSAPR will protect the health of millions of Americans by helping states reduce air pollution and attain clean air standards. Pursuant to the final rule, twenty-seven states

must significantly improve air quality by reducing power plant emissions that contribute to ozone and/or fine particulate pollution in other states, making it difficult for those downwind states to meet the health-based National Ambient Air Quality Standards. The rule will protect over 240 million Americans living in the eastern half of the country, resulting in up to $280 billion in annual benefits. The benefits far outweigh the $800 million projected to be spent annually on this rule in 2014 and the roughly $1.6 billion per year in capital investments already under way as a result of CAIR. Emission reductions will take effect quickly, starting January 1, 2012, for SO_2 and annual NO_X reductions, and May 1, 2012, for ozone season NO_X reductions. By 2014, combined with other final state and EPA actions, CSAPR will reduce power plant SO_2 emissions by 73 percent and NO_X emissions by 54 percent from 2005 levels in the CSAPR region.[39] Additional information is available at: http://www.epa.gov/crossstaterule/.

B. Climate Change

1. EPA Proposes Three Year Deferral of Clean Air Act Permitting for Biomass Sources

On March 14, 2011, EPA proposed a three-year deferral of Clean Air Act permitting requirements for carbon dioxide emissions from bioenergy and other biogenic sources.[40] The proposal covers facilities that emit carbon dioxide as a result of burning forest or agricultural products for energy, wastewater treatment, waste management (landfills), and fermentation processes for ethanol production. The proposed deferral applies to requirements under the Clean Air Act's Title V and Prevention of Significant Deterioration programs. It will allow sufficient time for a detailed examination of the science of emissions from these sources. Concurrent with the proposed deferral, EPA issued interim guidance to help permitting authorities establish that combustion of biomass fuels can be considered the best available control technology (BACT) for biogenic CO2 emissions under the PSD program. The guidance can be used until EPA takes final action on the deferral.[41] The proposal does not defer requirements for biomass sources under EPA's Greenhouse Gas Reporting Program. The public comment period ended May 5, 2011. More information is available on EPA's New Source Review website at: www.epa.gov/nsr.

2. EPA Names Second New York Community as Climate Showcase Community Grant Recipient

On April 14, EPA announced that Tompkins County, New York was awarded a $375,450 Climate Showcase Community grant for a project aimed at reducing greenhouse gas (GHG) emissions and improving human health.[42] Tomkins County will construct three new energy-efficient residential projects by drawing upon lessons learned from the EcoVillage at Ithaca, which uses 40% fewer resources than the typical community of its size. The projects will establish model zoning and building codes which will be applied to new residential projects in three different settings—hamlet, village, and urban. The county will monitor each project for GHG reductions and disseminate lessons learned to planners, developers, local government, and others.[43] This dissemination of information is consistent with the Climate Showcase Communities program goal of creating replicable models of sustainable community actions that generate cost-effective and persistent GHG reductions.[44] Within the three year project period, it is expected that 72 new residential units will be constructed that will achieve an 80% reduction in GHG emissions per unit over current energy code standards. Tompkins County joins the Central New York Climate Change Innovation Program, in Cayuga, Cortland, Madison, Onondaga and Oswego Counties, as the second Climate Showcase community in New York.[45] More information on the Climate Showcase grants and the grant recipients is available at: www.epa.gov/statelocalclimate/local/showcase/.

3. EPA Extends Deadline for Reporting Under Greenhouse Gas Reporting Rule

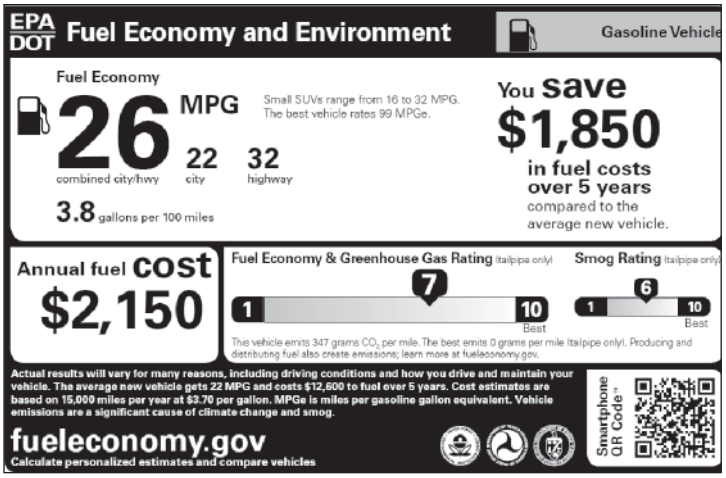
On March 17, EPA decided that 2010 GHG data, required to be submitted to the Agency pursuant to the Greenhouse Gas Reporting Rule, would be due by September 30, 2011, instead of March 31, 2011, as originally finalized.[46] EPA's GHG Reporting Program, launched in October 2009, requires the reporting of GHG data from large emission sources across a range of industry sectors, as well as suppliers of products that would emit GHGs if released or combusted. The six-month extension under the March 17 direct final rule will allow adequate time for EPA to test and refine its new online GHG reporting tool, known as e-GGRT, and make it possible for facilities to test the system and provide feedback to EPA before the reports are due. Sources had to register with EPA by August 1, 2011. This was a onetime extension; the annual reporting deadline in future years will remain March 31.[47]

For more information, see: www.epa.gov/climatechange/emissions/extension.html. More information on the GHG Reporting Program can be found at: www.epa.gov/climatechange/emissions/ghgrulemaking.html.

4. EPA and DOT Unveil Improved Vehicle Labels to Accompany New Vehicle Rules for Fuel Economy and Greenhouse Gas Reduction

On May 25, EPA and the U.S. Department of Transportation announced new vehicle fuel economy label requirements that will provide more comprehensive fuel efficiency information, including estimated annual fuel costs, savings, as well as information on each vehicle's greenhouse gas emissions and environmental impact.[48] Required by the Energy Independence and Security Act, this change in vehicle fuel economy labeling is the most dramatic overhaul since the program began over 30 years ago. The new labels must be affixed to all new passenger cars and trucks, including "next generation" cars, such as plug-in hybrids and electric vehicles, starting in early 2012 when sales of the 2013 model year vehicles will begin. The labels will reflect the improved energy efficiency and

reduction of greenhouse gases required by the 2010 final light duty vehicle rule, which applies to model years 2012 to 2016. DOT and EPA are currently working on a new light duty vehicle rule to cover model years 2017 to 2025. In July, the Administration plans to finalize the first-ever national fuel economy and greenhouse gas emission standards for commercial trucks, vans, and buses for model years 2014 to 2018.[49] Additional information is available at http://fueleconomy.gov/label, http://www.epa.gov/carlabel, and http://www.nhtsa.gov/fuel-economy.



IV. Waste, Toxics and Brownfields

A. Superfund—Sites, Cases and Guidance

1. General Electric Co. v. Jackson—U.S. Supreme Court denies GE Cert on its CERCLA Constitutional Challenge

Ending a decade of litigation, on June 6, 2011, the U.S. Supreme Court rejected General Electric's legal challenge to EPA's authority to issue cleanup orders to Potentially Responsible Parties ("PRPs") under Section 106 of CERCLA. The justices let stand a U.S. appeals court ruling that upheld EPA's power to issue unilateral administrative orders directing PRPs to clean up hazardous waste sites that pose an imminent and substantial threat to public health. In its December 29th petition to the Supreme Court, GE argued that the orders violated constitutional due-process rights and coerced compliance with such orders. The U.S. Department of Justice ("DOJ") opposed GE's petition and argued, as it had before, that the law provided sufficient procedural safeguards and parties have multiple opportunities to challenge EPA's assertions that a party is a PRP and/or may contest the issuance of an order at multiple stages of the process. DOJ also noted that a PRP can choose not to comply with an order; at that point it is up to the agency to seek to enforce such order in federal court, if it so chooses. DOJ also noted that the court of appeals also correctly rejected GE's contention that "collateral market reactions" (*i.e.* negative effects on stock price, brand value, or credit rating) to the issuance of an Order, deprive a PRP of a "protected property interest."[50]

2. GM Bankruptcy Settlements

After a 22-month wind-down process, on March 31, 2011, the U.S. Bankruptcy Court signed an order confirming Motors Liquidation Company's (formerly General Motors) Second Amended Joint Chapter 11 Plan. The Plan had been orally confirmed by the Court on March 3, 2011. The Plan creates four trusts, including the Environmental Response Trust. The establishment of the Environmental Response Trust, discussed in prior articles, was part of the "Owned Site" Settlement reached in October 2010, with Old GM, the United States, fourteen states, and the St. Regis Mohawk Tribe whereby $773 million was set aside to resolve Old GM's liabilities at 89 owned sites. Of the 89 sites, New York has two sites receiving funding—the GM Massena Site in Massena, New York (approximately $120 million) and the Onondaga Lake Site in Syracuse, New York (approximately $33 million). For more on this agreement, see: www.epa.gov/compliance/resources/cases/cleanup/cercla/mlc/index.html.

The Trust, now known as the Revitalizing Auto Communities Environmental Response Trust (the "RACER Trust") is the third largest holder of industrial property in America and the largest environmental trust in U.S. history.[51] The Trust will oversee the remediation, redevelopment and restoration of the former GM properties and will work with local communities to return jobs to regions hit hardest by GM's reorganization. EPLET, LLC, which is managed by Elliott P. Laws, has been appointed as the Administrative Trustee. Michael O. Hill has been selected as the Trust's Chief Operating Officer and General Counsel.[52] For more information regarding the RACER Trust, see: www.racertrust.org.

On March 29, 2011, the Court approved another settlement agreement in this matter. The "Non-Owned Site Settlement Agreement" resolves certain claims of the United States and several states, including New Jersey and New York, against Old GM at 34 "Non-Owned Sites" under CERCLA and RCRA for over $50 million.[53] For specifics on this agreement, see: www.epa.gov/compliance/resources/cases/cleanup/cercla/mlc/overview.html.

Later, on April 1, 2011, the United States announced a settlement with Old GM to resolve natural resource damage claims at five sites. Under the terms of the agreement, the settling governments will receive allowed general unsecured claims collectively exceeding $11.5 million for the restoration of wildlife, habitat, and other natural resources managed by Interior, NOAA, state and tribal governments at two sites in New York (including the GM Massena Superfund Site) and Indiana and an additional three sites for past assessment costs in New Jersey. In its proof of claim against Old GM, the United States asserted claims for natural resource damages and/or past assessment costs at six sites. This settlement resolves the claims at five of the six sites and is the ninth in a series of settlements of Old GM's environmental liabilities.[54]

In late June, a $2.8 million settlement was reached with Old GM which will fund the disposal of mercury switches that were used in GM-manufactured cars. The settlement will be pooled with funds other automakers are expected to provide and will assist with ongoing efforts to reduce the level of mercury in the environment. As of late June, about 3.5 million switches had been collected, amounting to approximately 7,650 pounds of mercury.[55]

3. Phase 2 of the Hudson River PCB Cleanup is Under Way

On the same day that the Supreme Court denied GE's petition in *GE v Jackson*, Phase 2 of the Hudson River cleanup began in earnest. During this phase of dredging, GE will remove about 2.4 million cubic yards of sediment from a forty-mile section of the Upper Hudson River between Fort Edward and Troy that is contaminated by polychlorinated biphenyls (PCBs). During this dredging season, which runs until November, mechanical dredges will remove the PCB-contaminated sediment from a 1.5-mile area. Four dredges will work 24 hours a day, six days a week to remove approximately 350,000 cubic yards of PCB-contaminated sediment from 100 acres of river bottom. The sediment will then be transported by barge to the sediment dewatering facility located on the Champlain Canal in Fort Edward. The water will be treated and the dewatered sediment will be loaded onto railcars for transport to a permitted out-of-state landfill.[56]

The start of the second phase of dredging follows an evaluation by an independent group of scientific experts of data collected during the first phase of dredging. After the review, improvements were made to the project design to increase productivity and reduce the resuspension of dredged sediment. During the second phase, more contaminated sediment will be captured in fewer passes of the dredges. EPA also established a limit on the amount of "capping" that can occur to isolate remaining PCBs. The second phase of the cleanup will remove the remainder of the contaminated river sediment that is targeted for dredging.[57]

Extensive monitoring will continue during this effort to protect water quality and limit impacts on local communities. For the latest dredging information and interactive maps, see EPA's dredging data website at: http://www.hudsondredgingdata.com. Additional information about the Hudson River PCBs Superfund site can be found at http://www.epa.gov/hudson.

4. Welcome to the National Priorities List

On March 8, 2011, EPA welcomed 10 more sites to the NPL. The sites include Mansfield Trail Dump in Byram Township, New Jersey, and the Dewey Loeffel Landfill, Nassau, New York. Fifteen sites were also proposed to the NPL at the same time; those sites include: the Garfield Groundwater Contamination in Garfield, New Jersey, and the New Cassel/Hicksville Groundwater Contamination, New Cassell/Hicksville, New York.[58]

The Dewey Loeffel Landfill Site is located in southern Rensselaer County approximately four miles northeast of the Village of Nassau. The landfill is contaminated with toxic substances, including polychlorinated biphenyls (PCBs), which have made their way into the groundwater beneath the landfill and into nearby streams and tributaries that feed Nassau Lake. Several species of fish have become contaminated with PCBs. The Valatie Kill and Nassau Lake are fisheries that have been closed and monitored by New York State since 1980 due to site-related PCB contamination.[59]

In October 2009, NYSDEC requested that EPA investigate the Dewey Loeffel Landfill. EPA collected sediment samples from various water bodies, which revealed the presence of PCBs. EPA proposed the site in October 2010, and a 60-day comment period followed in which EPA received more than 200 comments from members of the public.[60] For more information on the site, see: www.epa.gov/region2/superfund/npl/dewey/.

In March, EPA also proposed to consolidate areas in Hicksville, New Cassel, Westbury, Hempstead, and Salisbury in Nassau County, N.Y. into one site and add it to the NPL. Groundwater throughout the site is contaminated with volatile organic compounds (VOCs). The Magothy aquifer, Nassau County's primary source of drinking water, has likely been impacted by the contamination. Residents of the affected towns currently receive treated drinking water. The listing will allow EPA to further investigate the extent of the contamination and eventually remediate the site.[61] With the proposal of this Site to the NPL, a 60-day comment period began during which EPA solicited public input. For instructions on how to submit comments, go to www.epa.gov/superfund/sites/npl/pubcom.htm.

As of April 2011, there have been 1,637 sites listed on the NPL, 347 of which have been deleted, resulting in 1,290 current sites on the NPL. There are now 66 proposed sites awaiting final agency action: 61 in the general Superfund section and five in the federal facilities section.

5. EPA Issues Administrative Order on Consent for RI/FS at Newtown Creek

On July 7, 2011, EPA issued an Administrative Settlement Agreement and Order on Consent, pursuant to CERCLA, to six PRPs, requiring that they perform a Remedial Investigation and Feasibility Study ("RI/FS") at the Newtown Creek Superfund Site. The Creek, located in the Boroughs of Brooklyn and Queens in New York City, is a 3.8-mile urban water body that was listed on the NPL in September 2010.

The RI/FS is expected to cost upwards of $25 million and, in addition to requiring performance of the study, the order also requires the parties to reimburse EPA for $750,000 of its past site-related costs and for oversight of the study. The respondents are Phelps Dodge Refining Corporation, Texaco, Inc., BP Products North America, Inc., National Grid NY (formerly the Brooklyn Union Gas Company), ExxonMobil Oil Corporation and the City of New York. The respondents have already completed an EPA-approved work plan for the investigation to determine the nature and extent of the contamination in the Creek. The investigation will begin later this summer and will take several years to complete, after which EPA will oversee an analysis to develop and assess the full range of options for cleaning up Newtown Creek.[62]

EPA is continuing its PRP search activities and expects to name additional PRPs in the future. The Creek became contaminated by releases of hazardous substances from more than a century of heavy industrial operations by facilities located along or close to the Creek, including oil refineries and terminals, manufactured gas plants, chemical plants, land filling and raw sewage disposal. For more information on Newtown Creek, see www.epa.gov/region02/superfund/npl/newtowncreek/.

6. Vapor Intrusion

As we previously reported, earlier this year EPA announced that it would be accepting public input on whether to include vapor intrusion threats as a component for including hazardous waste sites on the National Priorities List. Vapor intrusion generally describes the migration of volatile chemicals from contaminated groundwater or soil into the atmosphere, and is a particular concern if vapors enter an overlying building.[63] EPA will consider information gathered during the comment period (which ended on April 16th), as well as input from several public listening sessions before making a decision on whether to issue a proposed rulemaking on this issue.[64] For more information on the potential change to the Hazard Ranking System, see: www.epa.gov/superfund/sites/npl/hrsaddition.htm. More information on vapor intrusion issues, see: http://www.epa.gov/oswer/vaporintrusion/.

B. Toxics

1. New Robot System to Test 10,000 Chemicals for Toxicity

As we are well aware, tens of thousands of chemicals are currently in commerce and hundreds more are introduced every year. As traditional chemical toxicity tests using animals are expensive and time consuming (not to mention ethically problematic[65]), only a small fraction of chemicals have been adequately assessed for potential risk. EPA's Computational Toxicology Research Program (CompTox) has been working to revolutionize how chemicals are currently assessed for potential toxicity.

In March, the EPA CompTox Research Program and several federal agencies unveiled a new high-speed robot screening system that will test 10,000 different chemicals for potential toxicity. The system marks the beginning of a new phase of an ongoing collaboration, referred to as Tox21.[66] Tox21 merges existing resources—research, funding and testing tools—to develop ways to more effectively predict how chemicals will affect human health and the environment.

The 10,000 chemicals the robot system will screen include chemicals found in industrial and consumer products, food additives and drugs. The results will provide useful information for evaluating if these chemicals have the potential to cause adverse health effects.[67]

For more information on the Tox21 collaboration, see: http://epa.gov/ncct/Tox21/. For more information on ToxCast, see: http://epa.gov/ncct/toxcast/.

2. TSCA—EPA Moves to Electronic Reporting of New Chemical Notices

As part of EPA's commitment to promote transparency and eliminate paperwork, the Agency will require electronic submissions for new chemical notices under the Toxic Substances Control Act (TSCA). On April 6, 2010, EPA issued a final rule that put in place a two-year phase-out of paper and optical disc reporting for new chemical

notices to EPA. The rule included a one-year phase-out of paper reporting and a two-year phase-out of optical disc reporting.[68]

Under TSCA, companies are required to submit new chemical notices, including pre-manufacture notices (PMNs), to EPA at least 90 days (in the case of PMNs) prior to the manufacture or import of the chemical. EPA reviews the notice and can set conditions to be placed on the use of a new chemical before it enters into commerce. EPA typically receives 1,000 new chemical notices each year, which can include hundreds of pages of supporting material. Companies are required to submit these notices using EPA's electronic PMN software either on optical disk (for one more year) or via EPA's Central Data Exchange (CDX).[69]

More information on EPA's electronic reporting software and CDX: http://www.epa.gov/opptintr/newchems//epmn/epmn-index.htm. For more information on EPA's efforts to increase access to chemical information, see: http://www.epa.gov/oppt/existingchemicals/pubs/transparency.html.

C. Brownfields Resources and Funding

EPA's Office of Site Remediation Enforcement (OSRE) recently completed two resources of note. The first, *Revitalizing Contaminated Sites: Addressing Liability Concerns (The Revitalization Handbook)* is a revised edition for 2011. This handbook is a comprehensive summary of key statutory and regulatory provisions of CERCLA and RCRA, and includes policy and guidance documents useful for managing environmental cleanup liability risks, associated with the revitalization of contaminated sites. It is designed for use by parties involved in the assessment, cleanup, and revitalization of sites, and provides descriptions of the tools used to address liability concerns. The handbook is available at: www.epa.gov/enforcement/resources/publications/cleanup/brownfields/handbook/bfhbkcmp-11.pdf.

The second document is entitled *Siting Renewable Energy on Contaminated Properties: Addressing Liability Concerns*. This fact sheet was issued jointly with EPA's Office of Solid Waste and Emergency Response to support EPA's "RE-Powering America's Land Initiative." This fact sheet provides answers to some common questions that developers of renewable energy projects may have regarding potential liability for cleanups. The fact sheet is available at: www.epa.gov/enforcement/resources/publications/cleanup/brownfields/re-liability.pdf.

In June 2011, Administrator Jackson announced more than $76 million in new investments across the country that will redevelop contaminated properties, boost local economies and help create jobs while protecting public health. EPA issued 214 grants through the Brownfields Assessment, Revolving Loan Fund, and Cleanup Grants programs that will go to 40 states and three tribes across the country.[70]

In New York State, Nassau County will receive funds to clean up waterfront property and pave the way for a new hotel complex, affordable housing units, a waterfront park, restaurant and retail space, and the county's first commuter ferry. The redevelopment will result in the creation of more than 7,700 new jobs.[71] Additionally, a total of $1.2 million in funding will be provided to Rochester ($200,000 clean up/$400,000 assessment), Rome ($200,000 clean up), and Niagara County ($400,000 community wide assessment) to help them revitalize and reinvest in their neighborhoods.[72] For more on the FY2011 grant recipients by state, see: http://www.epa.gov/brownfields/pilot_grants.htm. Additional information on grant recipients can be found at: http://www.epa.gov/brownfields.

D. RCRA Criminal Enforcement

On March 11, 2011, Honeywell International Inc. pleaded guilty in federal district court to one felony offense for knowingly storing hazardous waste without a permit in violation of the Resource Conservation and Recovery Act (RCRA). Honeywell was also sentenced to pay a criminal fine in the amount of $11.8 million.[73] In accordance with the terms of the criminal plea agreement, Honeywell will serve a five-year term of probation and must implement a community service project in the community surrounding the facility at issue.

Honeywell, a Delaware corporation with headquarters in Morristown, New Jersey, owns and operates a uranium hexafluoride (UF_6) conversion facility in Massac County, Illinois, near the city of Metropolis (Yes, Metropolis) and the Ohio River. Honeywell is licensed by the U.S. Nuclear Regulatory Commission to possess and manage natural uranium, which it converts into UF_6 for nuclear fuel. At the Metropolis facility, air emissions from the UF_6 conversion process are scrubbed with potassium hydroxide (KOH) prior to discharge. As a result of this process, KOH scrubbers and associated equipment accumulate uranium compounds that settle out of the liquid and are pumped as a slurry into 55-gallon drums. The drummed material, called "KOH mud" and consisting of uranium and KOH, has a pH greater than or equal to 12.5 (and thus is classified as a corrosive hazardous waste).[74] In November 2002, Honeywell shut down part of the reclamation process it used to reclaim the uranium from the KOH mud and the waste began to pile-up on-site. Needless to say, Honeywell did not have a RCRA permit to store any drums of waste at its facility longer than 90 days. In April 2009, EPA special agents found nearly 7,500 illegally stored drums containing waste that was both radioactive and hazardous.[75]

For more on EPA's revitalized criminal enforcement program, see: www.epa.gov/compliance/criminal/index.html. Also, check out EPA's Most Wanted List and see if you recognize any of them—www.epa.gov/fugitives/. Do not attempt to apprehend any of these individuals yourself.

E. SPCC Regulations—Got Milk?

As part of the Administration's efforts to make regulations more effective and eliminate unnecessary burdens, in April, EPA exempted milk and milk product containers from the Oil Spill Prevention, Control and Countermeasure (SPCC) rule. The potential savings to the milk and dairy industries has been estimated at more than $140 million per year. This regulation has been in place since the 1970s, and with this action EPA, for the first time, will ensure that all milk and milk products will be formally exempted.[76] The final exemption applies to milk, milk product containers, and milk production equipment. In addition, because some of these facilities may still have oil storage subject to the spill prevention regulations, EPA is also amending the rule to exclude milk storage capacity from a facility's total oil storage capacity calculation.[77] The SPCC regulations, in place since the 1970s, require facilities storing more than 1,320 gallons of oil to create and implement plans to prepare, prevent and respond to oil spills. The exemption does not apply to fuel oil and other applicable oils stored on farms; farms that store the regulatory threshold of fuel oil and other applicable oils are covered under the SPCC. The rule is intended to prevent damage to the inland waters and shorelines of the United States.[78]

More information on the milk and milk product containers exemption, see: http://www.epa.gov/oem/content/spcc/spcc_milk.htm.

F. Environmental Justice—Consultation and Coordination with Indian Tribes

In May, EPA released its final EPA Policy on Consultation and Coordination with Indian Tribes.

As building strong tribal partnerships is one of our top priorities for the agency, the creation of this national policy has been a critical initiative for EPA and this Administration. To review the new policy, see: www.epa.gov/tribal/consultation/consult-policy.htm.

V. Conclusion

For more information on what's new in EPA, Region 2, to report environmental violations, or to sign up to follow us on Twitter or Facebook, visit our website at http://www.epa.gov/region2/.

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

DEC Update

By John Louis Parker

DEC Focusing on Today's Challenges

The Department of Environmental Conservation continues evolving to meet its core mission. Governor Andrew Cuomo has appointed key staff members who have taken critical leadership positions in the agency. The review of environmental impacts related to gas extraction from Marcellus Shale continues and public review and comments will soon commence. The water withdrawal bill recently became law presenting additional responsibilities and opportunities to protect New York waters. Even smaller efforts of Department staff, particularly those with partners, are noteworthy, as exemplified by the recent recognition of the Catskill Interpretive Kiosk. Finally, the Department's re-calibration efforts are ongoing and are intended to enable the agency to meet the challenge of significant issues, today and beyond.

Major Staff Additions to the Department

Marc Gerstman
Executive Deputy Commissioner

Marc Gerstman formerly worked at the Department for thirteen years. During that time, Mr. Gerstman led the Department's legal team as Deputy Commissioner and General Counsel. He also served as the agency's Deputy General Counsel and Director of Legal Affairs. For the past sixteen years, Gerstman has managed his own law practice specializing in environmental, natural resource, land use, zoning, administrative, and municipal law.

Marc Gerstman earned his Juris Doctorate from Brooklyn Law School and holds a Bachelor's degree from SUNY New Paltz.

Ed McTiernan
Deputy General Counsel
Office of General Counsel

Ed McTiernan served as a litigator with Gibbons, P.C., a New Jersey-based law firm, for the past seventeen years. At Gibbons, P.C., he acted as a director and led the firm's environmental practice group. In this role, Mr. McTiernan represented clients before federal and state administrative agencies and litigated complex environmental actions. Mr. McTiernan previously held positions as an environmental scientist focused on site remediation. Mr. McTiernan has an extensive amount of experience in Superfund and hazardous waste issues, including contaminated sediment issues from his time working in New Jersey.

Ed McTiernan earned his Juris Doctorate from Seton Hall University, a Master's degree from SUNY College of Environmental Science & Forestry, and a Bachelor's degree from Fordham University.

Thomas Berkman
Associate Counsel
Office of General Counsel
Bureau Chief of the Natural Resources/Criminal Enforcement Bureau

Prior to joining the Office of General Counsel, Tom Berkman was responsible for investigating and prosecuting a wide array of criminal cases, including tax fraud, securities violations, and environmental and insurance crimes, as well as managing False Claims Act cases and Martin Act prosecutions during his tenure at the New York Attorney General's Office.

Before the Attorney General's Office, Mr. Berkman worked on SEC investigations of corporate fraud, real estate transactions, UCC contract disputes, defamation actions, and trademark infringement matters at Wilmer Cutler Pickering Hale & Dorr, LLP and McGuirewoods, LLP. Mr. Berkman's earlier prosecutorial work began at the Queens District Attorney's Office, where he worked on indictments, felony trials, and notable appellate cases.

Tom Berkman earned his Juris Doctorate from Boston College Law School.

Venetia Lannon
Regional Director, Region 2

Venetia Lannon has enjoyed considerable experience in New York City government. Ms. Lannon was a Deputy Director of the Recycling Bureau at the City Department of Sanitation, where she oversaw the composting program. After moving from the Department of Sanitation to the New York City Economic Development Corporation, Ms. Lannon participated in the development of the City's 20-year Solid Waste Management Plan. During her tenure as Senior Vice President at the Economic Development Corporation, Ms. Lannon oversaw the development of marine terminals, port facilities, and other transportation infrastructure, as well the implementation of transportation and waterfront policies.

DEC and Catskill Partners Catskill Interpretive Kiosk Is an Award Winner

In the Spring 2011 issue of *The New York Environmental Lawyer*, the DEC Update column covered the progress on the the Catskill Interpretive Center and Interpretive Kiosk. The Association for Conservation Information awarded the Interpretive Kiosk second place in its annual competition. The Kiosk placed in the "Big Ideas, Small Budget" category due to its construction budget of $11,000 worth of materials and additional in-kind service matches. The Kiosk is composed of sixteen informative

educational panels presenting the natural and cultural assets of the Catskill Mountains. The goal of the presentation is increasing environmental literacy and appreciation of the local environment of the Catskill region.

The Interpretive Kiosk is a collaboration between the Catskill Center for Conservation and Development, the Friends Group, the Department, and SUNY Delhi. The Center and Kiosk are located on Route 28. The Association for Conservation Information is a non-profit association of information and education professionals representing state, federal, and Canadian agencies and private conservation organizations.

Water Withdrawal Legislation Now State Law

Chapter 401 of the Laws of 2011

Governor Andrew Cuomo signed into law legislation that addresses New York's water supply by requiring a state permit for the withdrawal of large volumes of water from the state's rivers, lakes, streams, and groundwater. The law is known as the "Water Withdrawal Law" (the "Law").

The Law authorizes a comprehensive statewide permitting program for systems capable of withdrawing 100,000 gallons or more per day from surface or groundwater. The goal of the Law is to ensure that water remains available for drinking water supply, agriculture, hydropower, manufacturing, wildlife and plant species, navigation, water-based recreation, wetlands, and other uses. At the same time, the Law allows the Department to regulate withdrawals of water that are currently unregulated, like water taken by bottled water companies, or large withdrawals of water for hydraulic fracturing. The permitting process will ensure a continued water supply to existing municipal, agricultural and industrial users, and will help identify areas that could support new water-dependent businesses. Facilities that are estimated to be covered by the Law include hotels, hospitals, schools, public water supplies, and other facilities, but would not regulate individual facilities if they are already connected to a public water supply. Farms that have registered their withdrawals would not be required to obtain a permit but would be required to submit annual reports on water use.

The Law also specifically addresses requirements for New York under the Great Lakes Compact. The Great Lakes, and their watersheds, contain more than eighteen percent of the world's supply and nearly ninety percent of the United States' supply of surface water. Only about one percent of the water volume is renewed or replaced by precipitation and tributary inflow each year. Consequently, Great Lakes levels can be drawn down dramatically by sizable water withdrawals. Large withdrawals could adversely affect wetland habitat, spawning grounds, municipal and agricultural water supplies, recreational boating access, and hydropower production.

The Law takes effect February 15, 2012. The withdrawal permits (other than public water supplies already subject to permitting) would not be required until the Department adopts implementing regulations. Department staff are actively engaged in the rule-making effort and anticipates working through the process by Spring 2012.

Marcellus Shale Environmental Review Process Continues

Public Comment Begins September 7, 2011

The Department issued for public comment the revised Supplemental Generic Environmental Impact Statement (EIS) on September 7. The public comment period closes on December 12, 2011. The Supplemental Generic EIS is New York's governing document on potential natural gas drilling activities in the Marcellus Shale formation and the horizontal drilling and high-volume hydraulic fracturing techniques used to extract natural gas from these and other low permeability gas reservoirs across the Southern Tier and into the Catskills. Among other things, the Supplemental Generic EIS outlines safety measures, protection standards, and mitigation strategies required for operators to adhere to in order to obtain permits. The revised Supplemental Generic EIS includes additional detail and analysis prepared by consultants to the Department. Specifically, these components include community impacts, such as noise, visual, and traffic impacts in addition to socio-economic impacts.

The High-Volume Hydraulic Fracturing Advisory Panel named by Commissioner Martens has begun to meet and consider what resources will be needed for state and local government agencies, as well as to review and make recommendations to mitigate local impacts.

The DEC Update was compiled by John Parker from a variety of sources and solely in his individual capacity. The DEC Update is not a publication prepared or approved by the Department of Environmental Conservation, and the views are not to be construed as an authoritative expression of the DEC's official policy or position expressed here with respect to the subject matter discussed. John L. Parker is a Regional Attorney with the NYS Department of Environmental Conservation, Region 3.

Member Profiles

Long-Time Member: James A. Sevinsky


James A. Sevinsky

For this issue of *The New York Environmental Lawyer*, we recognize James A. Sevinsky. Mr. Sevinsky graduated from The University of Bridgeport in 1970 and Albany Law School in 1973. He currently serves as Executive Counsel, Environmental Health and Safety for GE Energy, a position he has held since 1996. He is responsible for managing EHS legal issues for the energy business's worldwide operations and acquisitions.

Mr. Sevinsky is passionate about the engaging issues he deals with daily, ranging from due diligence and integration into GE's many newly acquired businesses, contributing to GE's exploration of innovative technologies for renewable energy sources, and assisting with environmental and safety improvements to many products and services. He also supports the Product Safety Engineering group and was the recipient of a Quality Award for his work with the Product Safety Engineering team.

Mr. Sevinsky began his legal career in 1973 at the Environmental Protection Bureau of the New York State Attorney General, where he served as Deputy Chief from 1979-1984 and Chief from 1984-1995. He helped the Attorney General lead efforts to strengthen and enforce environmental laws and managed many controversial cases in state and federal courts. In one battle arising out of the discovery of the leaking Love Canal landfill in Niagara Falls, Mr. Sevinsky recalls how "Love Canal and thousands of other sites where hazardous substances had been released came to light and gave birth to the new use of old laws and the enactment of new laws like the federal superfund (CERCLA) to address a legacy of sites that posed hazards from waste handling and disposal practices that were not illegal at the time. The strict, joint and several liability imposed on generators, transporters and owners of waste sites to clean up sites created many years earlier—and sometimes also compensate for natural resource damages—gave rise to decades of legal disputes that continue today and will continue into the future." He also helped the New York Attorney General lead multistate coalitions in litigation and legislative reform to address interstate air pollution causing acid rain and other damage in downwind states. This experience translated into his passion today for working with GE on cleaner energy solutions, on preventing pollution and on dealing responsibly with environmental issues.

Mr. Sevinsky is generous with advice to young lawyers: "Remember the overwhelming importance and purpose of the laws that are designed to protect the environment and public health and work aggressively to implement them wisely and improve them, whether you work in the private, public or not-for-profit sector There is no one path." He emphasizes the importance of the pro bono and not-for-profit opportunities available to young lawyers, especially when recent graduates face such a tough job market. And, of course, he promotes staying active with the Environmental Law Section of NYSBA, which "affords a really unique opportunity to get to know and exchange views with a diverse group of enormously talented and dedicated environmental lawyers." His reflections on his own career are inspiring:

> If there is a greatest lesson to draw, I think it is that environmental lawyers can make a difference in influencing decisions that help protect the environment and health and safety in many ways and on a daily basis. It is not only the big crusades in litigation or legislation that advance environmental protection. Environmental lawyers can help leaders in industry to raise the bar and raise their EHS practices and over time this can influence industries as a whole to improve safeguards for what is reasonable protection. Preventing pollution, sound product stewardship, and eliminating harm to people or the environment is good business whether specific prescriptive laws are in place or not.

Mr. Sevinsky's impressive career is coupled by his long-term service to the New York State Bar Association's Environmental Law Section. He is a former Chair of the Section and sits on the Executive Committee. We are honored to have such a dedicated and inspiring leader and are grateful for his leadership and contributions. Mr. Sevinsky expects that he always will be engaged in environmental protection, and so we can expect more great work to come!

Genevieve Trigg


Andrew B. Wilson

New Member: Andrew B. Wilson

In this New Member profile, we welcome the already active Andrew Wilson to the Section. Drew is a 2010 *cum laude* graduate of Albany Law School and recipient of the Gary M. Peck '79 Memorial Prize in Environmental Law.

Drew is a professional, thoughtful, personable, and

deliberate young lawyer. Drew and I first met when he approached me to inquire about my scholarly research needs. Once he started working with me, he quickly proved himself by anticipating my research needs and participating in the development of my research agenda. Both in and out of the classroom, Drew 's accomplishments were unsurpassed. He was instrumental in the proposal, organization and approval of the Student Editorial Board for *The New York Environmental Lawyer*. He consistently contributed case law and other updates to professional publications. He was effective as Editor-in-Chief for the *Albany Law Journal of Science & Technology*. He was professional and productive in an article that we co-authored on wind energy planning. He was demanding of his education in class and active in his extra-curricular activities. Also, he was brilliant as my research assistant.

Following law school, Drew immediately entered the profession as a Legislative Fellow for Senator Jeffrey Klein in the New York State Senate and as clerk for the Alcoholism and Drug Abuse Committee. Drew presently serves the Independent Democratic Conference of the New York State Senate as counsel to Senators Klein, Savino, Valesky, and Carlucci and continues his work with the New York State Senate Standing Committee on Alcoholism and Drug Abuse. Drew expresses his gratitude to the Section and specific members of the Section that have facilitated his professional development: "I'm incredibly grateful to the professionals who have taken time to speak with me about how to stay involved in the field during a depressed (and often depressing) job market. What astounds me is the number of attorneys who have been in this field for so many years and remain passionate about their work. That is both a major selling point and incentive for me to keep heart: those in this field love it and stay engaged throughout their careers, be it non-profit, law firm, agency, or otherwise."

Drew continues his involvement with *The New York Environmental Lawyer*, contributing substantive articles and book reviews. He also serves on the Section's Legislation Committee. His high professional standards will serve him well in his career. I have no doubt that he will quickly establish himself as an indispensable authority in state and federal environmental law. We are fortunate to have Drew's involvement in the Section and look forward to many years of professional excellence and service to the profession, the bar, and the community.

Keith Hirokawa

Member News

Robert Hallman, Partner at Cahill Gordon & Reindel LLP, and Board Chair of the N.Y. League of Conservation Voters, was named by New York State Department of Environmental Conservation (DEC) Commissioner Joe Martens to the High-Volume Hydraulic Fracturing Advisory Panel. The Advisory Panel will be charged with: developing recommendations to ensure DEC and other agencies are enabled to properly oversee, monitor and enforce high-volume hydraulic fracturing activities; developing recommendations to avoid and mitigate impacts to local governments and communities; and evaluating the current fee structure and other revenue streams to fund government oversight and infrastructure related to high-volume hydraulic fracturing. "I want to thank the panel members for agreeing to participate," Martens said. "The guidance they will provide will be invaluable as we move forward with this process." For more information about the Advisory Panel and a list of the initial panel members, see the NYSDEC press release: http://www.dec.ny.gov/press/75416.html.

During this spring and summer, **Prof. Nicholas A. Robinson,** Pace Law School, presented a series of lectures on climate change law, expanding on his research reflected in his casebook, *Climate Change Law: Mitigation and Adaptation* (West). He presented at: the annual meeting of the National Institute for Social Sciences in New York City in April; Universidad Autonomo Metropolitana—Azcapotzalco, Mexico City and the Universidad Autonomo de Campeche in Campeche, Mexico in April; Ilia University and the University of Tblisi, in Tblisi, Georgia in May; the annual International Environmental Law Conference of Lawyers for A Green Planet in Sao Paulo, Brazil in May; the Ashbridge International Research Conference at the Ashbridge Business School in England in June; and the University of Texas Law Faculty (via audio-video conference) in July.

David Freeman, Partner at Paul Hastings LLP, was elected President of the New York City Brownfield Partnership, an organization comprised of site owners and developers, community groups, non-profit organizations, environmental professionals, and governmental agencies whose goal is to promote brownfield redevelopment in New York City. For more information about this organization, see www.brownfieldnyc.org.

Aaron Gershonowitz's article entitled "Does the Supreme Court's Burlington Northern Decision Require Reconsideration of the Aceto Line of 'Arranger' Liability Cases" was published in the *University of Baltimore Law Review* at 40 U. Balt. L. Rev. 383 (2011). Aaron's article entitled "The End of Joint and Several Liability in Superfund Litigation: From Chem-Dyne to Burlington Northern" will be published in volume 50 of the *Duquesne Law Review* (Fall 2011). Aaron is a partner at the Long Island law firm of Forchelli, Curto, Deegan, Schwartz, Mineo, Cohn & Terrana, LLP. He is also an issue editor for *The New York Environmental Lawyer.*

Miriam Villani, Editor-in-Chief of *The New York Environmental Lawyer*, and Partner at Sahn Ward Coschignano & Baker, PLLC, and Bruce Adler, Senior EHS Counsel, General Electric Company, were married on June 25, 2011. The wedding and reception were held at the Norwich Inn, Norwich, CT. The newlyweds had a wonderful honeymoon on the Olympic Peninsula, WA. In the midst of the honeymooning festivities, Miriam managed to fit in a 13-mile hike in the Olympic National Park that included Klahhane Ridge and Mount Angeles, from which the views of the Olympic mountain range to the south, the Strait of Juan de Fuca and Vancouver Island to the north, and Mount Baker rising high to the east were breathtaking. Congratulations and best wishes to the newlyweds.

2012 Professor William R. Ginsberg Memorial Essay Contest

Environmental Law Section
New York State Bar Association

The Professor William R. Ginsberg Memorial Essay Contest is an annual competition designed to challenge law students to analyze the environmental issues confronting us today.

Topic:
Any topic in environmental law.

Eligibility:
Contest open to all JD candidate students enrolled in a New York State law school. Essays may have been submitted for course credit or for law reviews, but not as part of paid employment.

Length:
Maximum length, 35 double-spaced pages (including footnotes, which may be single-spaced).

Format:
Each entrant MUST submit a hard copy AND an electronic version in either Microsoft Word or Wordperfect 5.0.

Judging:
Criteria for judging entries will be: organization, practicality, originality, quality of research, clarity of style. Entries will be judged by environmental law professors and other distinguished members of the Environmental Law Section from throughout the State.

Awards:
The first place winner will receive a $1,000 prize and the second and third place winners will receive certificates. In addition, the 1st place essay will be published by the New York State Bar Association, and the 2nd and 3rd place essays will be considered for publication. All three winners will receive an invitation to the Fall 2012 conference of the Environmental Law Section.

To Enter:
Send hard copy to, New York State Bar Association, One Elk Street, Albany, New York 12207, and email your entry to kplog@nysba.org. Include with your entry a cover letter stating your name, mailing addresses (both school and permanent), telephone number, email address, name of school, and year of graduation. This letter should also certify that the essay was not written as part of paid work. Please make sure your name and student information do not appear on the essay. No more than one entry per student per year is allowed.

Deadline:
June 1, 2012 (Winners will be announced in early September 2012.)

For Further Information:
Contact your environmental law professor or
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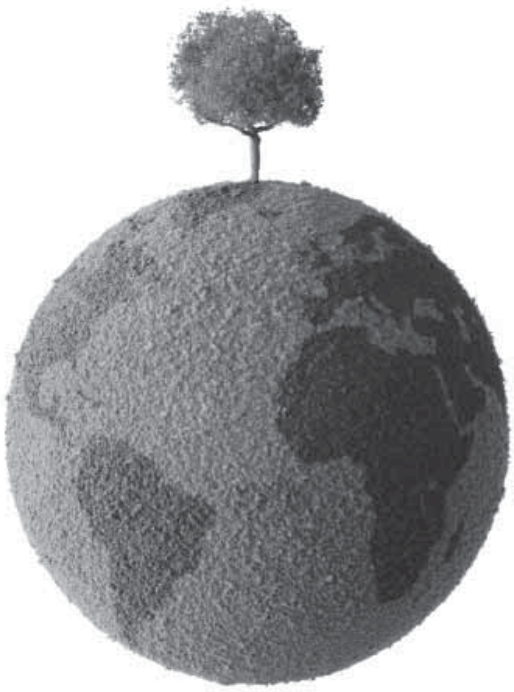

2011 Legislative Forum Final Report

NYSBA Environmental Law Section, Legislation Committee

By Jeffrey Brown, Michael J. Lesser and Andrew B. Wilson, Co-Chairs

The Section's annual Legislative Forum was a resounding success. Taking place on May 18, 2011, in NYSBA's Great Hall, the Forum drew in excess of 150 attendees for this year's topic: Marcellus Shale Hydrofracking—A Legislative Solution? Forum panelists included: State Senator Mark Grisanti of Buffalo, the current Chairman of the Senate Environmental Conservation Committee, representing the 60th State Senate District; Stephen B. Liss, Counsel to Environmental Conservation Assembly Committee Chairman Robert K. Sweeney from Lindenhurst (11th Assembly District); Paul Hartman, the Director of State Government Relations for Chesapeake Energy Corporation; Deputy Commissioner Eugene Leff of the NYS Department of Environmental Conservation; and, Kate Sinding, Counsel for the Natural Resource Defense Council. Handouts with useful web-based information were prepared by the Section's Legislation Committee with the additional assistance of Section member Erica Levine Powers and distributed to the attendees. Those handouts are attached and included with this summary. The lively audience fueled a thirty-minute question and answer session that followed the individual presentations.

The panelists represented a diverse cross section of the stakeholders interested in regulating the controversial natural gas drilling technique of horizontal high pressure hydrofracturing, otherwise known as fracking. The use of this technique allows for the cost effective release of trapped natural gas deep below the surface from a geologic formation called the Marcellus Shale. This formation extends beneath large areas of New York and other nearby states. However, fracking involves the ground injection of large quantities of water and chemicals. In turn, fracking then generates large quantities of waste water that could require further treatment and disposal. Critics of fracking claim that the risk of water pollution and hazardous waste releases would increase in environmentally sensitive areas including the Catskill's New York City watershed. The state is scheduled to issue a revised environmental impact statement ("EIS") on September 7, 2011, which, if finalized, will provide a basis for permit conditions for fracking operations.

Senator Grisanti commenced the proceedings by observing that the Department of Environmental Conservation's ("DEC") funding had been "cut to the bone" and he would work to restore funding to that agency to maintain the Department's ability to oversee the state's drilling program. He also opined that with regard to the technical and engineering issues associated with the fracking, he would "leave science to the scientists." He would, therefore, rely heavily on the professionals at DEC to make the state's environmental determinations. He also referenced a proposed bill he co-sponsored, which would close a regulatory loophole by allowing fracking wastes to be classified and treated as state hazardous wastes (a more stringent category of waste handling).

Steve Liss discussed the various issues raised by the more than 40 bills introduced in the State Assembly related to natural gas drilling. These ran the gamut from economic issues to various proposed moratoriums and bans. Many of the latter concerned the preservation of drinking water quality in the New York City watershed. He also discussed a seemingly unrelated proposed bill to re-draft Article 15 of the Environmental Conservation Law to regulate the use of large quantities of state groundwater via a new permitting system. However, that law, if passed, would also apply to large drilling operations that use fracking to extract gas.

Deputy Commissioner Leff used his segment to discuss the Department's preference to continue to use the ongoing administrative process to resolve the public's safety and environmental concerns. Safeguards for the fracking process would then be implemented via individual permit conditions rather than by regulations or legislation. Furthermore, the Department does not find moratoriums to be a useful regulatory tool.

Paul Hartman, speaking for one of the largest energy companies involved in Marcellus Shale natural gas production, decried the recent fear of and resistance to fracking and natural gas drilling in general. He recounted the long history of gas and oil drilling in New York and stated that his company had trust in DEC to do its job in regulating the industry via the existing EIS administrative process. In this respect, he also supported the restoration of funds and staff to DEC. But, according to him, the current gas drilling approval process had already taken three years and New York was just too slow in allowing his industry to start drilling operations. He further claimed that as a result, his company had already moved assets out of New York to other states and those future operations in this state will be slowed to a trickle. He concluded that continuing such policies could cost the state thousands of industry jobs plus cause other indirect economic harm.

Finally, the NRDC's Kate Sinding questioned the general reliance on any fossil fuel including natural gas due to the increased negative impacts of climate change and the diversion of emphasis on alternative energy sources. However, she did explain that if fracking is to be used, it should be banned from the NYC watershed and other likely drinking water source areas. Unlike DEC, however, NRDC does favor the promulgation of new gas drilling regulations. Kate described the existing regulations as dated and not very useful for the drilling procedures contemplated for fracking.

The Forum panel was followed by informative and timely remarks by the Section's lunch speaker, Steven Russo, Deputy Commissioner and General Counsel of the NYSDEC. Mr. Russo explained that in assuming the role of DEC General Counsel, he would not be a slave to existing principles and would be flexible in administering the Department's enforcement authorities. He announced a coming targeted amnesty for certain regulatory areas including underground storage tank enforcement which would include municipalities. In this regard, he also expressed the Department's desire to support local governments in implementing SEQRA requirements.

The Legislation Committee wishes to express its gratitude to Kathy Plog and Lisa Bataille of the NYSBA for their patience and assistance, and to 2010-2011 Section Chair Barry Kogut for his insights and guidance throughout the planning process.

Legislative Forum 2011: Supplemental Handout

By Andrew B. Wilson, Michael J. Lesser, Co-Chairs

Legislative Forum Speaker Related Websites:

Hon. Mark Grisanti, 60th S.D.
http://www.nysenate.gov/senator/mark-grisanti

Paul Hartman—Director of State Government Relations - New York, Chesapeake Energy
http://www.chk.com/Pages/default.aspx

Eugene Leff—Deputy Commissioner, N.Y.S. Department of Environmental Conservation
http://www.dec.ny.gov/

Steven Liss—Chief of Staff, Assemblyman Hon. Robert K. Sweeney, 11th A.D.
http://assembly.state.ny.us/mem/Robert-K-Sweeney/bio/

Kate Sinding—Natural Resource Defense Council
http://www.nrdc.org/newyork/ourteam.asp?utm_source=link&utm_medium=team&utm_campaign=nrdcNewYork

Selected Pending 2011 NY Bills Related to Gas Extraction,
NYS Assembly Bill Finder: http://assembly.state.ny.us/leg/

A3579	Sweeney CO: Brennan, Lifton, Jaffee, Zebrowski, Kavanagh, Titone, Cymbrowitz, Magnarelli, Reilly, Spano, Paulin, Castro, Rivera N, Rivera P, Rosenthal, Maisel, Perry, Ortiz, Cook, Weisenberg, Schimel Relates to permits to drill oil and gas wells **BLURB :** En Con L. oil and gas wells AN ACT to amend the environmental conservation law, in relation to permits to drill oil and gas wells **SUMM :** Amd SS23-0101, 23-0305 & 23-0501, En Con L Relates to permits to drill oil and gas wells.
A4237	Brennan CO: Colton, Lifton, Titone Establishes a moratorium on the issuance of permits for the drilling of wells and prohibits drilling within two miles of the New York city water supply infrastructure BLURB : En Con L. env protect; well drill AN ACT to amend the environmental conservation law, in relation to environmental protection related to the drilling of oil and gas wells, and providing for the repeal of certain provisions upon expiration thereof SUMM : Amd S23-0501, En Con L Establishes a moratorium on the issuance of permits for the drilling of wells and prohibits drilling within ten miles of the New York city water supply infrastructure.
A6426	Brennan CO: Colton, Millman, Castro, Lifton, Lentol, Clark, Kellner, Lancman, Paulin, Barron, Kavanagh, Camara, Crespo, Titone, Schimel, Meng Relates to the regulation of the drilling of natural gas resources BLURB : En Con L. natural gas drilling AN ACT to amend the environmental conservation law, in relation to the regulation of the drilling of natural gas resources SUMM : Add Art 23 Title 29 SS23-2901 - 23-2913, En Con L Relates to the regulation of the drilling of natural gas resources; prohibits natural gas drilling near watersheds; requires disclosure of hydraulic materials; provides protection of other environmental resources; requires permits for water withdrawals of more than five thousand gallons per day; requires inspections and annual audits.

S5167	LIBOUS—Establishes the natural gas oversight fund to provide funding to the department of environmental conservation for enforcement of well drilling provisions BLURB : St Fin. natural gas oversight fund SUMM : Add S81, St Fin L; amd S23-0501, En Con L Establishes the natural gas oversight fund to provide funding to the department of environmental conservation for enforcement of well drilling provisions.
A6541	Englebright Enacts the "look before you leap act of 2011" to establish a 5 year moratorium on high volume hydraulic fracturing and the conducting of an investigation thereon BLURB : Moratorium: 5 yrs. Hydro fracturing AN ACT to enact the "look before you leap act of 2011" relating to the imposition of a 5 year moratorium on high volume hydraulic fracturing for the purpose of conducting an investigation of the effect of hydraulic fracturing SUMM : Enacts the "look before you leap act of 2011" to establish a 5 year moratorium on high volume hydraulic fracturing and the conducting of an investigation thereon.
A5318A	Sweeney (MS) An act to amend the environmental conservation law, in relation to regulating the use of the state's water resources; and to repeal titles 16 and 33 of article 15 of such law relating to Great Lakes water conservation and management and water withdrawal reporting. The purpose of this bill is to authorize DEC to implement a water withdrawal permitting program to regulate the use of the State's water resources.

Source: NYS Legislature, May 2011

Legislative Forum 2011: Supplemental Handout

Prepared by Erica Levine Powers

Selected Background Materials:

Ian Urbina, series of articles in The New York Times, on the risks of natural gas drilling and efforts to regulate this industry:

http://topics.nytimes.com/top/news/us/series/drilling_down/index.html?scp=1&sq=Drilling%20Down%2 0series&st=cse.

Series includes articles on water testing, water quality, and chemicals and toxic materials in hydrofracking. Clear Waters, Vol. 40, No.4 (Winter 2010). Entire issue devoted to "Marcellus Shale Drilling—Water Quality and Treatment Issues." Clear Waters is a publication of the New York Water Environment Association, Inc. (NYWEA). Their web site is http://nywea.org/clearwaters/.

Abrahm Lustgarten series of articles in Pro Publica, an online investigative journalism site that won two Pulitzer Prizes in 2011: http://www.propublica.org/series/buried-secrets-gas-drillings-environmentalthreat. See, e.g., "Gas Drilling Companies Hold Data Needed by Researchers to Assess Risk to Water Quality" (May 17, 2011) http://www.propublica.org/article/gas-drilling-companies-have-the-waterquality-methane-risk-data.

Catskill Citizens for Safe Energy web site: Comprehensive review, updated daily: http://www.catskillcitizens.org/news.cfm.

Selected Legal Materials:

The DEC Marcellus Shale web site includes a hyperlink to the Commissioner's Testimony at NYS Assembly Hearing on Oil and Gas Drilling for DSGEIS, October 15, 2009: http://www.dec.ny.gov/energy/58821.html:

> Drilling using horizontal, high water volume hydraulic fracturing in the Marcellus shale formation and other low-permeability gas reservoirs presents an extraordinary challenge for New York State. The proposed drilling involves environmental risks, economic development opportunities for many communities and private landowners, and a means of achieving an important energy policy goal. I can assure you that we recognize all facets of the potential impacts, both positive and negative, and our appreciation of the significance of these impacts is reflected in the amount of work which has been done to develop the very comprehensive document that is the subject of this hearing. In accordance with law, the purpose of the dSGEIS is to inventory the potential environmental risks, determine which impacts are significant

> and provide mitigation measures. This process is routinely used to address the environmental impacts of many industrial processes. The host of complex environmental impacts analyzed in the dSGEIS range from the initial water withdrawals to the ultimate disposal of the waste products. In preparing the dSGEIS we have made every effort to recognize, characterize and provide appropriate mitigation measures based upon sound science, engineering and experience. We understand, of course, that some people will think that the dSGEIS goes too far, while others will believe that we did not go far enough. The pending public comment period will enable all of you, as well as members of the public, to weigh in on our analysis, and we look forward to receiving those comments.

NY State Department of Environmental Conservation: Marcellus Shale web site. http://www.dec.ny.gov/energy/46288.html.

This site includes a hyperlink to the draft Supplemental Generic Environmental Impact Statement (draft SGEIS) for horizontal drilling and high volume hydraulic fracturing to develop the Marcellus Shale, which closed on December 31, 2009, http://www.dec.ny.gov/energy/58440.html.

It also includes a hyperlink to Gov. David Paterson's Executive Order No. 41, issued December 13, 2010 with respect to issuance of the draft SGEIS: http://www.dec.ny.gov/energy/46288.html#41 which provides:

1. The Department shall complete its review of the public comments, make such revisions to the Draft SGEIS that are necessary to analyze comprehensively the environmental impacts associated with high-volume hydraulic fracturing combined with horizontal drilling, ensure that such impacts are appropriately avoided or mitigated consistent with the State Environmental Quality Review Act (SEQRA), other provisions of the Environmental Conservation Law and other laws, and ensure that adequate regulatory measures are identified to protect public health and the environment; and

2. On or about June 1, 2011, the Department shall publish a Revised Draft SGEIS, accept public comment on the revisions for a period of not less than thirty days, and may schedule public hearings on such revisions to be conducted in the Marcellus Shale region and New York City; and

3. Recognizing that, pursuant to SEQRA, no permits may be issued prior to the completion of a Final SGEIS, the Department, subsequent to the conclusion of the public comment period, shall report to the Governor on the status of the Final SGEIS and the regulatory conditions that are necessary to include in oil and gas well permits to protect public health and the environment.

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New York Begins to Address Smart Growth and Sprawl

By David K. Gordon

I. Introduction

Land development is a pressing environmental concern in many areas of New York State. The extent and projects which are approved alter the character of communities, and the natural environment. Housing subdivisions, commercial parks and shopping malls outside of existing towns can compromise ecological and human health, consume open space, damage scenery, increase energy use, and cause congestion and pollution. Particularly where the landscape and environmental resources create attractions for tourists and residents, this "sprawl"-type development can reduce quality of life and economic viability and increase municipal costs for infrastructure and services.

Nevertheless, the prevalent development pattern in much of the state over the past several decades has emphasized automobile dependence and physical separation from other land uses, including established downtowns and neighborhoods. As a result, it has consumed substantially more land than prior growth.[1] The ubiquity and convenience of automobiles, relatively inexpensive gasoline for much of the post-WWII period, federal provisions supporting financing of home mortgages, and expanded investment in road construction, including the interstate highway system, have all played key roles in the emergence of "sprawl." With the vast expansion of opportunities for automobile travel, formerly remote areas of land have become more attractive for siting new subdivisions and commercial projects.

The utilization of undeveloped land apart from existing communities has become the dominant model for land development. It has also come under substantial criticism on environmental, social and aesthetic grounds, including increased automobile dependence, energy use, and consumption of land and other natural resources, as well as increased municipal and infrastructure costs. Many critics have advocated alternative patterns of development, which they label "smart growth" because it may avoid many of the impacts of sprawl.

The emergence of suburban sprawl has occurred under, and largely resulted from, a very decentralized system of regulation. The primary permitting authorities for most land development proposals are the local boards where each project is located. Town and village boards and city councils are responsible for the comprehensive plans which broadly set forth each municipality's putative growth goals. Based at least in part on these plans, the legislative body enacts the codes which divide the municipality into zones and specify the allowable land uses and the physical standards for development in each zone. In most municipalities, a planning board reviews the proposed site plans for individual projects.[2]

Due to the nature of typical zoning, few local codes provide a substantive constraint on the progressive consumption of the landscape through sprawl. In many cases, zoning codes reduce the allowed density of construction in undeveloped areas, or require the developer to set aside land for conservation or affordable housing purposes. However, since the vast majority of the area subject to the municipalities' jurisdiction is zoned for some form of real estate development, the codes do little to constrain the sprawl of developed land into the countryside.

Given the emergence of sprawl as a central environmental concern in much of the state, the ineffective regulatory process has created substantial controversy. Nevertheless, the state has continued the traditional municipal jurisdiction over growth, without significantly strengthening local capacity to limit sprawl. The prior three governors have convened in-house task forces to review sprawl/smart growth-related issues, but the legal balance has remained largely unaltered.

In 2010, two state initiatives addressed the control of land development and the underlying controversies. One, which was embodied in new state legislation, for the first time established a state policy to limit sprawl, at least with respect to state infrastructure investments. The second was a "dialog" relating to the administration and implementation of State Environmental Quality Review Act ("SEQRA"),[3] conducted by the New York State Department of Environmental Conservation ("DEC") regional office overseeing the mid and lower Hudson Valley.[4] The state legislation, known as the Smart Growth Public Infrastructure Policy Act, is the subject of Part II of this article. The DEC Region 3 SEQRA Dialog and recommendations will be addressed in Part III.

II. The Smart Growth Public Infrastructure Policy Act

The New York State Smart Growth Public Infrastructure Policy Act ("the Act")[5] was enacted in the summer of 2010 and became effective on September 29, 2010.

The Act is the first statewide legislative declaration of policy on the merits of smart growth or sprawl. The Act encourages state infrastructure expenditures to be consistent with the principles underlying smart growth, including supporting existing infrastructure and communities rather than creating new facilities.[6]

The Act was codified as the new Article 6 of the Environmental Conservation Law. The statutory declaration of policy makes clear the law's focus on limiting environmental and other costs of sprawl. The Act declares:

> It is the purpose of this article to augment the state's environmental policy by

> declaring a fiscally prudent state policy of maximizing the social, economic and environmental benefits from public infrastructure development through minimizing unnecessary costs of sprawl development including environmental degradation, disinvestment in urban and suburban communities and loss of open space induced by sprawl facilitated by the funding or development of new or expanded transportation, sewer and waste water treatment, water, education, housing and other publicly supported infrastructure inconsistent with smart growth public infrastructure criteria.[7]

The Act reflects the legislature's finding that sprawl often involves substantial infrastructure costs and can deplete or damage natural resources.

The Act sets requirements for state expenditures, or other support, for "public infrastructure projects." It forbids "state infrastructure agenc[ies]," which include many state agencies and all state authorities,[8] from approving, undertaking, supporting, or financing a public infrastructure project, unless the project is consistent with a list of "smart growth public infrastructure criteria." Those criteria are as follows:

1. to advance projects for the use, maintenance, or improvement of existing infrastructure;
2. to advance projects located in municipal centers;
3. To advance projects in developed areas or areas designated for concentrated infill development in a municipally approved comprehensive land use plan, local waterfront revitalization plan, and/or brownfield opportunity area plan;
    a. to protect, preserve, and enhance the state's resources, including agricultural land, forests, surface and groundwater, air quality, recreation and open space, scenic areas, and significant historic and archeological resources;
    b. to foster mixed land uses and compact development, downtown revitalization, brownfield redevelopment, the enhancement of beauty in public spaces, the diversity and affordability of housing in proximity to places of employment, recreation and commercial development, and the integration of all income and age groups;
    c. to provide mobility through transportation choices including improved public transportation and reduced automobile dependency;
    d. to coordinate between state and local government and intermunicipal and regional planning;
    e. to participate in community based planning and collaboration;
    f. to ensure predictability in building and land use codes; and
    g. to promote sustainability by strengthening existing and creating new communities which reduce greenhouse gas emissions and do not compromise the needs of future generations, by among other means encouraging broad-based public involvement in developing and implementing a community plan and ensuring the governance structure is adequate to sustain its implementation.[9]

By enacting smart growth criteria for state infrastructure investments, the bill establishes a preferred pattern of growth.[10]

The Act mandates implementation procedures to support the requirement that infrastructure decisions be consistent with the smart growth criteria. Before making any commitment to construct or finance any covered project, the state agency must prepare a written "smart growth impact statement" attesting that the project, "to the extent practicable," meets the criteria.[11] If meeting the criteria is deemed impracticable, the agency must prepare a "statement of justification" to explain its determination.[12]

The requirement for a smart growth impact statement is similar to the SEQRA mandate for a detailed environmental impact statement to assist the agency in avoiding or minimizing significant adverse impacts. [13] Modeling the smart growth procedure on SEQRA reflects the increasingly central role of environmental impact review in administration of environmental issues, particularly the regulation of land development. However, the Act contains a critical difference: unlike SEQRA, the Act pointedly denies private parties the right to petition the courts to review agency determinations of consistency with smart growth criteria or any other requirement of the Act.[14] This provision is a notable exception from the general availability of judicial review of agency determinations, a common provision of state and federal administrative law[15] and an important component of environmental advocacy by affected individuals and businesses.

The proscription of judicial review, at least of petition by private parties, removes virtually all outside enforcement of the Act, and thereby consigns compliance to the diligence and conscience of the subject agencies. The Act requires each agency to appoint a "smart growth advisory committee" to advise it on compliance with the smart growth criteria.[16] The Act requires the advisory committees to solicit input from and consult with representatives of affected communities and "give consideration to the local and environmental interests affected by the activities of the agency or projects planned, approved or financed through such agency."[17]

The agencies covered by the Act are still in the process of appointing their advisory committees and crafting their implementation procedures, and there have been few decisions implementing the Act to date. Accordingly, there is little indication of the strictness with which the agencies will interpret the smart growth criteria and the consistency requirement. Notably, during his 2010 election campaign, New York Governor Andrew Cuomo pledged to implement the Act.[18] It remains to be seen how the agency advisory committees will instill the legislature's vision of smart growth as a basis for agency infrastructure investments, or if the lack of judicial review will allow for uneven agency implementation of the criteria.

A greater concern is the limited scope of the Act in reducing sprawl. Decades of infrastructure investments by government at all levels, particularly the construction and expansion of highways, have already provided the template for automobile based development into the foreseeable future. Moreover, with the infrastructure already in place, most controversies over sprawl occur at the municipal level, where local agencies have primary authority over growth patterns and individual projects, pursuant to their planning and zoning authority. As a result, even diligent implementation of the Act by state officials is unlikely, by itself, to reverse the prevalence of sprawl in the state's land use. Further state effort to guide development patterns will likely be necessary to realize the new legislative policy supporting smart growth.

III. DEC SEQRA Dialog Recommendations

In 2010, DEC Region 3 conducted a prominent public dialog with developers, environmental advocates, and other interested parties to review strategies to streamline the SEQRA process without compromising the environment or the opportunity of the public to participate (the "Dialog").[19] The Dialog arose at the request of the then-DEC commissioner Pete Grannis, prompted by concerns from developers that the review process for proposed real estate projects was too lengthy, uncertain, and expensive.

In theory, SEQRA is an anomalous target for reforming the land development review process. SEQRA applies to all state and local government decision-making that may have an adverse impact on the human environment or natural ecosystems. SEQRA is utilized by all state and local agencies and authorities in their program planning, promulgation of regulations, funding and undertaking their own projects such as road or building construction or condemnation of land. At its core, it provides a detailed framework for review of prospective environmental impact, to ensure that the agency is aware of the potential for such impact and analyzes this potential.[20]

SEQRA review provides the agency with the information necessary to determine whether there may be significant adverse impacts, to mitigate such impacts where they exist, and to deny the proposal or consider alternatives if it is not possible to reduce the impacts to an acceptable level. Yet, in the Dialog, the developers' primary complaint did not concern these "substantive" attributes of SEQRA, which can require changes to, or disapproval of, their proposed projects. Instead, the focus of their concern was the detailed procedures which agencies apply to formalize their review of environmental impact.

The SEQRA review procedures may seem more onerous to proponents of land development than other types of proposals because of the dearth of substantive restrictions governing sprawl. Many other areas of environmental review are governed by detailed codes specifying performance standards, and in some instances prescribing the methods and practices to be used, to protect the environment.

Zoning codes contain dozens of pages of specific criteria for development projects, including density requirements, limitations on uses, setbacks, height restrictions and numerous other standards. But sprawl and other areas of environmental concern are typically outside these specifications. As a result, developers commonly propose projects which comply with zoning codes but contribute to sprawl and violate many or all of the smart growth standards now recognized by the state. When this happens, the public often demands that the SEQRA review include analysis of one or more potentially significant environmental impacts which may not be addressed by any substantive regulation. In effect, the SEQRA review becomes the substitute for standards governing the location of development and the impact of sprawl.

Substantive concerns commonly include increased vehicular traffic, loss of open space, increased erosion and runoff with multiple potential impact on ground and surface water, potential damage to habitats, wetlands, and natural resources, and increased municipal costs, particularly for schools in the event of housing projects.[21] They also may include the impact on aesthetics and community character, particularly where the development is sized or designed in conflict with hitherto rural surroundings.

Thus, in many circumstances especially common in land development, the prospect of degraded resources results in significant controversy regarding the sufficiency of the SEQRA review. Where the lead agency[22] requires analysis of contended issues, the process may take substantially longer and cost more than the applicant's expectations. These frustrations, resulting from the lack of competent planning and standards for growth, have led to calls for mandatory time frames for SEQRA determinations and in some circumstances, complaints about agency delay and inappropriate motives by public commenters.[23]

As a consequence, business and development advocates have periodically called for reform of SEQRA review. The last major revision to DEC's SEQRA regulations in 1995 resulted in few substantial changes in applicable procedures. A 2005 proposal by the New York State Senate to institute time frames on various SEQRA determina-

tions never emerged from committee.[24] The DEC Region 3 Dialog became the latest review of SEQRA prompted by development concerns.

The constraints DEC placed on the Dialog reflected the agency's reluctance to substantially modify SEQRA based on land use controversies. In his initial charge to the parties, then-Commissioner Grannis asked for recommendations that could be implemented in the Region "within a short time frame without legislative or regulatory changes."[25] The former commissioner's avoidance of statutory or regulatory amendments by itself ensured that the core procedures would remain intact. The request for promptness and the limitation to Region 3 implementation further guaranteed a relatively informal and modest approach to reform. And his charge not to compromise the protection of the environment or the opportunity for public participation[26] recognized the importance of SEQRA in avoiding the potential for adverse impacts, particularly where there are no substantive standards, and the agency's unwillingness to infringe on this function in streamlining the procedures.

In this context it is not surprising that the first set of Dialog recommendations recognized that deficiencies in land use planning were at the root of the complaints about the SEQRA process. As a result, it recommended reform of the planning framework. DEC explained:

> Land use planning and SEQRA have become increasingly interwoven in recent years. While intended to be complementary activities, each activity is distinctly different. Local government land use planning (legally termed "comprehensive planning") is by definition a proactive, analytical effort designed to set public policy and to guide implementation tools such as zoning, subdivision regulations, capital financing and others. The best plans are also consensus-based and positive in policy. In New York State such planning is also generally non-mandatory (some basic procedures such a public hearing and compliance with SEQR are required IF a locality chooses to complete and adopt a "plan").
>
> Environmental assessment on the other hand is also analytical but is reactive triggered by a distinct, proactive action, be that a proposed plan, a rezoning, or one or more discretionary development permits. Such assessment is also rarely if ever voluntary but is mandatory as defined in State rules and regulations. As noted by some presenters, this assessment is also not about positive policy setting but about "proving negatives" that there will NOT be any significant, adverse environmental impact from certain proposed action.[27]

DEC's report also included statements from participants emphasizing the need for better land use planning, irrespective of any SEQRA reforms. One comment prominently quoted in DEC's Final Recommendations asserted:

> The problem isn't SEQRA, it's a lack of adequate investment, leadership, coordination and funding for local and regional land use planning…. SEQR is an inadequate substitute for good local and regional land use planning…. Until the state provides real guidance and support for comprehensive land use planning consistent with regional, state interests, then SEQR will continue to be an open ended replacement that includes inherent uncertainty.[28]

DEC did not include recommendations for any specific improvements in land use, zoning, or local environmental regulation, but instead listed a series of incentives and initiatives to be applied or emulated generally.[29]

A notable suggestion, repeated by several commenters, was the expanded use of Generic Environmental Impact Statements ("GEIS"). In essence, this would attempt to frontload the environmental review of land development by assessing cumulative impacts at the planning stage instead of during the reviews of individual projects.

Under SEQRA, GEISs are used to assess the expected generalized impacts of an agency's programmatic decision-making.[30] After a GEIS is prepared, the environmental review for individual projects, which are consistent with the GEIS, need only consider the projects' impacts which were not already considered in the GEIS.[31]

The expanded use of GEISs for land development, as contemplated by DEC and the commenters, would significantly alter current practice. GEISs for comprehensive plan and zoning revisions typically contain little analysis of the environmental impacts of the development they authorize. Often comprehensive plan amendments serve as their own GEISs.[32] As Orange County Planning Commissioner David Church, a member of DEC's Core Working Group, noted:

> GEISs are minimal, light documents designed more to complete the procedural requirements for non-site specific reviews. The[y] have little meaningful application when later implementation or site specific actions come on.[33]

SEQRA regulations allow GEISs to be general evaluations of the impacts of broadly applicable plans and regulations, when the site specific applications are not yet known.[34] GEISs similarly may identify one or more miti-

gation measures, without any plans to utilize them.[35] Unless the GEISs for comprehensive plans and zoning regulations refocus on the detailed impacts of development in particular parcels, such reviews cannot eliminate the need for individual studies.

A related problem is the tendency of most GEISs to assess the impact of land use amendments in comparison to the prior municipal plans and codes. For example, GEISs often report that proposed legislation will result in environmental benefit, because they either allow less development or improve the provisions for sensitive environmental resources. Indeed, such environmental benefit is often the purpose of the amendments, particularly in areas where environmental protection is popular (presumably including many of the municipalities where developers complain about delays in the SEQRA reviews of their projects). In contrast, the impacts of individual projects are measured against the physical state of the land prior to development (typically, open land), unless a project was previously approved on the site. As a result, whatever the merits of standard GEIS assessments of planning and zoning amendments, they do not comply with the public need and statutory mandate for review of the impact of development projects on the local environment.

Frontloading these analyses to a GEIS sufficient to reduce the need for, or scope of, a site-specific SEQRA review would demand a vastly increased commitment to land use planning and smart growth. Aside from the far greater expenditure for SEQRA review of the comprehensive plans and zoning codes, fundamental change to the planning process would be the likely result. The predicted impact would almost certainly engender demands from the public for a reduction in the scope of permitted growth, and for locating it in the areas of the municipality where it would do the least damage. Current plans and zoning codes authorize far more extensive development—sprawl over the vast majority, if not all of, the landscape—than would be acceptable to many communities. The costs of the SEQRA review would similarly encourage the municipal planners to specify and concentrate on the growth they advocate, and avoid counterproductive projects.

While the DEC Dialog contained several recommendations for expanding SEQRA education and coordination,[36] the failure of municipal planning and zoning to address the problems created by development has emerged as the fundamental shortcoming. With widespread opposition to the growth authorized by municipal plans and zoning codes, individual project reviews have grown more rigorous and lengthy. By failing to address sprawl—indeed, by creating plans and codes which authorize it—the current planning system dissatisfies both members of the public concerned about environmental preservation and developers seeking to create residential and commercial real estate.[37]

Conclusion

Sprawl development has resulted in substantial impacts and controversy throughout many areas of New York State, as well as other areas of the United States. Recent state legislation has recognized sprawl as a problem, and has directed state agencies to utilize their infrastructure expenditures to encourage better patterns of growth. However, with the majority of sprawl authorized by municipal boards, and substantial infrastructure already in place, the effectiveness of the Smart Growth Infrastructure Act in abating sprawl remains to be seen.

Public concern about sprawl at times results in increased rigor and length in the review of proposed projects. Developer dissatisfaction with these reviews has led to complaints about some practices of municipal boards in applying SEQRA. When DEC Region 3 conducted a Dialog on the use of SEQRA in land use reviews, the resulting report recommended improvements in municipal planning, in addition to modest reforms in SEQRA training and coordination. Changes in planning and zoning to specify smart growth, which is more desirable to host communities, could reduce both sprawl and lengthy project review.

Endnotes

1. For example, the New York State Department of State estimates that in upstate New York, "developed land increased 30% between 1982 and 1997, while the population increased just 2.6%." *Smart Growth*, NYSDOS Division of Local Government Services, available at smartgrowthny.org/lg_sg_final.pdf (last accessed July 11, 2011).
2. *See generally* Town L. Art. 16; Village L. Art 7.
3. SEQRA is codified in Article 8 of the Environmental Conservation Law, and its implementing regulations are in Part 617 of Title 6 of the New York Code of Rules and Regulations.
4. DEC Region 3 covers New York City's northern suburbs and exurbs including Ulster, Dutchess, Orange, Putnam, Rockland, Westchester and Sullivan Counties.
5. ECL §§ 6-0101–6-0111.
6. ECL § 6-0105; *see also*, S. Hoyt New York State Assembly Memorandum In Support of Legislation, Assembly Bill: A8011b, Assemblyman; S. Oppenheimer New York State Senate Introducer's Memorandum In Support S5560b (which justify the bill as necessary to target state infrastructure funding toward smart growth:

   > Sprawl is a problem that has exacerbated New York's financial crisis. The extension of infrastructure to areas that have traditionally been green fields have caused runaway expenditures and economic costs….
   >
   > [S]tate infrastructure funding decisions have supported settlement and land use patterns which necessitate expansive and expensive infrastructure resulting in new roadways, water supplies, sewer treatment facilities, utilities and other public facilities at great cost to the taxpayer and the ratepayer. With this pattern of dispersed development, public investment in existing infrastructure located in traditional main streets, downtown areas and established suburbs has been underutilized and those areas have suffered economically.

New York State needs to focus on smart spending that supports existing infrastructure and development in areas where it makes economic and environmental sense.

7. ECL § 6-0105.

8. ECL § 6-0103[2] (the Act defines "state infrastructure agency" as any of the following agencies: the department of environmental conservation, the department of transportation, the department of education, the department of health, the department of state, the state environmental facilities corporation, the state housing finance agency, the housing trust fund corporation, the dormitory authority, the thruway authority, the port authority of New York and New Jersey, the empire state development corporation, the New York state urban development corporation all other New York authorities, and any subsidiary or corporation with the same members or directors as any of the listed public benefit corporations).

9. ECL § 6-0107[2].

10. *See also* S8612, 214th N.Y. Leg Sess. § 1 (same as A7335-A, 214th N.Y. Leg Sess. § 1) (proposed ECL § 3-0317[1]) (proposed legislation in 2008 would have established many of the same criteria and generally required state agencies to consider smart growth principles in implementing state policies and programs and in reviewing applications. The bill passed both houses of the legislature but was vetoed by former governor David Paterson on September 25, 2008. The bill would have defined New York's "smart growth principles" as follows:

> a. public investment: to plan so as to account for and minimize the direct and indirect public costs of new development, including infrastructure costs such as transportation, sewers and wastewater treatment, water, schools, recreation, open space and other environmental impacts;
>
> b. economic development: to encourage redevelopment of existing community centers, and to encourage new development in areas where transportation, water and sewer infrastructure are readily available;
>
> c. conservation and restoration: to protect, preserve, enhance and restore the state's natural and historic resources, including agricultural land, forests, surface water and groundwater, waterfronts, recreation and open space, scenic areas, significant habitats, national and state heritage areas and regional greenways and significant historic and archaeological sites and to facilitate the adaption of such resources to climate change;
>
> d. partnerships: to establish intermunicipal and other intergovernmental partnerships to address development issues which transcend municipal boundaries, and which are best addressed by effective partnerships among levels of government, in order to increase efficient, planned, and cost-effective delivery of government services by, among other means, facilitating cooperative agreements among adjacent communities and to ensure within a regional context, the appropriate balance between development and open space protection;
>
> e. community livability: to strengthen communities' sense of place by encouraging communities to adopt development and redevelopment strategies which build on each community's vision for its future, including integration of all income and age groups, mixed land uses and compact development, transportation choices, downtown revitalization, open space protection, brownfield redevelopment, enhanced beauty in public spaces, and diverse and affordable housing in proximity to places of employment, recreation and commercial development;
>
> f. transportation: to provide transportation choices, including increasing public transit, pedestrian and bicycle and other choices, in order to improve health and quality of life, reduce automobile dependency, traffic congestion and automobile pollution and promote energy efficiency;
>
> g. consistency: to ensure predictability in building and land use codes; and
>
> h. sustainability: to strengthen existing and create new communities which reduce greenhouse gas emissions and do not compromise the needs of future generations, by among other means encouraging broad based public involvement in developing and implementing a community plan and ensuring the governance structure is adequate to sustain its implementation.

11. ECL § 6-0107[3] (the Act provides:

> Before making any commitment, including entering into an agreement or incurring any indebtedness for the purpose of acquiring, constructing, or financing any project covered by the provisions of this article, the chief executive officer of a state infrastructure agency shall attest in a written smart growth impact statement that the project, to the extent practicable, meets the relevant criteria set forth in subdivision two of this section, unless in any respect the project does not meet such criteria or compliance is considered to be impracticable, which shall be detailed in a statement of justification.

12. *Id.*

13. ECL § 8-0109.

14. ECL § 6-0111.

15. *See, e.g.*, CPLR 7801, 7803; 5 USC § 702.

16. ECL § 6-0109 Smart growth advisory committees are described by the Act as follows:

> The chief executive officer of each state infrastructure agency shall create a smart growth advisory committee to advise the agency regarding the agencies' policies, programs and projects with regard to their compliance with the state smart growth public infrastructure criteria. Such committees shall consist of appropriate agency personnel designated by the chief executive officer to conduct the evaluation required by section 6-0107 of this article. Such committees shall solicit input from and consult with various representatives of affected communities and organizations within those communities, and shall give consideration to the local and environmental interests affected by the activities of the agency or projects planned, approved or financed through such agency.

17. *Id.*

18. *See* Andrew Cuomo, *The New NY Agenda: A Cleaner, Greener NY*, 8th in a Series, at 22–23, October 2010, available at d2srrmjar534jf.cloudfront.net/6/d4/3/1266/andrew_cuomo_cleaner_greener_ny.pdf (last accessed July 11, 2011).

19. A description of the Dialog and the recommendations arising from it are in DEC's report, *State Environmental Quality Review (SEQR) Dialog, NYS Hudson Valley Catskill Region (DEC Region 3) SEQR Process Final Report And Recommendations* June 23, 2010 ("*Final Report*") at 3, 5. The Final Report, although dated June 23, 2010, was released in December, 2010. To assist in coordinating the Dialog, DEC recruited two prominent SEQRA stakeholders, Jonathan Drapkin, President of Mid-Hudson Pattern for Progress which advocates economic growth, and Ned Sullivan, President of Scenic Hudson, a conservation group. The group held three public meetings, on November 20, December 4 and December

18, 2009, where it heard from chosen speakers, and reviewed extensive written comment which it published in an appendix to its recommendations.

20. Standard SEQRA procedures include an environmental assessment form, a declaration of significance, and for projects with potentially significant impacts an environmental impact statement ("EIS"). Where an EIS is required, the process often includes scoping, and a public hearing on a draft EIS, and it must include an opportunity to comment on the draft EIS, a response to those comments, and publication of a final EIS and a statement of environmental findings, among other procedures. Where significant new information arises, the lead agency may require a supplemental EIS to address the environmental impacts implicated in the new information. *See generally* 6 NYCRR §§ 617.6, 617.7, 617.8, 617.9, 617.11.

21. *See* ECL § 8-0109[2](d), (f).

22. Under the SEQRA regulations, the lead agency is the agency that coordinates the review of environmental impact and makes the critical determination whether to require an environmental impact statement, when more than one agency has approval authority over the proposal. *See* 6 NYCRR §§ 617.6(b), 617.7.

23. *See* State Environmental Quality Review (SEQR) Dialog, NYS Hudson Valley Catskill Region (DEC Region 3), *A regional effort to identify opportunities to improve the SEQR process*, Appendix B at 115 (An anonymous commenter to DEC summarized this point of view as follows:

> The main problem is that it [SEQRA] is being misused… As we know, most EIS's take too much time, over-study issues that are not vital, and do their best to gloss over issues that are. In addition, the process is generally adversarial. A proponent prepares the EIS, which the lead agency accepts when it (finally) deems it complete, and the public, in order to attack the proposal itself, attacks the EIS. The lead agency acts as referee, when its role under SEQR is actually to evaluate and balance the competing economic, environmental and social forces of any proposal.)

24. *See* 2005 SB 5411. Among other things, the bill would have required a determination within sixty days of the submittal of a proposal whether an environmental impact statement would be needed; limited the scoping process to a maximum of sixty days after the receipt of the draft scope; required a determination whether a draft environmental impact was complete within ninety days; limited the public review of a draft environmental impact statement, including public hearings and written comments, to ninety days; and required a final environmental impact statement to be completed within sixty days. *Id.* at §§ 3-4. It would also have required the lead agency and the applicant to agree on the lead agency's consultants, and established an environmental review board with jurisdiction to adjudicate complaints against agency administration of the SEQRA procedures. *Id.* at §§ 1, 5, 9. The bill was not voted out of committee.

25. State Environmental Quality Review (SEQR) Dialog, NYS Hudson Valley Catskill Region (DEC Region 3) SEQR Process Final Report And Recommendations June 23, 2010 ("Final Report") (DEC labeled the dialog an effort to "streamline[e] SEQRA without compromising environmental protection or public participation" and to "improve the State Environmental Quality Review (SEQR) review process without compromising environmental protection or opportunities for stakeholder input.").

26. *Final Report* at 3.

27. *Id.* at 16.

28. *Id.* at 14 (quote by Mark Castiglione, AICP and Acting Executive Director, Hudson Valley Greenway).

29. *Final Report* at 14–15. The recommended programs included the Shawangunk Ridge "Green Assets" initiative and Local Waterfront Revitalization Plans (LWRPs) under the state Coastal Zone Management Program. *See id* at 15. The Shawangunk Ridge "Green Assets" initiative is an intermunicipal habitat protection strategy outlined in *Green Assets: Planning for People and Nature Along the Shawangunk Ridge*, Shawangunk Ridge Biodiversity Partnership, 2006.

30. *See* 6 NYCRR § 617.10(a)(4) (authorizing GEISs for "an entire program or plan having wide application or restricting the range of future alternative policies or projects, including new or significant changes to existing land use plans, development plans, zoning regulations or agency comprehensive resource management plans").

31. Under the DEC SEQRA regulations, a specific subsequent action does not require any further SEQRA review if it was fully considered in a GEIS and the findings statement. 6 NYCRR § 617.10(d)(1). If the project was not fully addressed in the GEIS then it will require a new declaration of significance, and either a supplemental environmental impact statement if its impacts are potentially significant or a negative declaration if they are not. 6 NYCRR § 617.10(d)(3), (4). *See also* N.Y. Gen City Law § 28-a(9), Town Law § 272-a(8), Village Law § 7-722(8) (exempting from SEQRA review "subsequent site specific actions that are in conformance with the conditions and thresholds established for such actions in…[a] generic environmental impact statement and its findings").

32. *See* N.Y. Gen City Law § 28-a(9), Town Law § 272-a(8), Village Law § 7-722(8) (authorizing comprehensive plans to serve as their own environmental impact reviews).

33. *Final Report*, Appendix B at 21; *see also Final Report*, Appendix C at 40 (David Porter similarly noted:

> Quite often,…[GEISs] are so broad in nature or so outdated that site-specific detailed review, using the latest methodology will still be needed. GEISs are helpful but should not be assumed to automatically provide "shovel-ready" green lights for sites falling later within their area scopes.).

34. *See, e.g.*, 6 NYCRR § 617.10(a).

35. *See, e.g.*, *Eadie v. N. Greenbush Town Bd.*, 7 N.Y.3d 306, 318-319 (2006).

36. *See generally*, *Final Report* at 18–30 (Among other things, the dialog recommended expanding education and training of municipal officials conducting SEQRA reviews, producing regional SEQR guidance, increasing the availability of DEC staff to provide SEQR Advice and assistance and greater use of mediation and dialog among stakeholders.)

37. Developer dissatisfaction with the review process for commercial and residential projects has resulted in proposals for weakening the regulatory system, in addition to the SEQRA Dialog. *See e.g.*, 2011 Assembly bill 347A / Senate bill 4554A which would significantly restrict the ability of municipalities to amend their zoning regulations in response to proposed land development projects in Dutchess, Orange, Putnam, Rockland and Westchester Counties in the Hudson Valley.

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2011 Update on Laws Impacting Green Buildings in New York[1]

By Christopher G. Rizzo

States and municipalities are steadily revising their building, energy, and zoning codes to require more sustainable building practices and development patterns. While certified green buildings constitute only a tiny fraction of the over 1,000,000 homes and 100,000 commercial buildings constructed each year in the United States, it is increasingly important for public officials, real estate professionals, and attorneys to understand this subject.[2] This article outlines some of the most recent developments in laws applicable to green buildings and sustainable land-use planning, with a particular focus on issues relevant for New Yorkers. It also recommends several leading resources for learning more about the topic.

I. Why Green Building Laws Are Important

Green building laws are essential to solving the nation's core environmental problems, including climate change. According to the U.S. Environmental Protection Agency, buildings are responsible for 38% of the carbon dioxide emissions in the United States.[3] In cities like New York, where today there are few factories and there is reduced dependence on automobiles, buildings are responsible for up to 80% of greenhouse gas emissions.[4] Buildings also use 39% of energy in the United States through electricity demands and onsite heating and cooling.[5]

Buildings' impacts on the environment are not limited, however, to energy and electricity demand. A 2009 U.S. EPA white paper further quantified the environmental impact of existing patterns of construction, landscaping, and sprawl. For example:

- Between 1950 and 2000, the U.S. population doubled but water usage tripled.
- Thirty percent of American's daily water use is devoted to landscaping and the average U.S. lawn consumes more water than local rainfall can deliver.
- Between 1945 and 2002, the amount of urbanized land area increased at twice the rate of the U.S. population—underscoring the impact that sprawl is having on the environment.
- 90% of the average American's time is spent indoors, yet one in fifteen U.S. homes has unsafe radon levels and indoor air quality is, on average, worse than outdoor air quality.[6]

These are just a select few of the statistics presented by the U.S. EPA in support of green building laws.[7]

Although it is widely believed that green building construction is substantially more costly, many studies show that careful planning can minimize or avoid additional construction costs.[8] Lower energy bills, government financial incentives, and premium sales and rents can help owners of green buildings recoup any excess costs.[9] Developing effective state and local green building laws can level the playing field and reduce regulatory uncertainty about what is expected from the private sector, both of which tend to control costs in the long term.

Finally, while there have been a handful of legal challenges to green building laws in the past few years, states and municipalities have continued to adopt green building standards at a rapid pace. New York and its municipalities have moved far slower, but that is likely to change dramatically in the next decade as the state finds ways to meet the Governor's Executive Order 24 of 2009, which directs the state to reduce its greenhouse gas emissions to 80% below 1990 levels by 2050.[10] This article outlines some guidelines and information to help this process.

II. Green Buildings in a Nutshell

Green buildings typically have some or all of the following characteristics: reduced energy use and greater energy efficiency; improved water efficiency; water-efficient landscaping; sustainable and non-toxic building materials; waste reduction and use of recycled building products; improved indoor air quality; and sustainable and transit-oriented locations.[11]

III. Green-Building Certification Programs

There are several prominent green building certification programs available in the United States. The most credible programs address the issues set forth above and require third-party verification of compliance. Four of the most notable include the following:

A. LEED

The U.S. Green Building Council's (USGBC) Leadership in Energy and Environmental Design (LEED®)[12] is the most widely recognized green building certification program. It has indisputably set the standard for green buildings in the United States. This author's recent search showed about 268 LEED-certified buildings in New York State, including about 125 LEED-certified buildings in New York City and 7 in Albany.[13] There are thousands of certified buildings nationwide and tens of thousands registered to achieve certification.

USGBC offers certifications for new construction (including the structure as a whole or, alternatively, the building's "core and shell"); existing buildings (formerly called "operations and maintenance"); commercial interiors; retail spaces; and schools. In 2010, the USGBC

launched its neighborhood design certification, which is discussed further below.

To earn LEED certification for a building, an applicant must meet certain prerequisites, as well as earn a specified number of discretionary points in several categories, which include:

- Sustainable sites (such as redevelopment of brownfields[14] and location near public transportation)
- Water efficiency
- Energy and atmosphere
- Materials and resources (using recycled building products and recycling discarded construction / demolition materials)
- Indoor air quality
- Design innovation (rewarding use of new technologies to reduce energy usage or achieve other forms of sustainability)

Depending on the number of points earned in the above categories, the USGBC will award the following certifications: *certified, silver, gold* or *platinum*.[15]

B. ENERGY STAR

ENERGY STAR is a certification program of the U.S. Environmental Protection Agency (EPA) and U.S. Department of Energy (DOE).[16] According to the program website, "to earn the ENERGY STAR, a home must meet strict guidelines for energy efficiency set by the U.S. Environmental Protection Agency. These homes are at least 15% more energy efficient than homes built to the 2004 International Residential Code (IRC), and include additional energy-saving features that typically make them 20–30% more efficient than standard homes."[17] The EPA's updated guidelines for ENERGY STAR took effect on January 1, 2011 and will require homes to be 20% more efficient than the applicable model code, discussed below.

Compliance is largely overseen by the private sector. Builders can register to become qualified to construct ENERGY STAR homes, which are certified by professional ENERGY STAR "raters," who must also register with the U.S. EPA. There are over one million ENERGY STAR-qualified homes built to date in the United States (almost 30,000 in EPA Region 2).[18]

C. Green Globes

Green Globes originated in Canada and is similar to LEED.[19] The Green Building Initiative, a Portland, Oregon-based nonprofit, operates the system in the United States.[20] Green Globes' streamlined certification process may be slightly more flexible, user-friendly, and cost-effective than LEED. Some high-profile buildings have chosen Green Globes, including Bill Clinton's presidential library in Little Rock. Overall, however, there are far fewer Green Globes-certified buildings in the United States than LEED or ENERGY STAR-certified buildings.

D. National Green Building Standard

The National Association of Homebuilders (NAHB), a trade organization that represents home builders, has its own standard, the *National Green Building Standard*.[21] NAHB developed this standard in 2008 with the International Codes Council, whose own model code is discussed below. The National Green Building Standard focuses on single- and multi-family residential projects and is somewhat more demanding than ENERGY STAR, but less demanding than LEED or Green Globes.

The above four programs are not the only certification programs in the United States for green buildings. There are dozens, including some that are state-specific, some focused on niche markets like affordable housing, and some sponsored by local environmental agencies or public utilities.[22]

IV. Public Adoption of Third-Party Standards[23]

Dozens of U.S. municipalities, mostly large cities, now require large new buildings to comply with LEED or similar third-party certifications.[24] For example:

- **Boston**: As of 2007, all projects over 50,000 square feet must meet the LEED certified level.[25]
- **Dallas**: As of October 1, 2009, new construction with 50,000 or more square feet of floor area must be capable of earning about half the points needed to be LEED "certified." As of October 1, 2011, new construction (except 1-2 family homes) must be capable of meeting LEED "certified" level or a similar level of certification under "Green Built North Texas" or other certification programs.[26]
- **San Francisco**: As of January 1, 2010, building permit applications for large commercial and residential buildings must submit documentation capable of supporting a LEED Silver certification or similar GreenPoint certification (a local green building program). As of January 1, 2012, large commercial buildings must submit documentation capable of supporting a LEED Gold rating.[27]

There are few municipalities in New York State that require compliance with LEED by private developers. A handful of municipalities on Long Island require compliance with ENERGY STAR. For more information on municipalities with mandatory green building laws, check out Columbia Law School's useful database of municipal green building laws in New York and elsewhere.[28]

Babylon, New York, is one of the few N.Y. municipalities to require private developers to comply with LEED.[29] The town has enthusiastically embraced green buildings and released the following statement about its program

in 2010: "In 2006, the Town of Babylon became the first municipality in the nation to require that all commercial and industrial construction over 4,000 square feet receive LEED certification. There are currently 34 registered or certified LEED projects in the town. In addition, the Town's Wyandanch Rising community development initiative is expected to be the first non-pilot LEED for Neighborhood Development project in the region, and was recently awarded a U.S. Green Building Council Affordable Green Neighborhoods Grant."[30]

Its approach, however, is considerably stricter than other municipalities in the United States. The 2006 regulation requires, in part, the following:

> *Town Code § 89-84*
>
> *The Town of Babylon hereby adopts, in principle, the U.S. Green Building Council's (USGBC) Leadership in Energy and Environmental Design for New Construction (LEED-NC) Rating System, Version 2.2, and, further, automatically adopts any future versions promulgated by the USGBC. For the first six months after adopting an amended version, applicants may apply under the preexisting version.*
>
> *Town Code* § 89-85
>
> *This article shall be applicable to all new construction of a commercial building, office building, industrial building, multiple residence or senior citizen multiple residence equal to or greater than 4,000 square feet, and the provisions of this article are mandatory for any application received by the Town one year after its effective date.*
>
> *Town Code* § 89-86
>
> *A. Every applicant who files a building permit application for construction of a new commercial building, industrial building, office building, multiple residence or senior citizen multiple residence shall provide a completed LEED-NC checklist or the local variant of a green building project checklist acceptable to the Commissioner of Planning and Development or his/her designee.*
>
> *B. Every applicant shall pay a fee of $0.03 per square foot of the project, not to exceed $15,000, to the Town of Babylon Green Building Fund. An applicant who achieves LEED-certified status shall have this fee refunded.*
>
> *C. No building permit shall be issued unless the LEED-NC review documentation or the local variant of green building project documentation demonstrates that the proposed building shall attain LEED-certification or the local variant acceptable to the Building Inspector.*

The above code is distinguishable from most municipal green building codes for at least three reasons. First, it applies to buildings of 4,000 square feet or greater, a lower threshold than most municipalities. Second, it prospectively adopts future LEED certification versions. Most towns require the town board to ratify future LEED versions. Third, it affirmatively requires LEED certification.[31] Most green-building laws require compliance with LEED standards only.

V. Incentives

This article does not detail the incentives that municipalities award for green building construction. The best resource for this information is the U.S. Department of Energy-funded database located at ww.dsireusa.org. Common municipal incentives for certified green buildings include increases in permissible building size, abated property taxes, reduced permitting fees and preferential treatment in the permitting process.

New York State and its municipalities do not offer as many incentives as other cities and states, but a few are notable. The New York State Energy Research and Development Authority offers builders and owners various grants related to green construction, energy efficiency, and renewable energy. The New York State Department of Environmental Conservation has $25,000,000 in tax credits available for green buildings (but is not accepting applications while it updates the governing regulations).[32] New York City offers a property tax credit for green roofs.[33]

Nationally, as green building practices become the norm and states struggle with historic budget deficits, these kinds of incentives are likely to disappear and be replaced by mandatory sustainability requirements.

VI. Amending Public Codes to Incorporate Green Building Standards

As an alternative to relying on third-party certification standards, some states and municipalities are instead amending their codes to incorporate green building practices directly. In the case of California, discussed below, the stated purpose of these efforts is to allow builders and municipalities to avoid relying exclusively on costly third-party certification programs.

Model Codes. States typically look to two nonprofit code-making organizations in developing their own building and energy codes, the International Codes Council (ICC) and the American Society of Heating Refrigeration and Air-Conditioning Engineers (ASHRAE). Federal energy law encourages state residential energy codes to comply with the ICC energy code and requires state commercial energy codes to comply with the ASHRAE energy code.[34] ICC and ASHRAE update their codes every few years with substantial public input.

The model codes are steadily including greater sustainability requirements. For example, a consortium of progressive states and localities called the *Energy Efficient Codes Coalition* has, with some success, lobbied the ICC to increase the energy efficiency requirements of its model code by 30%.[35] Additionally, some states like California, Oregon, and Washington have bypassed the model codes altogether and developed more demanding state energy codes of their own.

Recently, ICC and ASHRAE have gotten into the green building code business. In 2009, the ICC developed its own "International Green Construction Code"; ICC issued Version 2 in late 2010.[36] On a parallel track, in early 2010, ASHRAE released its Standard 189.1, *Standard for the Design of High Performance, Green Buildings Except Low-Rise Residential Buildings.*[37] These model codes are likely to provide public alternatives for states and cities that desire to green their building codes without relying exclusively on standards developed by USGBC and other independent organizations.

New York City. Rather than require compliance with LEED or similar standards, New York City has methodically incorporated new sustainability requirements into its local energy and building codes as part of the "Greener, Greater Buildings Plan for New York City" launched by Mayor Michael Bloomberg in 2009. Most significantly, Local Law 85 of 2009 created a New York City Energy Efficiency Code (NYCEEC), which is mandatory for new buildings and renovations as of July 1, 2010. This law imposes somewhat stricter standards than the Energy Conservation Construction Code of New York State, which applies statewide unless stricter local codes are in place.

The most notable thing about the energy efficiency laws passed by the City in 2009 and 2010 is that they challenge the presumption that existing buildings are grandfathered under newer codes. The City's energy efficiency laws change that presumption by requiring certain owners to upgrade their properties as the energy code evolves. Some notable laws include the following:

- Local Law 85 of 2009 requires all substantive renovations to comply with the NYCEEC. Most energy codes, including the State's, exempt renovations that alter less than 50% of a building's energy and HVAC systems. The NYCEEC eliminates that presumption. Certain routine maintenance, minor upgrades, and emergency work are still exempted.
- Local Law 88 of 2009 requires buildings of 50,000 square feet or more to upgrade their lighting systems by 2025 in compliance with the code requirements in place at the time of upgrade. It also requires owners to install sub-meters in tenant spaces of 10,000 square feet or more.
- Local Law 84 of 2009 requires owners of buildings of 50,000 square feet or greater to benchmark their electricity and water use and file reports annually beginning on May 1, 2011. These reports will present usage data, allow comparisons from year-to-year and permit comparisons between buildings. The data will be publicly available.
- Local Law 87 of 2009 requires owners of buildings of 50,000 square feet or greater to conduct energy audits and retrofits, with staggered initial compliance dates between 2013 and 2022. (The specific compliance date will depend on the building's location.) Audits and retrofits must be completed every 10 years after the first compliance date. Requirements may not include compliance with the new NYCEEC. But they will include calibration of electric and HVAC equipment to ensure operating efficiency, elimination of systems leaks and similar good housekeeping requirements.
- Local Law 48 of 2010, which took effect December 28, 2010, amends the energy code in part by requiring automatic lighting sensors and controls in commercial buildings.
- Local Law 55 of 2010 encourages the use of drinking fountains as opposed to bottled water by removing a provision in the plumbing code that permits bottled water vending machines to be used as substitutes for required drinking fountains in certain occupancies. Under the current law, in occupancies other than restaurants where drinking fountains are required, up to 50% of the required drinking fountains may be substituted with bottled water dispensers. As of July 1, 2012, this substitution will no longer be permitted.

California. California's Global Warming Solutions Act became law on January 1, 2007, and requires various actions to reduce greenhouse gas emissions in the state to 1990 levels by 2020, reportedly a 25% reduction.[38] This law has required California lawmakers to think creatively about ways to reduce greenhouse gas emissions in all economic sectors. One of the state's most notable efforts is the 2010 California Green Building Code, known as "Cal Green."[39]

Cal Green applies statewide to all new construction beginning on January 1, 2011. This represents a major change for most residents since only 10% of municipalities had green building requirements prior to Cal Green. While the Commission predicts an increase in cost of new homes by $1,500, energy and water savings are likely to make up those costs over time--especially since California has suffered from chronic energy and water shortages in the past.

Some of the notable requirements include the following:

- *mandatory* and *voluntary* paths to compliance

- mandatory reduction of water consumption of 20%; voluntary reduction of 30-40%
- mandatory diversion of 50% or more of C&D materials from landfills and towards recycling; more for voluntary paths
- low-pollution building materials and furnishings (e.g., paints, carpet, vinyl flooring, manufactured wood)
- separate water metering for residences (to encourage conservation and allow landlords to pass through water bills to tenants)
- mandatory inspections of nonresidential buildings for compliance with energy efficiency requirements
- mandatory stormwater controls
- mandatory landscaping irrigation standards

VII. Renewable Energy Considerations

On-site electricity generation can be an important component of a green building and some economists predict that residential demand for solar panels will rise dramatically over the next few years as manufacturers compete for business, reduce prices and improve the technology. But since many local building and zoning codes are silent about solar panels, cogeneration equipment and windmills, municipalities may be ill-equipped to process related building permit applications. Updating local codes to deal with renewable energy and on-site generation is, therefore, critical in New York.

Below are some considerations for municipalities in regulating on-site solar panels, which is the form of onsite electricity generation that is likely to be the most common in New York State.[40] For a fuller analysis of the issue, look at Judith Wallace's article in the March 2010 edition of *American City and County*.[41]

- Zoning codes should specify in which districts solar energy is a permitted use. The Town of Ithaca zoning code, for example, provides that rooftop, building-mounted, ground-mounted, and free-standing solar collectors are permitted in all zoning districts, subject to setback requirements and height limits.[42]
- Zoning codes should specify whether solar panels must be installed within building height limits, whether they are mounted on rooftops or on the ground. The Town of Oyster Bay, New York, for example, lists solar panels along with antennas, chimneys, cupolas, and the like in its height limit exception, allowing an extra 10 feet in residential districts and 15 feet in nonresidential districts, and excludes solar panels from the limit of 10% roof coverage that applies to other height exceptions.[43]
- Zoning codes should also specify whether solar collectors may be located in front and side yards, and should include property-line setback requirements.
- When a municipality has operational requirements, specifying them in the zoning code provides guidance that will help developers design projects likely to gain prompt approval. For example, the Town of Ithaca, New York, requires installation by qualified solar installers, inspection of electrical and public utility grid connections, storage of solar batteries in secure containers, and removal of a solar collector that has been non-operational for 12 months.[44]
- Many states have enacted statutes restricting shading of solar panels and invalidating restrictive homeowners' association and condominium rules that would prohibit solar energy. California's statute[45] is well known, and similar state statutes have been enacted in Hawaii, New Mexico, and New Jersey. Municipalities can also consider the impact of shading on existing or even future solar projects. For example, the Village of Massena, New York prohibits buildings and landscaping that shade solar energy systems in existence on adjacent lots.[46] The Solar Board for Codes and Standards, a nonprofit organization funded by the U.S. Department of Energy, has developed a model solar access statute.[47]
- Expedited permitting: Municipalities typically review solar energy installations in connection with either building or electrical permits and inspections. For small residential projects, there have been numerous models promoted for standardized and expedited review.[48] Similarly, for larger solar projects, any degree to which building and electrical permit application requirements can be clarified and streamlined will reduce costs and allow developers to anticipate project timelines more effectively.

Aesthetic considerations are likely to be one of the most controversial issues for clean energy, particularly in landmark and scenic districts. In February 2010, a New York City task force convened by the local chapter of USGBC issued a comprehensive set of recommendations for making New York City's codes friendlier for green buildings.[49] To promote solar power, that report recommended allowing solar panels to be visible from the street in historic districts without review by the City's Landmarks Preservation Commission. That seems exceedingly unlikely given the control that the Commission exercises over other minor property improvements on landmark sites. For a discussion of tips for greening landmark buildings, look at John Weiss's article on the subject in the Spring 2009 edition of *The New York Environmental Lawyer*.

VIII. Liability Issues for the Private Sector: Greenwashing

Green construction obviously carries with it new risks. But there are very few reported cases concerning green building matters. This is at odds with what many attorneys were predicting a few years ago—a boom in litigation among owners, architects, builders, tenants, and certification programs (like LEED) over green building projects gone wrong.

The most tangible risk for sellers of green building products and green buildings are federal and state truth-in-advertising laws, which will govern the explosion in marketing claims about the environmental attributes of buildings and building products.

The Federal Trade Commission ("FTC") regulates truth in advertising.[50] It first published its guide for "green" marketing claims in 1992 and updated it in 1998.[51] The guide generally requires green claims to be truthful, specific, and verifiable.

Since 1998, there has been an explosion in the number of products bearing sustainability claims, including green building products. The FTC, therefore, began updating its guide in 2007. On October 6, 2010, it published a new draft. Not surprisingly, the guide specifically references green building products and could conceivably apply to green building certifications (e.g., LEED). During the update process the FTC wrote:

> Since the Green Guides were last reviewed in 1998, green claims have increased dramatically, and this trend has been particularly prevalent in the marketing of green building and textiles. In the textile arena, there has been an increase in the use of environmental claims to sell products made from organic cotton and bamboo fiber. In the building market, green claims are prevalent for a wide range of building products, including flooring, carpeting, paint, wallpaper, insulation, and windows. In addition, builders are making claims that the buildings or homes they construct are green. There also has been an increase in the number of environmental seals and third-party certification programs purporting to verify the positive environment impact of textiles, building materials, and buildings.[52]

The FTC intends to finalize the revised guidance in late 2011. Regardless of its final form, a key consideration for makers of green building products will be use of product certifications and endorsements that come from genuinely independent third-parties. The guidance states: "It is deceptive to misrepresent, directly or by implication, that a product, package, or service has been endorsed or certified by an independent third-party."[53]

While there has not been much litigation in the United States regarding fraud and green building products, at least one recent lawsuit is notable. On January 6, 2010, a California federal court denied S.C. Johnson & Son's motion to dismiss a private lawsuit alleging false advertising in the case *Koh v. S.C. Johnson & Son, Inc.* Johnson is the manufacturer of *Windex* and related cleaning products. In 2008, the company launched a line of allegedly environmental cleaning products on which it placed its *Greenlist* label. The plaintiff alleges that the company designed this label to look like a third-party certification. In fact, as defendant admitted, it is defendant's own in-house certification. The court concluded that "plaintiff's allegations are sufficient to create a question of fact as to whether the *Greenlist* label is deceptive."[54]

The reasoning of *Koh* is applicable to green building products and green building certifications, particularly in light of the FTC's 2010 updated green marketing guidelines. A recent complaint filed in New York underscores this point. In *Gifford v. U.S. Green Building Council*, the plaintiff, the owner of a home heating company, alleges that USGBC and its top executives (named individually) committed fraud through the LEED green building certification system.[55] In the case, Mr. Gifford seeks class certification on behalf of all persons who have paid for LEED certification, building professionals who have been harmed by LEED competition, and taxpayers that have paid for LEED certification of public buildings.

The allegations include USGBC's alleged violations of the Sherman Anti-Trust Act, which restricts creation of monopolies; the Lanham Act, which requires truth in advertising; and similar provisions of New York law.[56] The gist of Gifford's complaint is that LEED is a scam; while the USGBC is earning millions each year from building and professional certifications, its buildings allegedly do not operate more efficiently than traditional buildings.

IX. Liability Issues for the Public Sector: Preemption and Delegation

Given the lack of reported legal challenges to green building laws, there is some uncertainty about their legal vulnerabilities. Two constitutional issues are worth special consideration by municipalities, however, "preemption" and "delegation."

Preemption. The 1975 U.S. Energy Policy and Conservation Act ("EPCA") explicitly preempts state regulation of energy efficiency of certain appliances, such as water heaters and HVAC equipment. It states: "no State regulation concerning the energy efficiency, energy use, or water use of [a federally regulated] product shall be effective with respect to such product."[57] The prohibition is meant to prevent states from creating a national patchwork of regulations that would harm manufacturers of home ap-

pliances or allow one state to set a de-facto national standard.

A three-year-old federal case challenging Albuquerque, New Mexico's green building law underscores the broad nature of the EPCA's prohibition. On October 1, 2008, the city created a municipal Energy Conservation Code that contained three sets of standards for the following classes of buildings: new multi-family and commercial buildings; new one and two-family homes; and renovations of existing buildings that exceed 50% of building floor area.

The law contains various compliance paths. For example, a new commercial building can comply by (a) earning LEED silver certification; (b) making the building 30% more efficient than the prevailing ASHRAE standard would require; or (c) complying with detailed city requirements for construction, including using HVAC and water heaters that exceed federal standards set forth under the EPCA.

A private professional organization, the Air Conditioning, Heating and Refrigeration Institute, immediately challenged the law on EPCA preemption grounds and won a preliminary injunction.[58] The court reasoned that while compliance options (a) and (b) permitted builders to use appliances meeting federal standards, they would be penalized in the process by having to make up "points" in other categories.[59]

On September 30, 2010, the court granted portions of plaintiffs' summary judgment motions in a ruling that was mostly unfavorable for the city. Albuquerque's primary defense was that by presenting builders with alternative paths to compliance that were not preempted (i.e., LEED or Build Green New Mexico compliance), the compliance option involving federally regulated appliances should not be preempted. The court strongly disagreed and stated: "The City has not persuaded the Court that a local law is not preempted when it presents regulated parties with viable, non-preempted options."[60]

In February 2011, the U.S. District Court for the Western District of Washington handed a critical victory to proponents of state building codes that require and incorporate sustainability requirements in *Building Industry Association of Washington (BIAW) v. Washington State Building Code Council*.[61] Shortly after it was enacted in 2009, BIAW challenged Washington's new state building code on the grounds that it violated and was preempted by the 1975 U.S. Energy Policy and Conservation Act (EPCA).[62] As noted above, the EPCA has twin goals of reducing energy consumption in the United States as well as preventing a patchwork of state energy efficiency requirements that would harm the economy. While the law generally prohibits states from setting appliance standards higher than federal standards, they can do so if alternative compliance options are offered.

Washington's 2009 building code allows builders to comply in a variety of ways, including by using appliances that substantially exceed the federal standards set by the U.S. Department of Energy under EPCA. BIAW alleged that while the law contained compliance options, in practice, builders would be penalized for using appliances that met federal standards. The plaintiffs in *Air Conditioning, Heating and Refrigeration Institute v. City of Albuquerque* successfully made this argument against Albuquerque's 2008 municipal building code. The court distinguished *City of Albuquerque*, stating: "In that case, the District Court found…that the plaintiff had shown that Albuquerque's code's 'performance-based alternatives, as a practical matter, cannot be met with products that meet, but do not exceed' federal standards. Plaintiffs here have not made any such showing."

The *BIAW* decision is one of the few court decisions addressing recent state and local efforts to green their building and energy codes. It underscores the importance of crafting such laws to comply with the EPCA, which is a relatively obscure federal environmental law. As the federal court stated in *City of Albuquerque*: "At the time the Code was drafted, the Green Building Manager, by his own admission, was unaware of federal statutes governing the energy efficiency of HVAC products and water heaters, and the City attorneys who reviewed the Code did not raise the preemption issue."[63]

Delegation. Courts have interpreted New York State's constitution to bar the state and its municipalities from delegating their law-making authority to third parties.[64] There is no reported litigation on this topic in the green building context, but it has spurred a fair amount of discussion among scholars of green building laws.

While it is common and necessary for state and local lawmakers to refer to third-party standards (such as ASTM or ANSI), laws that put legislative authority in private hands would raise red flags.[65] In the green building context, for example, a law that automatically "adopts LEED version 3.0 or any future version that the U.S. Green Building Council might promulgate" raises delegation concerns. Additionally, a law that puts appeals from the denial of a certification in the hands of a private body, like USGBC, could also be problematic. For example, a law that states "commercial buildings of 50,000 square feet or greater must achieve LEED silver certification from the USGBC, whose decision shall be final" could raise issues of delegation or constitutional due process.

X. SEQRA

Agencies will now need to consider green building issues in complying with the N.Y. State Environmental Quality Review Act (SEQRA), which generally requires all state agencies, counties, and municipalities to consider the environmental impacts of their actions prior to issuing permit, planning, funding, or other approvals. On July 15, 2009, the NYS Department of Environmental Con-

servation released its guidance document for evaluating climate change in environmental impact statements prepared under SEQRA ("Guidance").[66] This Guidance technically only applies to environmental impact statements for which the DEC is lead agency, but it is understood that state agencies and municipalities will use it to guide their own SEQRA compliance.

The Guidance addresses (1) when to evaluate climate change; (2) whether to provide quantitative or qualitative information about greenhouse gas emissions; and (3) how to consider lower-emission alternatives.[67] The Guidance also includes dozens of suggested mitigation measures for an action's contribution to greenhouse gas emissions, many of which require incorporation of green building techniques. These include: high-efficiency HVAC equipment; maximizing interior daylight; using building materials with recycled content; using locally sourced materials; using water-efficient landscaping; and providing access to public transportation to reduce automobile use. The Department of Environmental Conservation's proposed revisions to the SEQRA environmental assessment forms would require consideration of energy efficient building alternatives.

These mitigation measures and others are found in most third-party green building certification programs. *For that reason, SEQRA mitigation may take the form of compliance with LEED*. In this author's experience, it is now common for municipalities to condition discretionary approvals, like zoning changes, on a developer's commitment to obtain LEED or similar green building certification. The new SEQRA Guidance appears to endorse this approach.

For example, a 2009 environmental impact statement for a major commercial and residential project in Manhattan included the following statement:

> Overall, the site selection, the dense and mixed-use design, the commitment to seek LEED Silver certification for all buildings and achieve a significant reduction in energy use, and other measures incorporated in the Proposed Actions, would result in lower GHG emissions than would otherwise be achieved by similar residential and commercial uses, and, thus, would advance New York City's GHG reduction goals as stated in PlaNYC.

The EIS concluded that, because of the ample green building components to the project, the project would not have any significant adverse impacts in the category of climate change.[68]

The SEQRA Guidance also incentivizes the use of green building mitigation measures. It states:

> In the cases of (1) indirect GHG emissions from off-site energy generation and (2) indirect emissions from vehicle trips generated by the project, DEC staff may make a determination, based on a demonstration by a project proponent, that a project as designed has minimized emissions to the maximum extent practicable. In these situations, the EIS may include a qualitative discussion of emissions from these categories rather than a quantification of emissions.[69]

The practical implication of this provision of the guidance is that projects that are near public transportation, incorporate strong energy efficiency measures, and include green buildings may be able to reduce the cost and scope of environmental review, a *SEQRA off-ramp*, by incorporating sustainable features into the project's design and location.

In 2010, New York City released its revised City Environmental Quality Review (CEQR) Technical Manual, which provides guidance to all City agencies for complying with SEQRA. Not surprisingly, it includes a chapter on greenhouse gas emissions. Unlike the SEQRA Guidance, however, it specifically limits the requirement to assess greenhouse gas emissions to certain kinds of large-scale projects. It states:

> Currently, the GHG consistency assessment focuses on those projects being reviewed in an EIS that would result in development of 350,000 square feet or greater. However, the need for a GHG emissions assessment is highly dependent on the nature of the project and its potential impacts and the lead agency should evaluate, on a case-by-case basis, whether an assessment of consistency with the City's GHG reduction goals should be conducted for other projects undergoing an EIS. For example, if a project would result in the construction of a building that is particularly energy-intense, such as a data processing center or health care facility, a GHG emissions assessment may be warranted, even if the project would be smaller than 350,000 square feet.[70]

With regard to "significance," the Guidance advises City agencies to measure their action's consistency with the City's goal of reducing greenhouse gas emissions by 30% below 2005 levels by 2030.[71] The suggested mitigation measures include numerous green-building practices and are consistent with the SEQRA Guidance and the third-party green building certifications described above.

XI. Smart Growth

Two developments are worth mentioning in the context of smart growth, which refers to urban planning that focuses new development towards existing urban areas and public transportation and away from undeveloped open space, farmland, and rural areas.

New York Smart Growth. In 2011, New York Governor Cuomo renewed former Governor Spitzer's 2008 executive order creating a "smart growth cabinet" to recommend statutory, regulatory and policy changes to promote smart growth and transit-oriented development in New York State. This bodes well for the State's ongoing implementation of the *Smart Growth Public Infrastructure Policy Act*, which former Governor Paterson signed on August 30, 2010.[72]

Agencies covered by the law must, to the "extent practicable," avoid approving, funding or otherwise supporting public infrastructure projects that are inconsistent with the law's anti-sprawl goals. The law's goals include (a) using existing infrastructure; (b) directing growth towards existing municipal centers; (c) promoting infill development in locations that municipalities themselves have already identified for growth; (d) preserving open space and other natural resources; and (e) fostering downtown revitalization.

Each agency action must be accompanied by a smart growth impact statement explaining how the project meets the law's requirements or, if not, why complying with them is not practicable. Each covered agency must also create a smart growth advisory committee. Covered agencies under the bill include any "state infrastructure agency," which is defined to include the "Department of Transportation, Department of Education, Department of Health, Department of State, Environmental Facilities Corporation, Housing Finance Agency, Housing Trust Fund Corporation, Dormitory Authority, Thruway Authority, Port Authority of New York and New Jersey, the Empire State Development Corporation," and all other "authorities" and their subsidiaries. But the term "authorities" is somewhat vague in New York State, which has hundreds of agencies, departments, public authorities, and public benefit corporations.

LEED ND. USGBC has finalized its own "smart growth" certification program, *LEED for Neighborhood Development* or *LEED ND*.[73] This certification applies to residential subdivisions, university expansions, and mixed-use development, etc. The point system is similar to USGBC's traditional green building certifications, which allows applicants to earn points in sustainability categories and qualify as LEED ND-certified, silver, gold, or platinum. Applicants must meet certain prerequisites and earn other discretionary points in the categories of *smart locations and linkages; neighborhood pattern and design;* and *green infrastructure and buildings*. The project must also include at least one LEED-certified building.

The program has been in "pilot" for a couple of years and includes several high-profile projects, such as Columbia University's expansion of its campus in Harlem. The pilot phase is over and USGBC is accepting applications to LEED ND.

XII. Future of Green Building Laws

California has traditionally led the nation in the development of environmental laws and the same is likely to be true of green building laws. *Cal Green* is a bold step towards making green building practices the norm and reducing municipalities' reliance on third-party certification programs. New York is likely headed in a similar direction; the New York State Climate Action Plan Interim Report, released in November 2010, recommends greening building and energy codes to meet former Governor Paterson's goal of reducing greenhouse gases by 80% below 1990 levels by 2050.[74] New York State's building and energy codes are, therefore, likely to become greener over the next few years, a process that will displace reliance on third-party certification programs over time and make greener building practices the norm throughout the state.

Resources

- U.S. Department of Energy, et al., "Database of State Incentives for Renewables and Efficiency," www.dsireusa.org[75]
- U.S. Environmental Protection Agency, "Green Buildings," http://www.epa.gov/greenbuilding/
- U.S. Environmental Protection Agency, "Sustainable Design and Green Building Toolkit for Local Governments," June 2010 (This guidance document provides extensive references for greening all aspects of local building codes.)
- U.S. EPA and U.S. Department of Energy, "ENERGY STAR Home Rating System," www.energystar.gov
- New York State Energy Research and Development Authority, www.nyserda.org
- Urban Green Council, "New York City Green Codes Task Force Report," February 2010, www.urbangreencouncil.org/greencodes (UGC is the local chapter of the U.S. Green Building Council.)
- G-Works, "The New York City Greener, Greater Buildings Plan and How It Affects You," www.g-works-group.com (G-Works is a consortium of building consultants and architects.)
- Terrachoice, "The 'Six Sins of Greenwashing,' A Study of Environmental Claims in North American Consumer Markets," November 2007 (Terrachoice is an environmental marketing consultant. Its widely read 2007 report concluded that most green advertising claims were as least partly false or mis-

leading. It published a 2010 report that focuses on home and building products. Both the 2007 and 2010 report are available at www.terrachoice.com.)

- Columbia Law School, "Model Municipal Green Building Ordinance," available at http://www.law.columbia.edu/centers/climatechange/resources/municipal
- Peter Fleischer, *Empire State Future*, www.empirestatefuture.org (smart growth organization and blog)
- Stephen Del Percio, *Green Real Estate Law Journal*, www.greenrealestatelaw.com (green building law blog)

Endnotes

1. An earlier version of this article was presented at the NYSBA Environmental Law Section's annual meeting on January 28, 2011.
2. These figures pre-date the 2008-2009 economic recession.
3. Builders constructed 7.188 million new homes between 2005 and 2009 and 170,000 commercial buildings each year; only a small fraction of these buildings were certified "green" buildings. *See* U.S. Envtl. Prot. Agency, http://www.epa.gov/greenbuilding/pubs/whybuild.htm (last visited July X, 2011).
4. NYC Mayor's Office of Long-Term Planning and Sustainability: PLANYC 2030 9 (2007), *available at* www.nyc.gov/plannyc2030. (sets a goal of reducing the City's greenhouse gas emissions by 30% of 2005 levels by 2030).
5. *See supra* note 4.
6. Indoor air quality sources include combustion sources, building materials, carpets and other furnishings, cleaning products, pesticides and many other items.
7. U.S. Envtl. Prot. Agency, Buildings and the Environment: A Statistical Summary (April 22, 2009), *available at* http://www.epa.gov/greenbuilding/pubs/gbstats.pdf.
8. *See* Urban Green Council, Cost of Green in New York City, 7 (2009) (the NYC chapter of USGBC concluded that constructing LEED certified buildings was not more costly in New York City. The study focused, however, on large-scale projects). *But see* Andrew C. Burr, *CoStar Study Finds ENERGY STAR, LEED Bldgs. Outperform Peers*, CoStar Group (March 26, 2008), *available at* http://www.costar.com/News/Article/CoStar-Study-Finds-Energy-Star-LEED-Bldgs-Outperform-Peers/99818 (a publicly traded real estate information company, concluded that LEED and ENERGY STAR buildings earn higher rents and have higher occupancies). *See also* Leigh Kellett Fletcher, *Green Construction Costs and Benefits: Is a National Regulation Warranted*, Natural Resources and Environment, Summer 2009 (24-Sum Nat. Resources & Env't 18) (discussing costs and benefits).
9. Alison Gregor, *Playing to Hedge Funds, A Trophy Rises in Midtown*, N.Y. Times, February 1, 2011 ("…landlords could achieve an average premium on rents of 5 to 10 percent nationally if a building was certified as environmentally friendly"). *See also* N.Y.S. Energy Research & Dev. Auth., *available at* http://www.nyserda.org/programs/Green_Buildings/default.asp (last visited July 2, 2011).
10. Exec. Order of Gov. Patterson, No. 24 of 2009, Establishing a Goal to Reduce Greenhouse Gas Emissions Eighty Percent by the Year 2050 and Preparing a Climate Action Plan, *available at* http://www.dec.ny.gov/energy/71394.html.
11. *See supra* note 4.
12. U.S. Green Bldg. Council, www.usgbc.com (last visited July 1, 2011) (non-profit organization composed of builders, municipalities, individuals and others interested in sustainable construction).
13. *Id.* note 13 (U.S. Green Building Council website allows searches for buildings by state and municipality), *available at* http://www.usgbc.org/LEED/Project/CertifiedProjectList.aspx.
14. Brownfields are properties that are or may be impacted by contamination. These include sites where manufacturing or other polluting uses may have been located. Despite the complications involved in reusing these sites, they are often located in the heart of U.S. cities, on the coast and in other attractive locations.
15. *Supra* note 13 (U.S. Green Building Council rating systems: Out of a total of 100 base points and 10 potential bonus points, *certified* buildings must earn at least 40-49 points; *silver* buildings must earn 50-59 points; *gold* buildings must earn 60-79 points; and *platinum* buildings must earn 80 or more points), *available at* http://www.usgbc.org/DisplayPage.aspx?CMSPageID=222.
16. ENERGY STAR, www.energystar.gov (last visited July 2, 2011).
17. *Id.* (information on ENERGY STAR for new homes), *available at* http://www.energystar.gov/index.cfm?c=new_homes.hm_index.
18. *Id.* (statistics regarding ENERGY STAR buildings in the United States), *available at* http://www.energystar.gov/index.cfm?fuseaction=new_homes_partners.locator.
19. Green Globes, Practical Bldg. Rating System, www.greenglobes.com (last visited July 2, 2011).
20. Green Bldg. Initiative, www.thegbi.org (last visited July 2, 2011).
21. Nat'l Green Bldg. Program, www.nahbgreen.org (last visited July 2, 2011).
22. PATH, http://www.pathnet.org/incentives_green (last visited July 2, 2011) (a nonprofit housing organization that includes a resource list of some incentive programs).
23. This article does not cover state and local laws in New York requiring public buildings to comply with private green certifications. These are much more prevalent. *See, e.g.,* N.Y.C., Local Law 86 (2005) (effective January 2007, new buildings and additions constructed by the City that cost more than $2 million must also be energy efficient and adhere to the LEED green building guidelines. Because the City owns approximately 1,300 buildings and leases over 12.8 million square feet of office space, Local Law 86 of 2005 has significant impacts on the local real estate market).
24. For context, there may be as many as 40,000 municipalities in the United States depending on how they are counted. Only a small fraction have green-building laws.
25. Boston, Ma., Zoning Code, art. 37 (2007), *available at* http://www.bostonredevelopmentauthority.org/pdf/zoningcode/article37.pdf.
26. Dallas, Tx, City Council Green Bldg. Ordinance (2008), *available at* http://www.greendallas.net/pdfs/Green_Building_Ordinance.pdf.
27. S.F., Cal. Bldg. Code, Chapter 13C (2008), *available at* http://www.sfenvironment.org/downloads/library/sf_green_building_ordinance_2008.pdf.
28. Columbia Law School Municipal Climate Change laws Resource Center, http://www.law.columbia.edu/centers/climatechange/resources/municipal (last visited July 1, 2011).
29. Town of Babylon Code, *available at* www.townofbabylon.com (last visited July 1, 2011).
30. Press Release, Town of Babylon, Babylon Recognizes Tanger Outlets in Deer Park for Environmental Achievements (Dec. 16, 2010), *available at* http://www.townofbabylon.com/news.cfm?id=388&category=143&searchDate=2010-12-16%2000:00:00.0.
31. The consequence for failure seems to be loss of the hefty building permit fee, rather than revocation of the certificate of occupancy.
32. *See* N.Y. Comp. Codes R. & Regs. Part 6, § 638 (2011).

33. N.Y. Real Prop.Tax Law § 499-bbb (McKinney 2008).

34. *See* 42 U.S.C. § 6833 (2005).

35. The consortium's website is located at www.thirtypercentsolution.org. New York State utilizes the ICC and ASHRAE model codes.

36. For information regarding the code, visit www.iccsafe.org and click on "codes, standards & guidelines."

37. http://www.ashrae.org/publications/page/927.

38. The California Environmental Protection Agency's website is http://www.calepa.ca.gov/. California's Global Warming Solutions Act is available at http://www.arb.ca.gov/cc/docs/ab32text.pdf.

39. California Bldg. Code, Title 24, Part 11.

40. For example, New York State offers a personal tax credit for installation of solar equipment. N.Y. Tax Law § 606 (g-1) (McKinney Year).

41. Judith Wallace, *Rays of Hope*, American City and County, March 1, 2010, *available a*t http://americancityandcounty.com/topics/green/local-solar-promotion-201003/#.

42. Ithaca, N.Y., Town Code § 270-291.1 (Solar collectors and installers). *See generally* Patricia Salkin, *Modernization of New York's Land Use Laws Continues to Meet Growing Challenges of Sustainability*, (Albany Law School Working Papers Series No. 13 (2009)) (collecting solar land use statutes).

43. Oyster Bay, N.Y., Town Code § 246-4.5.

44. Ithaca, N.Y. Town Code § 270-291.1 (Solar collectors and installers).

45. California Codes, Public Resource Code §§ 25980-25986.

46. Massena, Village Code § 300-31(G)(3).

47. *A Comprehensive Review of Solar Access Law in the United States*, (2011) http://www.solarabcs.org/solaraccess.

48. *See generally* Bill Brooks, Expedited Permit Process for PV Systems 2-4 (2011), *available at* solarabcs.org/permitting.

49. Urban Green Council's report is available at http://www.urbangreencouncil.org/greencodes/.

50. Federal Trade Commission Act, 15 U.S.C. § 45.

51. 16 C.F.R Part 260; although published with the agency's regulations, this is guidance only.

52. *FTC Announce Workshop on 'Green Guides' and Environmental Claims for Buildings and Textiles*, (June 3, 2008), http://www.ftc.gov/opa/2008/06/greenguides.shtm.

53. 16 C.F.R § 260.6.

54. Koh v. S.C. Johnson & Son, Inc., 2010 WL 94265 (ND Cal. 2010).

55. Complaint, *Henry Gifford, Gifford Fuel Saving, Inc. v. U.S. Green Building Council, David Gottfried, Richard Fedrizzi, Rob Watson, et al.*, 10 CIV 7747 (S.D.N.Y., October 8, 2010).

56. Sherman Anti-Trust Act, 15 U.S.C. § 2; Lanham Act, 15 U.S.C. § 1125(a)(1)(B); N.Y. General Business Law § 349 (GBL); N.Y. GBL § 350; Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1962.

57. 42 U.S.C. § 6927.

58. *Air Conditioning, Heating and Refrigeration Institute v. City of Albuquerque*, 2008 WL 5586316 (D. N.M. 2008).

59. *Id.* at 8.

60. The court granted partial summary judgment in favor of the plaintiffs on September 30, 2010 in an unpublished decision.

61. *Building Industry Ass'n of Washington v. Washington State Bldg.Code Council*, 2011 WL 485895 (W.D. Wash., 2011).

62. 42 U.S.C. § 6297.

63. *Air Conditioning, Heating and Refrigeration Institute v. City of Albuquerque*, 2008 WL 5586316, 2* (D.N.M., 2008).

64. N.Y. Const., Article III, Section 1 states: "The legislative power of this state shall be vested in the senate and assembly."

65. *See, e.g., People v. Mobil Oil Corp.*, 101 Misc. 2d 882, 886, 422 N.Y.S.2d 589, 591 (District Ct. Nassau County 1979) ("It appears then that, generally, there can be no valid delegation of governmental power to nongovernmental agencies. However, where certain standards are created and the municipality continues to control the authority, the delegation may be valid.").

66. *Climate Change Guidance Documents*, (2011) http://www.dec.ny.gov/regulations/56552.html.

67. Notably absent from the guidance document is any guidance on when greenhouse gas emissions are considered "significant," which is a term of great importance in SEQRA. For example, a finding of a potentially significant impact in any category of impact (e.g., traffic, air quality, historic preservation and, now, climate change) would require an agency to prepare an environmental impact statement. Additionally, agencies are typically under a duty to identify mitigation for significant adverse impacts.

68. The 2009 EIS for the Western Rail Yards development in Manhattan is available from the New York City Department of City Planning, which served as a co-lead agency for the project with the Metropolitan Transportation Authority. The EIS concluded that the project would emit 106,390 tons of CO2 per year during its operation, which result from electricity use, on-site heating and cooling, vehicle trips generated and other activities. Even this figure is not a net increase in CO2, however, because the people living and working at the project site would presumably be living and working elsewhere—including locations far from transportation where emissions could be higher.

69. SEQRA Guidance, p. 6.

70. The 2010 CEQR technical manual is available from the website of the Mayor's Office of Environmental Coordination, www.nyc.gov/oec (see p. 18).

71. *Id.* at 18-13.

72. The Smart Growth Public Infrastructure Policy Act is codified as a new Article 6 to the N.Y. Environmental Conservation Law.

73. For more information about LEED ND, visit www.usgbc.org.

74. *New York State Climate Action Plan Interim Report* (November 9, 2010), www.nyclimatechange.us/interimreport.cfm; the New York State Climate Action Advisory Group took comments on the plan until February 7, 2011.

75. The U.S. Department of Energy funds this project, which is run by the North Carolina Solar Center (a project of North Carolina State University) and the Interstate Renewable Energy Council.

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No Boundaries: Exploring the Potential Cumulative Impacts of Natural Gas Drilling on Air Quality in the Northeast

By Jay Duffy

Introduction

While much of the recent media focus has been on the water extraction, disposal, and contamination issues associated with hydraulic fracturing in the Marcellus Shale, many are warily looking west and discovering that air pollution may be an even bigger issue. Counties in the western United States, where hydraulic fracturing for natural gas has been ongoing for a decade, provide a grim picture of what could happen in the Northeast if similar mistakes are made. And unfortunately, due to the size of the shale play, which actually includes the Marcellus, Utica, and upper Devonian shale (Geneseo or Burkett), and the already densely populated and industrialized Northeast corridor, even modest improvements upon western practices may not be sufficient to maintain air quality standards.

The Marcellus Shale extends from eastern Kentucky through West Virginia, Ohio, Pennsylvania, Maryland, and New York. It is estimated to contain 500 trillion cubic feet of recoverable gas, making it the second largest gas field in the world behind South Pars, a region shared by Iran and Qatar.[1] It is further estimated that 100,000 wells will be necessary to extract all of the gas from the Marcellus Shale.[2] While New York currently has a de facto moratorium on hydraulic fracturing for natural gas, 947 wells were drilled in neighboring Pennsylvania in the first four months of 2011, and all other Marcellus states except Maryland are currently drilling.[3]

Natural gas, which is primarily methane, generates fewer smog-causing emissions when burned and releases less CO_2 into the air per unit of energy than other fossil fuels. However, Robert Howarth, professor of ecology and environmental biology at Cornell University, has found that methane, which is a more powerful greenhouse gas than CO_2, is leaking into the atmosphere during the production and distribution phases of natural gas, thereby contributing to climate change.[4]

Oil and gas operations, including exploration, production, and processing, consist of many pieces of equipment and practices that release air pollutants known to be harmful to public health and the environment. The impact on air quality includes emissions of volatile organic compounds (VOCs), nitrogen oxide (NO_x), particulates, and hazardous air pollutants (HAPs). VOCs and NO_x mix with air and sunlight to produce ground-level ozone, which causes a variety of respiratory problems. The emission of hazardous air pollutants, such as benzene and formaldehyde, is linked to elevated levels of cancer and neurological health issues.[5]

The impacts of oil and gas development on air quality are by no means insignificant. Areas of the country that have more fully developed shale plays are experiencing significant effects from the cumulative impacts of oil and gas production. A 2009 Southern Methodist University study found that summertime emissions of smog-forming pollutants from the oil and gas sector in the Dallas-Fort Worth area exceed emissions from motor vehicles.[6] A 2008 analysis by the Colorado Department of Public Health and Environment ("CDPHE") concluded that the smog-forming emissions from Colorado's oil and gas operations exceed vehicle emissions for the entire state.[7] In 2009, for the first time in its state's history, Wyoming failed to meet federal health-based standards for air pollution. According to the Wyoming Department of Environmental Quality, the emissions from the state's growing oil and gas sector were to blame.[8] In northeastern Utah, unprecedented ozone levels in the Uintah Basin were recorded last year, and the Bureau of Land Management has identified the multitude of oil and gas wells in the region as the primary cause of the ozone pollution.[9]

Source Determinations

The major air issue currently being debated and litigated across the country is source determinations under the Clean Air Act (CAA) for oil and gas operations. An emissions unit is a "major source" and subject to Title V permitting and New Source Review (NSR) or Prevention of Significant Deterioration (PSD) if it has the potential to emit 100 tons per year (tpy) or more of CO, NO_x, SO_x, and PM_{10}, 50 tpy of VOCs, 10 tpy of a single HAP, or 25 tpy of multiple HAPs. Various emissions units are generally connected and there is usually only one end-product; however, emissions can sometimes be a considerable distance apart and operate independently. Regulators must determine whether they will treat each small source separately or aggregate all of the sources together into one large source of potential emissions for permitting purposes.

The United States Environmental Protection Agency ("EPA") defines a stationary source as any "building, structure, facility or installation, which emits or may emit a…regulated pollutant."[10] The Rules define "building, structure, facility, or installation" as:

> …all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person

> (or persons under common control) except the activities of any vessel. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same first two-digit code).[11]

On September 22, 2009, Gina McCarthy, Assistant Administrator for the EPA's Office of Air and Radiation, issued a memorandum entitled, "Withdrawal of Source Determination for Oil and Gas Industries."[12] This memorandum withdrew a previous guidance memorandum from Acting Assistant Administrator, William Wehrum, which relied heavily on the distance between emissions units when deciding whether to aggregate the units into one source. McCarthy explains that permitting authorities should rely foremost on the three regulatory criteria for identifying whether the emissions are: (1) in the same industrial grouping; (2) located on one or more contiguous or adjacent properties; and (3) under common control. Further, in applying these criteria McCarthy explains that permitting authorities should remain mindful of the explanation that the EPA provided in the 1980 Preamble.[13] The Preamble to the new regulations discussed the policy considerations for aggregation identified by the D.C. Circuit in *Alabama Power*:

> In EPA's view, the December opinion of the court in *Alabama Power* sets the following boundaries on the definition for PSD purposes of the component terms of "source": (1) it must carry out reasonably the purposes of PSD; (2) it must approximate a common sense notion of "plant"; and (3) it must avoid aggregating pollutant-emitting activities that as a group would not fit within the ordinary meaning of "building," "structure," "facility," or "installation."[14]

The most controversial aspect of single-source determinations usually involves the interpretation of "contiguous or adjacent properties," and the EPA has expressly declined to adopt a specific physical distance beyond which emissions activities would be considered "separate sources."[15] The source criteria and Preamble guidance have been developed and supplemented over the years through fact specific inquiry and the issuance of determinations.[16] The EPA recently provided guidance on how to make a source determination in response to a petition in *In re Kerr-McGee/Anadarko Petroleum Corporation:*

> In order to do a thorough analysis, I [Lisa P. Jackson, EPA Administrator] recommend that CDPHE evaluate Kerr-McGee's complete system map showing all emission sources owned or operated by the Company in the Wattenberg gas field…and determine whether the various pollution-emitting activities are contiguous or adjacent to, and under common control with, the Frederick Compressor Station…I also recommend that CDPHE obtain from Kerr-McGee / Anadarko a flow diagram showing the movement of gas from the well sites to the various facilities in the Wattenberg field operated by both Kerr-McGee / Anadarko and other companies in the field, so that CDPHE may determine the nature of the sources' emissions and determine whether or not the process units associated with those emission sources are interdependent on the operation of the Frederick Compressor Station. Finally, I recommend that CDPHE obtain from Kerr-McGee / Anadarko business information regarding the nature of control of the Frederick Station and nearby wells between the Company and other companies in the field to determine whether various pollution emitting activity should be considered under common control for purposes of making the source determination.[17]

Petitioners, Wild Earth Guardians, ultimately lost their appeal in the above case after three petitions. CDPHE found that Frederick Compressor Station and the other emission sources did not have a unique or dedicated interdependent relationship and were not proximate and, therefore, were not contiguous or adjacent, and, based on these facts the EPA determined that Petitioner had not demonstrated that CDPHE's determination was fundamentally flawed or contrary to the relevant regulations, including the Colorado SIP.[18]

It is clear that where there is complete interdependency, aggregation will be required in like circumstances as determined in the *Summit Petroleum* decision. There the EPA found that Summit's sour gas wells, sweetening plant, and associated flares constituted a single source for purposes of permitting under Title V of the CAA.[19] Summit Petroleum appealed this decision and it is currently being briefed before the Sixth Circuit Court of Appeals. The issue in that appeal appears to be "how far is too far for emission sources to be considered adjacent?" The answer, according to the EPA and previous guidance, is a case-by-case determination and "require[s] the aggregation of 'all emissions units under common control at the same plant site' and applies the three regulatory factors in light of the specific factual circumstances to determine the scope of the source," and that eight miles is not necessarily too far.[20]

The question that remains unanswered, however, is whether aggregation should be required where there is not complete interdependency, but rather substantial or primary interdependency. This question is stayed before the Environmental Appeals Board in *In re: BP America Production Company, Florida River Compression Facility*, while the parties engage in alternative dispute resolution. The EPA's recent guidance and decisions (in the context of oil and gas production) call for aggregation only where there is complete interdependency, but Appellants in this case argue that "aggregating oil and gas sources does not require that the sources meet the 'exclusive dependency' test as EPA suggests. Instead, EPA's prior guidance on the matter, as well as the common sense notion of plant embodied by the EPA's PSD regulations, demonstrates that oil and gas sources should be aggregated if they ***regularly*** support one another in the production of pipeline quality gas."[21]

As natural gas operations ramp up in Pennsylvania, concerns regarding aggregation are starting to mount there as well. This is particularly the case because Pennsylvania currently exempts oil and gas exploration and production facilities from the requirements for a Plan Approval or Operating Permit, except for compressor station engines equal to or greater than 100 horsepower.[22] These exemptions could have major implications for the air quality in Pennsylvania and in the downwind states. The Association of Petroleum Industries of Pennsylvania, in a letter to the Pennsylvania Department of Environmental Protection (PA DEP), stated that, "[As] many as 35 different engine types, ranging in use from large earthmoving equipment such as graders and dozers to portable equipment such as pumps and generators, may be used at a single well pad."[23] Each of these engines, along with others associated with various natural gas processes, are currently exempt from permitting requirements in Pennsylvania. Further, the vast majority of natural gas operation permits in Pennsylvania escape Title V and are regulated under state permits, if such operations are regulated at all.

Two permit appeals are currently before the Pennsylvania Environmental Hearing Board to review allegations of the failure to properly aggregate. The Pittsburgh-based Group Against Smog and Pollution has appealed the issuance of a Plan Approval to Laurel Mountain Midstream Operating, LLC for the failure to aggregate associated well sites with the Shamrock Compressor Station.[24] The Philadelphia-based Clean Air Council has appealed the issuance of a Plan Approval to MarkWest Liberty Midstream & Resources, LLC for its failure to aggregate associated compressor stations with the Houston Gas Processing Plant.[25]

Greenhouse Gas Emissions

Proper oil and gas source determinations will also have a significant impact on the effectiveness of the EPA's recent greenhouse gas (GHG) programs and rulemakings.

On November 8, 2010, the EPA finalized reporting requirements for the petroleum and natural gas industry under the Greenhouse Gas Reporting Program.[26] The rule requires facilities to report annual methane (CH_4) and CO_2 emissions from equipment leaks and venting; emissions of CO_2 and NO_x from flaring, onshore production stationary and portable combustion emissions; and combustion emissions from stationary equipment involved in natural gas distribution.[27] Facilities that contain petroleum and natural gas systems that emit 25,000 metric tpy or more of CO_2 equivalent (CO_2e) in aggregated emissions from all sources are required to report annual GHG emissions to the EPA. Reporting is at the facility level and data collection began on January 1, 2011. Reports will be submitted annually with the first report due to the EPA by March 31, 2012. These reports should give the public a better sense of the GHG emissions released from natural gas operations and the life-cycle effect natural gas has on climate change. Citizens and advocacy groups, including the Clean Air Council, have called on the EPA to perform a full emissions inventory, which would include GHG emissions along with other pollutant emissions from natural gas operations.[28]

In response to the *Massachusetts v. EPA* decision, in which the Supreme Court held that GHGs qualified as air pollutants covered by the CAA, the EPA finalized its GHG Tailoring Rule on May 13, 2010.[29] The program is divided into three steps. During Step One, which applied from January 2, 2011 through June 30, 2011, only those sources otherwise subject to PSD requirements were subject to GHG requirements.[30] No facility was subject to PSD or Title V solely because of GHG emissions.[31] Only facilities with GHG increases of 75,000 tons CO_2e or more were subject to Best Available Control Technology (BACT) requirements.[32] Step Two began on July 1, 2011 and will continue through June 30, 2013.[33] Under Step Two, new sources emitting 100,000 tpy CO_2e, which is 5,000 tpy CH_4, are subject to PSD and Title V even if no other pollutants trip the threshold.[34] PSD applies to modifications that increase GHG emissions by 75,000 tpy CO_2e.[35] The EPA may implement Step Three, which would cover all sources emitting 50,000 tpy CO_2e.[36] Due to the exemptions and limited Title V permits and aggregation in Pennsylvania, the GHG Tailoring Rule is unlikely to affect Pennsylvania's natural gas industry in the near future.

State of Drilling in New York

In New York State, most projects or activities proposed by a state agency or unit of local government, and all discretionary approvals (permits) from a state agency or unit of local government require an environmental impact assessment under the State Environmental Quality Review Act (SEQRA).[37] The Department of Environmental Conservation's (DEC) SEQRA regulations authorize the use of generic environmental impact statements (GEIS) to assess the environmental impacts of separate actions having generic or common impacts. A GEIS and its findings "set forth specific conditions or criteria under which future actions will be undertaken or approved, including requirements for any subsequent SEQR compliance."[38] When a final GEIS has been filed, "no further SEQR compliance is required if a subsequent proposed action will be carried out in conformance with the conditions and thresholds established for such actions" in it.[39]

In 2008, Governor Paterson directed the DEC to update the 1992 GEIS for the Oil, Gas and Solution Mining Regulatory Program to assess the new issues unique to horizontal drilling and high volume hydraulic fracturing of the Marcellus Shale and other low permeable reservoirs. The supplemental GEIS draft was issued on September 30, 2009, and over 13,000 public comments were accepted until December 31, 2009.

On December 13, 2010, Governor Paterson issued Executive Order 41 and ordered the DEC to complete its review of the public comments, make such revisions to the Draft supplemental GEIS that are necessary, and comprehensively analyze the environmental impacts associated with high-volume hydraulic fracturing combined with horizontal drilling.[40] Paterson further ordered the DEC to ensure that environmental impacts are appropriately avoided or mitigated consistent with SEQRA, other provisions of the Environmental Conservation Law and other laws, and ensure that adequate regulatory measures are identified to protect public health and the environment.[41] On January 1, 2011, Governor Cuomo extended Executive Order 41.[42]

There is also always the possibility that a company will move forward by performing its own site-specific environmental impact statement (EIS). However, this is considered by most to be prohibitively expensive.

On June 6, 2011, the New York State Assembly passed in a 96-46 vote on Bill A07400, which is "[a]n act to suspend hydraulic fracturing; and providing for the repeal of such provisions upon expiration thereof."[43] The bill would suspend, until June 1, 2012, the issuance of new permits for the drilling of a well that would utilize the practice of hydraulic fracturing for the purpose of stimulating natural gas or oil in low permeability natural gas reservoirs such as the Marcellus and Utica shale formations.[44] The bill would create an actual moratorium and companies would not have a loophole to perform their own EIS. Further, several significant reports on the safety and environmental impact of hydrofracking, including studies by DEC and the EPA, will be released during the proposed moratorium period.[45] The bill is currently in the New York State Senate's Environmental Conservation Committee.[46]

On July 8, 2011, the DEC released the 2011 Preliminary Revised Draft SGEIS.[47] An updated SGEIS including socioeconomic and community impacts will be released in August.[48] That release will be followed by a sixty-day comment period, review of comments and, finally, the release of a final SGEIS.[49] With respect to air quality, the current SGEIS requires enhanced air pollution controls on engines used at well pads and indicates that DEC will monitor local and regional air quality at well pads and surrounding areas. Further the Draft SGEIS will require use of existing pipelines when available rather than flaring.

Natural Gas Operations' Regional Effects on Air Quality

Air emissions from natural gas operations are not only an issue for residents within states that allow drilling, but also for residents of downwind states. This is especially true in the Northeast where, due to dense population, industrialization, and emissions from coal-fired power plants in the Midwest, there is little room for additional sources of pollution before National Ambient Air Quality Standards (NAAQS) are violated.[50] These issues will only become more pressing if the EPA's proposed revisions to the national standards for ground-level ozone go into effect. A significant portion of the emissions from natural gas operations is a result of the heavy reliance on older diesel engines that emit NO_x. The NO_x reacts with VOCs and sunlight to form ozone. While the EPA has promulgated standards for new diesel engines, older engines escape regulation.

On January 6, 2010, the EPA proposed to strengthen the eight (8)-hour "primary" ozone standard, designed to protect public health, to a level within the range of 0.060-0.070 parts per million (ppm).[51] As part of the EPA's extensive review of the science, Administrator Jackson asked Clean Air Scientific Advisory Committee (CASAC) for further interpretation of the epidemiological and clinical studies that they used to make their recommendation.[52] Jackson has stated that she prefers slow rulemaking to ensure proper study and consideration in order to make sound determinations and be better situated for the inevitable litigation.[53] Given the ongoing scientific review, the EPA intends to set a final standard in the range recommended by the CASAC by the end of July 2011.

These standards could have major implications for drillers, states permitting the drillers, and downwind

states. The 1977 Clean Air Act Amendments contain provisions to address pollution transport. CAA § 110(a)(2) authorizes the EPA to require states contributing significantly to nonattainment or interfering with maintenance of attainment in other states to amend their state implementation plans (SIPs) to require implementation of additional control measures.[54] Individual states also have the option of petitioning the EPA, under CAA § 126, to shut down or impose emission limitations on sources in other states that are contributing to nonattainment or maintenance problems in the petitioning state.[55]

Due to issues of ground-level ozone pollution transport, the 1990 CAA Amendments established a permanent 12-state Ozone Transport Region (OTR) extending from Maine to northern Virginia.[56] Regardless of attainment, stationary sources in the OTR with the potential to emit 50 tons of VOCs or more per year are considered "major" and must comply with all requirements applicable to major sources located in moderate nonattainment areas. Additionally, states in the OTR are expected to require reasonably available control technology (RACT) for all VOC sources for which the EPA has issued a control techniques guideline (CTG). To date the EPA has not issued a CTG for oil and gas operations, but has the authority under CAA § 182 to target ozone precursor emissions and establish recommendations for RACT.[57] If the final ozone standard is consistent with the original proposal, the pressure will increase to use tools such as SIP calls, § 126 suits, CTG, and other provisions of the CAA to reduce ozone precursor emissions at oil and gas operations.

The EPA's Review of Air Regulations

In addition to reviewing the current ozone standards, the EPA is currently reviewing four existing air regulations for the oil and natural gas industry.[58] Two of these air regulations are New Source Performance Standards (NSPS). The first requires VOC leak detection and repair for gas processing plants and the other controls SO_x emissions from gas processing plants.[59]

The other two regulations are National Emissions Standards for Hazardous Air Pollutants (NESHAPs). These standards are industry specific and apply to new and existing facilities. The reductions are based on Maximum Achievable Control Technology (MACT).[60] One rule applies to operations that are major sources of air toxics emissions, and the other is for operations that are smaller emitters, or "area" sources.[61] For major sources, the existing standards apply to tanks with flash emissions, equipment leaks, and glycol dehydrators. For area sources, the standards only apply to glycol dehydrators. The other rule for natural gas transmission and storage operations applies only to glycol dehydrators at major sources.

In 2009, WildEarth Guardians and San Juan Citizens Alliance filed a suit for failure to conduct required reviews of the two NSPS (1985) and failure to conduct risk and technology reviews of the NESHAP rules (1999).[62] In accordance with a court order resulting from that case, the EPA must now issue proposals for these air regulations by July 28, 2011, and take final action by February 28, 2012.[63] These rules will be a start, but there are still emissions from various processes and stages of natural gas production that are not currently covered by existing rules.[64]

Conclusion

The natural gas industry is attempting to squeeze their industry and the significant amount of air pollution that comes along with it into a very narrow window in the Northeast. The air quality issues in the Northeast have the potential to surpass those in the West due to the size of the shale deposit and the already strained air quality. Non-profit and citizen groups are working diligently to assure that sources of air emissions from natural gas operations are aggregated when appropriate and source determinations are made correctly. At the same time, the EPA is proposing and finalizing various air pollution standards and NAAQS that will place pressure on states and industry to reduce air emissions from natural gas operations. The mission of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare" and it appears it will be put to the test.[65]

Endnotes

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2. Penn State University, *Marcellus Center for Outreach and Research, FAQs*, <http://www.marcellus.psu.edu/resources/faq.php#>.
3. Department of Environmental Protection, Bureau of Oil and Gas, *All Permits Issued and Wells Drilled* (Jan.-May 2011), *available at* <http://www.dep.state.pa.us/dep/deputate/minres/oilgas/photogallery/photo13295/Wells%20permitted-drilled%20MAY%202011.gif>.
4. Robert W. Howarth, et al., *Methane and the greenhouse-gas footprint of natural gas from shale formations, a letter*, Climactic Change (Apr. 12, 2011), *available at* <http://www.springerlink.com/content/e384226wr4160653/fulltext.pdf>. *See also* Michael Levi, *Rebutting the Howarth Shale Study*, Council on Foreign Relations (May 20, 2011), <http://blogs.cfr.org/levi/2011/05/20/rebutting-the-howarth-shale-gas-study/> (criticizing the Howarth study); *See also* Worldwatch Blogs, *Natural Gas versus Coal: Clearing the Air on Methane Leakage* (Apr. 13, 2011), <http://blogs.worldwatch.org/natural-gas-versus-coal-clearing-the-air-on-methane-leakage/>http://blogs.worldwatch.org/natural-gas-versus-coal-clearing-the-air-on-methane-leakage/ (criticizing Howarth study).
5. *See* National Cancer Institute, <http://www.cancer.gov/cancertopics/factsheet/Risk/formaldehyde>; *See also* <http://www.cancer.gov/cancertopics/factsheet/Benzene>.
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7. Colorado Dept. of Public Health & Environment, Air Pollution Control Division, Oil and Gas Emission Sources, Presentation for the Air Quality Control Commission Retreat (May 15, 2008), at pages 3-4.

8. WYDEQ, Technical Support Document I for Recommended 8-Hour Ozone Designation For the Upper Green River Basin, WY, p. viii (Mar. 26, 2009), *available at* <http://deq.state.wy.us/out/downloads/Ozone%20TSD_final_rev%203-30-09_jl.pdf>.

9. Scott Streater, *Air Quality Concerns May Dictate Uintah Basin's Natural Gas Drilling Future*, N.Y. Times, Oct. 1, 2010, *available at* <http://www.nytimes.com/gwire/2010/10/01/01greenwire-air-quality-concerns-may-dictate-uintah-basins-30342.html?pagewanted=1>.

10. 40 C.F.R. § 51.165(a)(1)(ii).

11. *Id.*

12. Memorandum from Gina McCarthy, Assistant Adm'r of the Office of Air and Radiation, *Withdrawal of Source Determinations for Oil and Gas Industries* (Sept. 22, 2009).

13. *Alabama Power v. Costle*, 636 F.2d 323 (D.C. Cir. 1979). The definition of "source" under PSD and Title V has it roots in the case of and the PSD regulations that followed. *Id.* In *Alabama Power*, the Court struck down EPA's PSD definition of a "source" as too broad. It held that the meaning of "source" was limited by the four statutory terms, "structure, building, facility or installation," and that EPA can treat contiguous and commonly owned units as a single source only if they fit within these four statutory terms. *Id.* However, EPA should define these terms broadly enough to encompass an entire plant. *Id.*

14. 45 Fed. Reg. 52676, 52694-95 (Aug. 7, 1980).

15. 45 Fed. Reg. 52695 (Aug. 7, 1980).

16. *See generally* http://www.epa.gov/region07/air/nsr/nsrindex.htm (listing, *inter alia*, source determinations and guidance letters).

17. *In re Kerr-McGee/Anadarko Petroleum Corporation, Frederick Compressor Station*, Petition VII-2008-02 (Order on Petition) (Oct. 8, 2009).

18. *In re Anadarko Petroleum Corporation, Frederick Compressor Station*, Petition VIII-2010-4 (Order Responding to Petitioners' Request that the Administrator Object to Issuance of State Operating Permit) (Feb. 2, 2011). "Where there is no dedicated relationship between Frederick Compressor Station and other activities under common control. Instead, multiple owner/operators control the movement of gas, and Kerr-McGee Gathering's gas gathering agreements do not specify that collected gas will be moved through any specific compression station, including the Frederick Compressor Station, and the gas from the wells (including KMOGO's wells) can flow to any number of locations other than Frederick Compressor Station." *Id.*

19. *See e.g.*, Letter from Cheryl Newton, Dir., Air and Radiation Div., EPA Region 5 to Scott Huber, Summit Petroleum Corp. (Oct. 18, 2010). "The Summit Petroleum natural gas sweetening plant is connected by a pipeline to approximately 100 sour natural gas production wells that supply the natural gas exclusively to this gas sweetening plant. The closest natural gas production well is approximately 500 feet from the gas sweetening plant and the farthest natural gas production well is slightly over eight miles from the gas sweetening plant. Furthermore, flares are spread throughout the three well fields between the wells and the collection system that directs untreated natural gas to the sweetening plant." *Id.*

20. Brief for Respondents at 10, *Summit Petroleum Corp. v. U.S. E.P.A.*, No. 09-4348, 10-4572, 2011 WL 2178283 (6th Cir. 2011) (citing 61 Fed. Reg. at 34206).

21. Petition Review, *BP America Production Company, Florida River Compression Facility*, Envt. App. Board (2010) (No. CAA 10-04).

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31. *Id.*

32. *Id.*

33. *Id.*

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36. *Id.*

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54. 42 U.S.C.A. § 7410(a)(2). *See generally* David Wooley and Elizabeth Morss, *Clean Air Act Handbook § 3:1 Interstate air pollution—Introduction* (2011).

55. 42 U.S.C.A. § 7426.

56. CAA § 184, 42 U.S.C.A. § 7511(c).

57. The Ozone Transport Commission is expected to identify additional measures to reduce emissions of VOCs and NO_x where needed to reach attainment and recommend them to the EPA. CAA § 176A, 42 U.S.C.A. § 7506a. The EPA Administrator must render a decision on these recommendations within nine months, and if she approves the recommendations, must issue a notice requiring states to revise their SIPs. CAA § 110(k)(5).

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59. *Equipment Leaks of VOCs from Onshore Natural Gas Processing Plants*, 50 Fed. Reg. 26122 (June 24, 1985) (codified at 40 C.F.R. Part 60, Subpart KKK); *Onshore Natural Gas Processing SO_2 Emissions*, 50 Fed. Reg. 40158 (Oct. 1, 1985) (codified at 40 C.F.R. Part 60, Subpart LLL). EPA is required to review and revise its NSPSs for the Crude Oil and Natural Gas Production source category at least every eight years. 42 U.S.C. § 7411(b)(1)(B).

60. 42 U.S.C. § 7412(d)(2).

61. *NESHAPs for the Oil and Natural Gas Transmission and Storage Major Categories*, 64 Fed. Reg. 32610 (June 17, 1999) (codified at 40 CFR Part 63, Subparts HH and HHH).

62. Complaint for Declaratory and Injunctive Relief, *Wild Earth Guardians v. U.S. E.P.A.*, No. 1:09-cv-00089-CKK, (D. D.C. 2009).

63. Consent Decree, *Wild Earth Guardians v. U.S. E.P.A.*, No. 1:09-cv-00089-CKK, (D. D.C. 2009).)

64. *See* U.S. E.P.A. Review of Federal Air Regulations for the Oil and Natural Gas Sector, slides 14-17, *available at* <http://www.epa.gov/airquality/oilandgas/pdfs/presentation2010.pdf > (showing where the emissions come from during each step of the natural gas production process and which are currently covered by federal regulations).

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Where We Stand in the Wake of the Supreme Court's Decision in *American Electric Power Co. v. Connecticut*

By Andrew B. Wilson[1]

I. Introduction

On June 20, 2011, the United States Supreme Court decided *American Electric Power Company v. Connecticut*.[2] In this case, plaintiffs, comprised of eight States, New York City, and three land trusts, sought equitable relief under federal common law against six electric power corporations operating in twenty states to cap emissions which contribute to climate change. Specifically, the plaintiffs petitioned for an abatement of greenhouse gas emissions to curtail domestic contributions to climate change, the effects of which are already being felt and likely will not abate before causing billions of dollars of nationwide harm.[3] *American Electric* is perhaps the most high-profile environmental case since *Massachusetts v. EPA*, which is known for, *inter alia*, requiring the United States Environmental Protection Agency (EPA) to promulgate rules to regulate greenhouse gases under the Clean Air Act. *American Electric* held that not only is EPA responsible for promulgating rules, but the States, and possibly subdivisions of states as well as private citizens, may be able to civilly limit emissions under federal common law.

The novelty of bringing a civil suit against greenhouse gas emitters was first considered by the plaintiffs in the late 1990s.[4] By 2004, state attorneys general, the City of New York, and the three land trusts came together to explore different legal avenues, eventually settling on a public nuisance theory as the "most promising approach."[5] As *American Electric* worked its way through the federal courts, in 2007 *Massachusetts* was decided. This is vital to the 2011 decision as *American Electric* and *Massachusetts* were actually being litigated concurrently for a time. The time line is as follows: *American Electric* was first filed in 2004[6]; three years after, in 2007, *Massachusetts* was decided; *Connecticut v. American Electric Power Co.* was decided in the Second Circuit in 2009; *American Electric Power Co. v. Connecticut* was decided in 2011. This time line is the crux of what became the issue primary to the Supreme Court's decision: whether, for the purposes of the suit, federal common law had been displaced by the EPA's process of rule promulgation scheduled to be completed in 2012, and whether displacement requires that a field has simply been occupied or if it must be occupied in a particular manner. Some history on the decision helps to put these issues in context.

II. History

The legal theory of using nuisance to combat environmental threats to human well-being has a rich history. States used this theory to abate pollutants from neighboring states and even localities for many decades. For instance, in the 1901 decision of *Missouri v. Illinois*, Missouri was granted injunctive relief against Chicago for the discharge of untreated sewage into waters that flowed into Missouri.[7] In 1916, in *Georgia v. Tennessee Copper Co.*, Georgia was able to curtail private copper companies' discharging sulfur-dioxide.[8] Perhaps most-cited are *Milwaukee I* and *Milwaukee II*, which discussed the Clean Water Act (CWA) and which, in the first decision, allowed Illinois to abate sewer discharges into Lake Michigan, and in the second, held that the amendments to the CWA now displaced federal common law in this area.[9] However, application of this legal theory to greenhouse gases was novel because of the difficulties of redressability, standing, and political question. Regardless, under a theory of federal common law public nuisance, the plaintiffs sought to partly abate the nuisance of global warming with an injunction capping the defendants' carbon dioxide emissions and then reducing them by a specified percentage per year for at least ten years.[10]

The theory as applied to greenhouse gases would permit a government body or, in some cases a private interest, to enjoin an activity that constitutes a public nuisance, *i.e.*, some "unreasonable interference with a right common to the general public."[11] The basic thrust behind such a lawsuit is: (i) global warming constitutes a public nuisance in that its harmful effects are serious and widespread; (ii) this nuisance is caused by carbon dioxide pollution in the atmosphere; (iii) the chosen defendants are and have been major emitters of carbon dioxide into the atmosphere; (iv) abatement of the nuisance requires that the defendants be enjoined from emitting carbon dioxide. Thus, although redressibility would appear to be a concern as those emitters are not the sole cause of the problem, a causational link based upon major contribution to the problem was affirmed in *Massachusetts* and paved the way for this decision.

While traditionally a matter of state common law, a federal cause of action for public nuisance does exist in certain situations—namely, where a plaintiff state or its residents are harmed by pollution originating in another state.[12] The plaintiffs, *American Electric*, therefore, state a claim under federal common law, and state a public nuisance claim under state law in the alternative.[13] Additionally, two complaints—one for the government plaintiffs (the States and City of New York) and one for the land trusts—were filed in the U.S. District Court for the Southern District of New York on July 21, 2004.[14] The cases were consolidated for simplicity and the remainder of this discussion will refer to the plaintiffs as a whole.

A. The Southern District of New York Dismisses as Presenting a Non-Justiciable Political Question

After the complaints were filed, the defendants asserted numerous grounds for dismissal. As summarized by the district court:

> First, Defendants contend that Plaintiffs have failed to state a claim upon which relief can be granted because: (1) there is no recognized federal common law cause of action to abate greenhouse gas emissions that allegedly contribute to global warming; (2) separation of powers principles preclude this Court from adjudicating these actions; and (3) Congress has displaced any federal common law cause of action to address the issue of global warming. Second, Defendants contend that this Court lacks jurisdiction over Plaintiffs' claims because: (1) Plaintiffs do not have standing to sue on account of global warming and (2) Plaintiffs' failure to state a claim under federal law divests the Court of [federal question] jurisdiction. In addition to advancing these primary arguments, Defendants Southern, TVA, Xcel, and Cinergy move to dismiss for lack of personal jurisdiction, and TVA moves to dismiss because, as an agency and instrumentality of the United States, it claims that it cannot be sued for a tort when the subject of the lawsuit is the actions it performs as part of its discretionary functions.[15]

Despite its options to avoid reaching the merits of the case, the district court chose to dismiss the complaints *sua sponte* as raising a non-justiciable political question.[16] "Because resolution of the issues presented here requires identification and balancing of economic, environmental, foreign policy, and national security interests," the district court reasoned, "'an initial policy determination of a kind clearly for non-judicial discretion' is required."[17] The remainder of the defendants' motions were then dismissed as moot.[18] The plaintiffs timely appealed.

B. The Second Circuit: Political Question Doctrine and Further Merits

After the Southern District of New York dismissed the case for lack of justiciability, the Second Circuit, similar to the Supreme Court in *Massachusetts*,[19] allowed a presumptively global problem to be captured within the limited scope of tort claims. The opinion by the Second Circuit illustrates a narrow, more pragmatic view of non-justiciability.

The District Court relied upon the third of six *Baker v. Carr* factors in deciding that the causes of action were "'impossi[ble] [to] decid[e] without an initial policy determination of a kind clearly for non-judicial discretion.'"[20] The Second Circuit reviewed this decision *de novo* analyzing all six *Baker* factors, as well as standing, applicability of federal common law, and displacement of the plaintiffs' claims. In terms of non-justiciability, the Second Circuit set a high standard under *Baker*: there must be an "'inextricable [link] from the case at bar.'"[21] Notably, the court cautioned that a politically charged issue is not synonymous with non-justiciability. That is, simply because a case raises a controversial political issue does not render it beyond the competence of the courts to adjudicate.[22] To ameliorate the justiciability of a politically charged issue, the controversy must "revolve around policy choices and value determinations constitutionally committed" to the Legislative or Executive Branch.[23] In this case, the court reasoned that the separation of powers was not at risk because the executive and legislative branches retained full authority to change any carbon dioxide emissions policy established by the courts.[24] Judicial resolution of the case at bar would, therefore, not infringe on the political branches' rights under the Constitution to formulate and employ their own remedies.

Of the six *Baker* factors evaluated, the second and third bear the brunt of analysis. The second factor asks whether manageable standards exist for resolving the case. The court determined that manageable standards do exist because the framework of Plaintiffs' tort claim has been adjudicated in the past in *Missouri v. Illinois* and *Georgia v. Tenn. Copper Co.*[25] and the standards for nuisance have been developed in the Restatement (Second) of Torts.[26] Tort encompasses the Plaintiffs' primary claim, that defendants created, contributed, or maintained a public nuisance in the form of a "posit[ed] [] proportional relationship… '[between carbon dioxide] emissions, [to] greater and faster [] temperature change[s] [], with greater resulting injuries'"[27] from the emission of millions of tons of carbon dioxide annually.[28] Later in the decision, addressing applicability of federal common law, the court laid out the Restatement § 821B(1) nuisance elements as: an "unreasonable interference" and "a right common to the general public."[29]

The third factor, impossible to decide without a prior non-judicial policy decision, was heavily relied upon by the District Court. Defendants had two principal arguments against recognizing this cause of action under this factor. First, they argued that there could be no federal common law cause of action absent some constitutional necessity for it and no such necessity existed here. Second, they argued that under Supreme Court precedent, the cause of action may only be applied to "nuisances of a 'simple type'" that "involve 'immediately noxious or harmful substances [that] cause severe localized harms that can be directly traced to an out-of-state source.'"

However, the Second Circuit construed this factor through the lens of Plaintiffs' reliance on tort and the plaintiffs' capacity to sue as states and as owners of property allegedly injured by defendants' conduct. The doctrine of *parens patriae* permits a state government to bring suit to protect "its natural resources and the health of its citizens,"[30] notably in public nuisance cases[31] where a private lawsuit could not likely achieve an adequate remedy.[32] *Parens patriae* standing could be established here because the states alleged that "virtually their entire populations" would be harmed by defendants' carbon dioxide emissions, and be-

cause individual, private-party plaintiffs could not likely achieve complete relief.[33] Thus, as it stood, the court held that the plaintiffs may pursue federal common law claims that "have been adjudicated in federal court for over a century."[34]

Related to this subject is the court's analysis of displacement of federal common law. Citing *United States v. Texas*,[35] the court emphasized that a refusal to legislate does not amount to displacement of common law; however, it conceded that later regulation "may in time pre-empt the field of federal common law of nuisance."[36] Also, the court stated that federal common law is resorted to by the courts only "in the absence of an applicable Act of Congress."[37] While defendants contend that the Clean Air Act is just the sort of comprehensive federal statutory scheme that should displace any federal common-law authority over carbon dioxide emissions,[38] the Second Circuit found no specific act or amalgam of several acts that "[spoke] *directly* to [the] question otherwise answered by federal common law." The court found that neither Congress nor the EPA had displaced federal common law by regulating the subject matter of Plaintiffs' claims.[39] The crux of the determination was that even though the EPA may have authority under the Clean Air Act to control greenhouse gas emissions, and despite legislative measures to research greenhouse gas emissions and adhere to certain treaties on the subject of climate change, no action has been taken to control and regulate actual emissions from sources such as defendants' power plants.[40]

In summation, the court's role in reviewing the plaintiffs' standing should have been limited, as this appeal was presented from a motion for summary judgment. In such situations, Plaintiffs need not "present scientific evidence to prove…injury…or that the remedy they seek will redress those injuries."[41] Yet, the court cited *Summers v. Earth Island Inst*.[42] and *Lujan v. Defenders of Wildlife*[43] in addressing the broad history and platform of environmental standing, affirming *sua sponte* Plaintiffs' standing at this stage of litigation. The Second Circuit vacated the summary judgment decision and remanded the case to the District Court, finding the federal common law claim made by the Plaintiffs to be proper, justiciable, and not displaced. Without subsequent legislation, or at the very least, without responsive rulemaking by the EPA, tort law appeared a source of viable litigation strategy to confront major polluters. The implications of which, as pointed out in Justice Ginsburg's opinion as well, would be that major emitters in industry and perhaps even state and local governments would be vulnerable to civil actions.[44] On the other hand, a dismissal of the claims would be a major setback for those advocating action to address global warming and climate change.

C. U.S. Supreme Court Grants Certiorari

The defendants appealed the Second Circuit's decision, filing petitions for certiorari on August 2, 2010. Certiorari was granted on December 6, with Justice Sotomayor recusing herself from consideration of the petition due to her involvement on the panel of the Second Circuit, although not in the underlying decision itself.[45] Broadly described, the issues expected to be considered on this appeal were: (1) whether states and private parties may seek emissions caps on utilities for their alleged contribution to global climate change; (2) whether a cause of action to cap carbon dioxide emissions can be implied under federal common law; and (3) whether claims seeking to cap carbon dioxide emissions based on a court's weighing of the potential risks of climate change against the socioeconomic utility of defendants' conduct would be governed by "judicially discoverable and manageable standards" or could be resolved without "initial policy determination[s] of a kind clearly for nonjudicial discretion."[46] In the actual June 20th decision, Justice Ginsburg refined the issue to be "whether the plaintiffs… can maintain federal common law public nuisance claims against carbon-dioxide emitters." The answer, in short, was "no."

First, however, the primary issue upon appeal from the original District Court decision is the issue of justiciability concerning political question—the basis for the District Court dismissal—and standing. Justice Ginsburg notes in her opinion that four members of the Court would hold that some plaintiffs have standing while four members of the Court would adhere to the dissenting opinion in *Massachusetts*, and hold that none have standing. As a result, an equally divided Court affirmed "the Second Circuit's exercise of jurisdiction," thus agreeing that the political question doctrine is not a bar to review and there are "no other threshold obstacle[s that] bar[] review."[47] However, the 4-4 vote on this issue is important, and thus will warrant further evaluation below.

The remainder of the decision concerning the merits hinges on the *Massachusetts v. EPA* decision wherein the Supreme Court ruled that the EPA had not acted in accordance with the law when it denied a requested rulemaking concerning greenhouse gas emission standards.[48] Justice Ginsburg, writing for the majority, relies upon that decision as well as the actions the agency has taken towards rulemaking since the decision—such as 75 Fed.Reg. 25324 concerning emissions from light-duty vehicles and the commenced rulemaking directed towards regulating fossil-fuel fired power plant emissions under § 111 of 42 U.S.C. § 7411—in ruling that the field has been occupied and thus displaces a federal common law claim directed at the same question.

The Court states the appropriate test: "whether congressional legislation excludes the declaration of federal common law is simply whether the statute 'speaks directly to the question' at issue."[49] This can be distinguished from the Second Circuit's interpretation of the rule which is much more narrow and only found displacement where the agency "actually exercises its regulatory authority."[50] The Supreme Court states that the application of the rule is tested by "whether the field has been occupied, not whether it has been occupied in a particular manner."[51] That is, "Congress [has] delegated to EPA the decision whether and how to regulate carbon dioxide emissions from power

plants; the *delegation* is what displaces federal common law."[52]

As the Clean Air Act provides for lists of categories of pollutants, standards of performance for emission of pollutants within the categories, enforcement of the guidelines, and a mechanism if limits are not set—factors which amount to "considered judgment" of the legislature concerning regulation of air pollution (although air pollution is permitted until the rules are promulgated)—the area is occupied and no "parallel track" through the federal courts may be sought.[53] While it is unclear if all the factors must be present in a delegating law to constitute displacement, the Court holds that federal common law has been displaced by the Clear Air Act in this case. Federal judges may not set limits on greenhouse gas emissions. The EPA must be free to set emission limits under the Clean Air Act and those limits are subject only to judicial review under U.S.C. § 7607(d)(9) to determine whether the limits are "arbitrary, capricious…or otherwise not in accordance with the law."[54]

Woven through the displacement decision is an illustration of judicial prudence. Although the Court does not accept a theory of dismissal by the petitioners of a "prudential" bar to adjudication of generalized grievances, there is certainly substantial discussion dedicated to the importance of judicial discretion when applying federal common law.[55] Federal common law may apply to "subjects within national legislative power where Congress has so directed"—explicitly encompassed in this category by the Court is environmental protection—by filling in "statutory interstices" and even "fashion federal law."[56] However, the Court cautions that not all areas where the federal government should be involved are appropriate for application of federal common law. Without a "demonstrated need," the Court will often adopt a state law until Congress acts; in this case "the law of a particular State would be inappropriate" due to the national scope of the issue. Also, presenting an argument often used by courts when faced with scientific decisions, Justice Ginsburg highlights that courts are ill-equipped to perform the tasks of an expert agency.[57] Additionally, there is a chance of piecemeal decision making while facing an issue as all-encompassing as climate change as federal district judges "lack authority [to] render precedential decisions binding other judges, even members of the same court."[58]

Although the Court found that the alleged federal common law causes had been displaced by the Clean Air Act, disposition of the federal causes did not resolve the applicability of state nuisance law which was not briefed by the parties and thus not addressed by the Court.[59] Accordingly, the case was remanded for further development.

III. Implications

While this decision has received a lukewarm welcome from many environmental groups and industry alike, this decision should be viewed as a victory in the overarching scheme of environmental law and regulation.[60] A pessimist might consider this case a wash where the decision on the real issue before the court—justiciability—is 4-4 and, therefore, non-precedential and the analysis on the merits plausibly dicta. However, the Supreme Court was likely aware of the potential split on the standing issue and yet still took up the case and took time to discuss the merits. Although it may be merely a prophylactic action on the Court's part, in the larger context, even dicta from the Supreme Court serves several important jurisprudential purposes and, reading as much from what is *not* written, this decision serves by implication as an affirmation of *Massachusetts*.

First, the implications of the very short analysis of the issue before the court, justiciability, should be evaluated. An equally divided (4-4) court on the issue bears the unfortunate effect of being non-binding and the Second Circuit decision prevails. That is, upon remand, this controversy will be bound by the Second Circuit decision, but that decision is not binding on other courts. This may explain the brevity of the Court's analysis. However, a close reading of the standing paragraph will note that the phrase "hold that at least *some* plaintiffs have Article III standing" may imply there is not agreement on whether all plaintiffs have standing or simply the States.[61] This potential pivotal issue is not illuminated further,[62] leaving the ability of municipalities and private organizations to bring suits of this type.

However, an important note is that this petition was not originally based upon the merits of federal common law applicability. This decision is an appeal from a motion for summary judgment on whether the issue is justiciable as pertaining to the issues of political question doctrine and standing for the plaintiffs; the discussion on the merits was taken up *sua sponte* by the Second Circuit. This decision is a victory for the respondent States who may now no longer fear political question as a bar to suits. A question for the future is whether Justice Sotomayor's vote will affirm standing for States.

On the merits, the time line is important in this decision, as *Massachusetts* was decided during the pendency of this controversy.[63] Regardless, standing alone, this decision adds to a growing line of cases stating that the courts will entertain environmental cases pertaining to the abatement of pollutants under a theory of tort. Although federal common law in this particular case concerning greenhouse gas emissions has been displaced, this decision strengthens cases like *Milwaukee I* which hold that federal common law may apply in similar areas. It also serves as an affirmation of *Massachusetts* as under the court's composition and with the absence of Justice Sotomayor, this would have been a prime opportunity to undermine the landmark decision. However, this opportunity has passed by and instead the causal link of contribution to climate change is left untouched and the EPA remains required to promulgate regulations. In the future, this case may even be directly on point if Congress acts to prohibit the EPA from regulating in this area or the EPA is disbanded altogether.[64]

Further, one may speculate that without such EPA rulemaking, this decision would have turned out differently,

despite the prudential concerns of expertise and piecemeal district court decisions in crafting federal law where none stands but is necessary. The Court does not decide that federal common law is inapplicable in these situations. Instead, it corrects the Second Circuit's rule by narrowing the test of displacement and finding that the circumstances of EPA rulemaking meets the criteria. Notably, under its own analysis, in the absence of *Massachusetts*-required rulemaking, this decision may have required a finding of no displacement. Thus in the greater context, the value of a clarified rule which affirms federal common law use in the area of pollution abatement outweighs the specific defeat in this case. The primary importance of this case in its infancy was to explore viability of alternate avenues of curbing contributions to climate change once the EPA under the George W. Bush Administration determined that the EPA would not regulate. The importance of this purpose was considerably blunted by *Massachusetts*—the very decision which is the basis for the finding here against the States' use of federal common law. On balance, the implications to the larger field of environmental law, as well as in preserving state nuisance claims, versus the defeat of federal common law in this particular case, is tilted in favor of long-term environmental law.

Even viewing this decision as a victory in the long term, there are several issues left on the table which the court considers academic in this decision due to the basis upon displacement of federal common law. In one paragraph, Justice Ginsburg quickly cites a few issues that remain a concern such as whether private citizens or political subdivisions may invoke federal common law of nuisance or even that "a State may sue to abate any and all manner of pollution originating outside its borders."[65] This leaves an open question as to the bounds of the standing decision, although it is fairly clear that States have standing, and it also leaves open to debate the limits of this decision's applicability.[66]

Also troubling are the undertones of judicial prudence cited by Justice Ginsburg. While Justice Ginsburg cites both the lack of creativity and the lack of expertise as limitations of courts in addressing these issues, she stops short of stating that the Courts are unable to approach such issues.[67] Bearing this in mind, one may theorize that a plaintiff may shoulder this burden of scientific exploration, as is the case in many areas of law such as patent law and medical malpractice, and present compelling evidence to the Court to overcome the expertise constraints of the Court. Additionally, while the Court may be overstating its lack of creativity given a history of equitable decisions,[68] this obstacle may also be addressed by a party either by asking for straightforward abatement or by fashioning relief based upon existing regulations.

Even with these live issues, this case will remain in the courts for years to come. Seven years of litigation have led to the holding that this case is justiciable and that there is standing to bring such a suit in the Second Circuit, albeit the suit is limited to state nuisance theories for this particular issue.

VI. Conclusion

Although application of federal common law is displaced by the interpretation of the Clean Air Act in *Massachusetts*, this case remains an important clarifier on a number of key environmental issues:[69]

This case has clarified that federal common law may still be crafted, although hesitantly, by courts and used by States as a tool for environmental regulation, albeit not where an agency is the delegated authority to regulate in the same area. It has also clarified that the political question doctrine is less of a barrier to suits seeking to address climate change issues, at least in terms of contributive emissions from large producers where causation may be shown. This decision opens the door to state nuisance claims, the jurisprudence of which may vary from state to state, but may still target large emitters based nationwide. It also clarifies that the courts retain the power to review regulations that are arbitrary and capricious and also that may not be in accordance with federal Acts—not simply those where regulation is refused as was the issue in *Massachusetts*.

However, standing for States remains without a majority opinion binding all the Circuits. Moreover, standing for non-States remains a serious question as citizens, groups, and localities seek to become involved in climate change. How far the courts are willing to go in recognizing causality between pollutants and climate change remains an issue, as well as the scope of what a large emitter is. Of course, we also await a decision on the merits of the applicability of state nuisance claims against emitters and polluters.

This area of law will certainly remain an active source of litigation even as the EPA promulgates regulations pertaining to the emission of greenhouse gases. Despite a supposed loss to environmentalists in this decision, there are large and important implications that, when viewed in tandem with *Massachusetts*, leave the environmental field of law vibrant, dynamic, and an area which will show continued progress.

Endnotes

1. Thank you to Michael Frascarelli for contributions and help in researching this article.
2. Am. Elec. Power Co., Inc. v. Connecticut, 131 S.Ct. 2527 (2011).
3. Connecticut v. Am. Elec. Power Co, 582 F.3d 309, 317–18 (2d Cir. 2009).
4. *See, e.g.*, Matthew F. Pawa, *Global Warming: The Ultimate Public Nuisance*, 39 ENVTL. L. REP. NEWS & ANALYSIS 10230, 10236 (2009).
5. *Id.* at 10237.
6. *Sub nom* Connecticut v. Am. Electric Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005).
7. 180 U.S. 208 (1901).
8. 240 U.S. 650 (1916).
9. 406 U.S. 91 (1972); 451 U.S. 304 (1981).
10. *Id.* at 270.

11. Restatement (Second) of Torts § 821B (1979).
12. *See, e.g.*, Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (sulfurous fumes from copper smelting); Illinois v. City of Milwaukee, 406 U.S. 91 (1972) (sewage dumping into Lake Michigan).
13. Complaint of State of Conn. *et al.* ¶ 1, Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (No. 104CV05669).
14. S.D.N.Y docket nos. 04 Civ. 5669, 04 Civ. 5670 (2004).
15. Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d at 270 (internal citations omitted).
16. *Id.* at 274. The district court considered the political question issue as raising a species of subject matter jurisdiction deficiency, permitting it to dismiss the action under Fed. R. Civ. P. 12(b)(1) on its own motion. *Id.* at 270–71. No legal authority was cited for this interpretation. Perhaps to avoid addressing this issue on appeal, the Second Circuit chose to interpret the decision below as adopting the defendants' separation-of-powers argument for dismissal. Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 219 (2d Cir. 2009).
17. *Id.* at 274 (*quoting* Vieth v. Jubelirer, 541 U.S. 267, 278 (2004)).
18. *Id.*
19. 549 U.S. 497 (2007).
20. Baker v. Carr, 369 U.S. 186 (1962); Connecticut v. Am. Elec. Power Co., 406 F.Supp.2d 265, 272 (S.D.N.Y. 2005) (quoting Vieth v. Jubelirer, 541 U.S. 267, 278 (2004)).
21. *Connecticut*, 582 F.3d at 321 (quoting *Baker*, 369 U.S. at 217).
22. *Id.* at 322.
23. *Connecticut*, 582 F.3d at 323 (quoting Japan Ass'n v. Am. Cetacean So'y, 478 U.S. 221, 230 (1986)).
24. *Id.* at 332.
25. 180 U.S. 208 (1901).
26. 206 U.S. 230 (1907).
27. *Connecticut*, 582 F.3d at 327–28.
28. *Id.* at 326 (citing Restatement (Second) Torts § 821B(1) (the court further fleshes out these elements by discussing § 821B(2) which includes examples of interference with a public right)).
29. *Id (*quoting *National Academy of Sciences).*
30. *Id.* at 334–35.
31. *Id.*
32. *Id.* at 336.
33. *Id.* at 338.
34. *Connecticut*, 582 F.3d at 331.
35. 507 U.S. 529 (1993).
36. *Id.* (citing *Milwaukee II*, 451 U.S. 304, 313–14 (1981)).
37. *Id.* at 387.
38. *Id.* at 375.
39. *Id.* at 374 (quoting *Milwaukee II*, 451 U.S. at 351).
40. *Id.* at 381–89. The court did note that displacement could happen in the event that EPA does take action to directly control greenhouse gas emissions. *Id.* at 381.
41. *Id.* at 333.
42. 129 S.Ct. 1142 (2009).
43. 504 U.S. 555 (1992).
44. Am. Elec. Power Co. v. Connecticut 131 S.Ct. 2527, 2540 (2011).
45. Am. Elec. Co. Inc. v. Connecticut, 131 S. Ct. 813, 178 L. Ed. 2d 530 (2010).
46. SCOTUSblog, http://www.scotusblog.com/case-files/cases/american-electric-power-co-inc-v-connecticut-2/; Petitioners' Brief to the U.S. Supreme Court at (i).
47. Am. Elec. Power Co., Inc. v. Connecticut, 131 S.Ct. at 2535.
48. *Id.* at 2532, *citing* 549 U.S. 497 (2007) at 534-35.
49. *Id.* at *2537 *citing* Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978), *Milwaukee II*, 451 U.S. at 315, County of Oneida v. Oneida Indian Nation of N.Y., 470 U.S. 226 (1985).
50. *Id.* at 2538.
51. *Id. citing Milwaukee II*, 451 U.S. at 324.
52. *Id.* at *2538 (emphasis added).
53. *Id.* at 2537 (note, however, the Court is quick to add that the EPA's judgment "would not escape judicial review" as courts "can review agency action []to assure compliance with" an Act) *Id.* at 2359. Also note that, in what appears to be dicta, Justice Ginsburg spends some time discussing the appropriateness of ex-parte EPA making the rules and regulations as opposed to "district judges issues ad hoc, case-by-case injunctions." *Id.*
54. *Id.* at 2540.
55. *See id.* at 2535 n.6.
56. *See id.* at 2535 (*citing* Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) and *In Praise of* Erie–*And of the New Federal Common Law*, 39 N.Y.U.L.Rev. 383 (1964)).
57. *Id.* at 2535, *11.
58. *Id.* at 2539.
59. *Id.* at 2540.
60. *See generally* Bill Mears, *Justices reject multistate lawsuit over global warming*, cnn.com, June 20, 2011, available at http://www.cnn.com/2011/US/06/20/scotus.global.warming/index.html?iref=allsearch; *see also* Lawrence Hurley & Gabriel Nelson, *High Court Blocks States' Lawsuit Over Coal Plant Emissions*, NYTimes, June 20, 2011, available at http://www.nytimes.com/gwire/2011/06/20/20greenwire-high-court-blocks-states-lawsuit-over-coal-pla-60218.html?scp=2&sq=supreme%20court%20american%20electric&st=cse.
61. Am. Elec. Power Co. v. Connecticut, 131 S.Ct. at 2535 (emphasis added).
62. A fair assumption is that the three joining Justice Ginsburg are Justices Kagan, Breyer and Kennedy and the four against are Justices Roberts (Chief), Alito, Scalia and Thomas.
63. Am. Elec. Power Co. v. Connecticut, 131 S.Ct. at 2534.
64. This may seem outlandish, but as noted by Lawrence Hurley, *GOP Lawmakers Take Obama Admin's Side in Supreme Court Greenhouse Gas Case*, NYTimes, Feb. 8, 2011, available at http://www.nytimes.com/cwire/2011/02/08/08climatewire-gop-lawmakers-take-obama-admins-side-in-supr-19115.html, there is legislation circulated to prohibit the EPA from regulating greenhouse gases and it is well known that some figures, such as prominent former Speaker and now Presidential-hopeful Newt Gingrich, would scrap EPA altogether. *See New Gingrich CPAC Speech: EPA Should Be Scrapped*, Huffington Post, Feb. 10, 2011, available at http://www.huffingtonpost.com/2011/02/10/newt-gingrich-cpac-speech_n_821507.html.
65. Am. Elec. Power Co. v. Connecticut 131 S.Ct. at 2536.
66. For instance, if, hypothetically, *Massachusetts* was not decided and plaintiffs were seeking the abatement of a specific type of greenhouse gas, say methane, perhaps that specific emission is not "fairly traceable" as its more prominent companion, carbon dioxide.
67. *Id.* ("the Court remains mindful that it does not have creative power akin to that vested in Congress").
68. *See, e.g.*, Willard v. Tayloe, 75 U.S. 557 (1869) (finding wide equitable discretion by the courts in that "relief is not a matter of absolute right to either party; it is a matter resting in the discretion of the court, to be exercised upon a consideration of all the circumstances of each particular case").
69. Am. Elec. Power Co. v. Connecticut 131 S.Ct. at 2540.

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Solar Energy Development: Proposed Legislation as an Essential Element in New York State's Future

By James P. Rigano

Sunlight can generate electricity through well developed and widely available solar panels that convert sunlight into electricity. The panels are typically installed on roofs, although they can also be mounted on the ground and as carports in parking lots. In New York and other states, excess solar electricity can be sold to local utilities, and when additional electricity is needed, electricity from conventional sources can be delivered through the transmission system, a process known as net metering.[1]

Incentives for the development of renewable energy have promoted the growth of the industry. However, additional incentives are critical.

Solar Renewable Energy Credits, SRECs, have developed in some states as a successful incentive. SRECs are commodities traded in the marketplace based on supply and demand.[2] The markets are based on individual state laws where generally one SREC is equal to 1,000 kilowatt hours ("kWh") of electricity. A typical house will utilize 5,000 to 11,000 kWh per year. Currently, New York State has no functional SREC market. SREC requirements, which have been adopted in other states,[3] require electric utilities to buy a specific amount of power from individuals and businesses with solar installations. New Jersey adopted a SREC program several years ago causing New Jersey to be the number two state, after California, for total solar capacity.[4] New York State has a total of 36 megawatts of solar, including 26 on Long Island, compared to 235 megawatts in New Jersey provided through about 7,500 systems. Solar energy represents well under one percent of New York's electricity generation today, which could change dramatically if the New York Solar Job Act is enacted. The Act as proposed would set up a SREC program similar to New Jersey. Today, 79% of New York State's electricity comes from fossil fuel (natural gas, coal, and petroleum) and nuclear facilities. Another 15% to 19% comes from hydroelectric facilities.[5]

SRECs provide a source of revenue that offers significant financial assistance to pay for solar installations and reduce the payback period. Solar system owners can sell their SRECs to the local electric utility which is required to buy a certain amount of SRECs per year based on the utility's total electricity provided to its customers.[6] The value of a SREC is not guaranteed and SRECs trade in a competitive market based on supply and demand. In New Jersey, the SRECs have a value of about $600.[7]

New York's Proposed SREC Legislation

New York State's proposed SREC legislation, Assembly Bill, A5713B, would amend the state public service law[8] and public authorities law[9] to create the NY Solar Industry Development and Job Act of 2011. The purpose of the law is to stimulate the installation and generation of solar energy in New York State. The law was first introduced in 2010 and a modified version was introduced in the Assembly in 2011. The proposed legislation will require electric utilities to enter into 15 year agreements for the purchase of SRECs to meet specific percentages of the supplier's electric sales in a given year. In 2013, the annual requirement will be 0.15% and then will increase each year until 2025 when the annual requirement will be 3.00%. The New York Power Authority and Long Island Power Authority will be subject to similar requirements with slightly higher percentages. In 2013, the authorities will be required to procure 0.33% of their total electric sales, which will increase each year through 2025 to 3.5%.[10]

The proposed legislation encourages a diverse market for the acquisition of solar credits, with 20% of the total obligation having to be met through small solar projects and 30% through generation of any size, supporting small, large, and utility-scale solar projects across the state. Also, the bill proposes a cap on the cost that can be passed to the electric utilities and the rate payers: if the costs exceed 1.5%, the utilities are only required to achieve the current year's required percentages. This important provision is intended to limit the financial impact to 1.5% cost increases. Also, electric suppliers are able to recover their incurred costs through the electric customer's bills.[11]

The Senate has a comparable bill, S4178, with different percentages and some other provisions. For the investor-owned utilities, it ranges from .05% in 2013 up to 1.5% in 2023, and the authorities have a requirement of 0.25% in 2013, increasing to 4.5% in 2025.[12]

The proposed SREC legislation has been supported by over 100 businesses and organizations including General Electric, Dow, Mitsubishi, and Staples in addition to a long list of entitles in the solar industry. Governor Cuomo also supported a State SREC program in 2010 during his campaign.[13] However, New York State utilities have expressed strong opposition to the law through a trade association, the Independent Power Producers of NY, Inc., on grounds that the energy market should be based on competition and that new energy infrastructures should be built by merchant providers.[14] It is apparent that the utility industry is expressing support for continued use of fossil fuels, presumably natural gas-fired electric power facilities. The concern regarding these power plants is that they are often controversial and receive significant

public and political opposition. It is interesting that Consolidated Edison, Inc. ("ConEd"), NYC's utility, has been reported to be opposed to the New York State SREC legislation even though ConEd is developing the largest solar plant in the northeast, a 20 megawatt facility in New Jersey.[15] Presumably, ConEd would benefit significantly from New Jersey's SREC program.

It is reported that the New York State SREC legislation would create 28,000 jobs and generate more than $20 billion in economic activity.[16]

One alternate incentive approach would be to establish a feed in tariff, similar to that which has been proposed on Long Island but was not adopted.[17] Feed in tariffs require the payment for the production of solar electricity by the utility at a set figure. This allows the developer of a solar facility to be certain about the amount it would be paid for electricity generated from its facility. Several countries, including Germany and Spain, have feed in tariffs that have led to the rapid and extensive growth of solar facilities.

As a general matter, while solar is more expensive than conventional sources of electricity, many believe that with appropriate incentives in today's marketplace, solar electricity can be delivered in the future at substantially lower costs.

Existing State and Federal Incentives

New York State, through the New York State Energy Research and Development Authority ("NYSERDA") and the Long Island Power Authority, provides reimbursements equivalent to $1.75 per watt[18] with caps that essentially limit the benefits to households and small commercial / institutional facilities.

Under the federal incentives, the government will provide a grant for 30% of the cost of the facility.[19] This program expires in late 2011, and given the status of the federal deficit, there is concern that the program will not be renewed. However, a related federal program that provides federal income tax credits in the amount of 30% of the installed costs remains in effect through 2016, and will remain a useful program to facilities that have the necessary income tax liability.[20] Another important, but underutilized, federal incentive is accelerated depreciation. Through the end of 2011, the cost can be fully depreciated in the first year, an unusual and generous federal benefit offering one-year accelerated depreciation.[21] Even if the one-year accelerated depreciation is not renewed, it is likely that some form of accelerated depreciation will be allowed after the end of 2011.

With the federal incentives described above and a SREC program, a commercial or residential solar facility could recover its initial installation costs (after incentives and divided by the annual electric cost without the system) within 3 to 4 years. As a result, after the 3 to 4-year period, the owner of the facility would have no electric cost for the life of the solar facilities, a period that typically extends for more than 20 years.

The New Jersey Experience

States with SREC programs, including New Jersey, Delaware, Maryland, Massachusetts, North Carolina, Ohio, and Pennsylvania, are promoting an increase in their solar installations.[22] New Jersey is in the lead and now has the second largest capacity of solar generation of any state in the country. Some have expressed concern regarding New Jersey's high electric rates and the potential for the SREC programs to increase the impact to the rate payers. Further, New Jersey's Governor Christie has issued a draft 2011 energy master plan that contemplates decreasing the state's goal of electricity from renewable sources from 30% to 22.5%, still a respectable goal.[23]

The Rutgers University School of Planning and Public Policy issued a March 2011 evaluation of the electric rate impacts of New Jersey's SREC program.[24] The analysis shows that SRECs priced at $252, a figure that would significantly boost New York's solar capacity, would result in an increase of 0.14 cents per kWh, or a $1 per month increase in the average New Jersey household cost for electricity for 2011. This is based on an SREC cost resulting in an increase of wholesale electricity by 1.80%.[25] The impact in New York should be less given that the proposed New York SREC legislation limits the increase to 1.5%. The Long Island Power Authority currently charges an efficiency and renewable charge of about 0.6 cents per kWh.[26]

The Low NIMBY Threshold for Solar Facilities

The Not In My Backyard ("NIMBY") objection to conventional electric energy sources is significant. Individuals and municipalities will often express strong NIMBY opposition to electric generating facilities proposed in their area. However, it is extremely uncommon to hear of NIMBY objections to solar facilities: the environmental benefits associated with solar facilities are obvious, and the economic benefits associated with the proposed SREC legislation include growth in the solar industry, resulting in substantially increased employment.

While critics of the SREC legislation (and solar generally) often complain about the increased costs of energy production associated with renewable resource development, this concern must be considered in the context of the comparative ease of unopposed solar approvals. Solar facilities can be readily installed without a NIMBY reaction or local objection. Further, with the increased installation and use of solar facilities, as with all other industries, the costs could be expected to decrease substantially. Significant economic benefits will result given that the source

of energy is domestic and local, not from other countries or from other regions of the country.

Endnotes

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19. Database of State Incentives for Renewable Energy and Efficiency, U.S. Dept. of Energy, Renewable Energy Grants, www.dsireusa.org/incentives/incentive.cfm?incentive_code=us53f (last visited Aug. 28, 2011).
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Greening the Legal Profession—Law Office Climate Challenge Profiles

In early 2007, the American Bar Association (the "ABA") and the U.S. Environmental Protection Agency (the "EPA") partnered to encourage law offices to commit to waste reduction and energy and resource conservation. The partnership resulted in the Law Office Climate Challenge program. Participation in the program continues to grow, in large part due to the leadership of particular attorneys in New York. In this issue of *The New York Environmental Lawyer*, we recognize the innovation and commitment of attorneys in the New York offices of Beveridge & Diamond and Harris Beach. Information on the ABA-EPA Law Office Climate Challenge Program can be found at: http://www.abanet.org/environ/climatechallenge/home.shtml. Questions regarding the Law Office Climate Challenge may be directed to Megan Brillault (mbrillault@bdlaw.com) or Kristen Wilson (kwilson@harrisbeach.com).

Beveridge & Diamond, P.C.

Beveridge & Diamond, P.C. ("B&D"), one of the nation's leading environmental law firms, has taken a leadership role in the field of sustainability for law office management. B&D's commitment to the ABA-EPA Law Office Climate Challenge is one example of the Firm's place at the forefront of these critical issues. B&D became the first law firm in the country to commit to all four components of the ABA-EPA Law Office Climate Challenge for all of its offices nationwide. Two B&D attorneys oversaw the design and implementation of the program via their leadership in the ABA Section on Environment, Energy and Resources.

Through its participation in the Climate Challenge, B&D has committed to purchasing renewable energy in an amount equivalent to 100% of the Firm's electricity usage nationwide, becoming one of the first law firms in the country to do so. B&D has also committed to reducing its paper usage; increasing its recycling of paper and its use of recycled-content paper; and reducing its environmental footprint by investing in energy-efficient lighting, appliances, and office equipment.

In addition to its specific commitments under the Challenge, B&D has undertaken a comprehensive review of the Firm's sustainability policies. To lead this effort, the Firm established the B&D Green Team, which consists of at least one representative from each of the Firm's offices, and includes attorneys, managers, and staff. This process has produced numerous opportunities for the Firm to improve its environmental sustainability policies. Some examples of steps taken to date by B&D to improve its environmental sustainability include:

- The Firm has entered into an agreement to purchase 1,500 mWh of renewable energy certificates (RECs) annually for wind-generated electricity. This purchase of low-carbon RECs is in an amount equivalent to 100 percent of the Firm's nationwide electricity usage.
- In all of its offices, the Firm is utilizing paper containing at least 30 percent post-consumer recycled content for all standard in-house printing and copying.
- The Firm has instituted a policy of double-sided copying and printing for drafts and internal documents with a goal of ensuring that at least half of all printing and copying in each office is double-sided.
- The New York office (the only one of B&D's offices that has its own, as opposed to building-wide, electricity meter) has reduced its electric usage by nearly 10% since implementing changes recommended by the Green Team.
- The San Francisco office has achieved a significant energy savings by replacing light fixtures and bulbs with more efficient alternatives.
- The Firm purchases computer equipment and appliances that are Energy Star compliant, meeting efficiency standards set by EPA and the U.S. Department of Energy. All of the Firm's old computer equipment is donated for reuse or recycling.
- Consistent with Energy Star guidelines, the Firm's computer monitors and hard drives are programmed to go into sleep mode after 30 minutes of inactivity, and printers and copiers go into sleep mode after one hour of inactivity. Computer equipment is shut down at the end of each business day.
- All Firm personnel are encouraged to minimize use of unnecessary lighting by shutting off lights in rooms not actively being used, and by unplugging cell phone, PDA, and other chargers when not in use.
- In recent years, the Firm has held events during the month of April in honor of Earth Day. These have included cell phone, battery, and used-sneaker recycling drives, as well as a "Pocket Change for Eco-Change" program, in which the Firm raised over $500 to support the ABA's One Million Trees Project.

Harris Beach PLLC

In 2007, Harris Beach PLLC realized that Kermit the Frog's saying "It Ain't Easy Being Green" was no longer the case. Indeed, Harris Beach realized that being "green" not only resulted in bottom line savings, it also was important to respect our world and be pro-active in instituting green policies. In 2008, the firm's home office in Rochester, New York became the first law office in Rochester to join the Law Office Climate Challenge. At present, each of the firm's 14 offices throughout New York State and the Tri-State area participate in the Best Practices for Office Paper Management program.

As part of this growing awareness, Harris Beach instituted a new internal Practice Green initiative to promote environmental stewardship through internal waste reduction, recycling, and energy conservation practices. The Practice Green initiative, in conjunction with the Law Office Climate Challenge practices, has helped Harris Beach achieve an 11 percent reduction in electricity. Some of the practices that Harris Beach has adopted include:

- All copiers default to double-sided / duplex printing;
- All offices purchase copy paper that contains 30 percent post-consumer recycled content (Harris Beach estimates that the offices save approximately 400 trees per year as a result of this practice);
- All offices have paper shredding and recycling programs and drop locations for recycling of cans;
- Harris Beach continues to aggressively recycle batteries, envelopes, paper, plastic, binders, and related office supplies;
- Harris Beach provides offices with ceramic coffee mugs in lieu of paper cups (in addition, the firm has eliminated Styrofoam cups and other non-renewable and non-biodegradable items);
- Harris Beach purchases Energy Star equipment when feasible;
- Harris Beach reduces HVAC settings and electricity in offices that the firm owns;
- Harris Beach uses environmentally friendly cleaning supplies to clean the offices; and
- Lawyers are provided a "Top 10 List" of ways to practice "greener."

Harris Beach encourages its employees to be supporters of the environment throughout the year outside the office as well. For example, for Earth Day 2011, Harris Beach employees donated money to the New York Restoration Project (NYRP) to promote the redevelopment and revitalization of open space and forgotten parks in New York City's neglected neighborhoods.

Administrative Decisions Update

Prepared by Robert A. Stout Jr.

In the Matter of *the Alleged Violations of Article 17 of the Environmental Conservation Law and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York, by Creekhill Realty, LLC, Respondent.*

Ruling on Motion for Default Judgment
April 6, 2011

Summary of Decision

The Administrative Law Judge denied DEC staff's motion for a default judgment based upon Respondent's failure to appear because of defects contained in the notice of hearing and complaint served on Respondent.

Background

DEC's complaint relating to a residential building and petroleum bulk storage (PBS) facility set forth the following five causes of action:

1. Failure to renew facility registration in violation of ECL § 17-1009 and 6 NYCRR Part 612.2(a);
2. Failure to transfer ownership of the facility registration in violation of 6 NYCRR Part 612.2(b);
3. Failure to display the facility's PBS registration certificate on the premises in violation of 6 NYCRR Part 612.2(e);
4. Failure to perform leak detection in violation of 6 NYCRR Part 613.4(a)(2), and
5. Failure to test facility tank and piping system for tightness in violation of 6 NYCRR Part 613.5(a).

The notice of hearing and complaint was served by mail on September 27, 2010. Respondent failed to answer the complaint and failed to appear at the prehearing conference scheduled in the notice for October 29, 2010. By notice of motion dated February 24, 2011, DEC moved for a default judgment. As of the date of the Ruling, a response had not been received to DEC's motion.

Ruling of the Administrative Law Judge

Despite DEC's production of all of the basic elements required for a default judgment, the ALJ denied the motion, citing a defective notice of hearing. The ALJ cited several inconsistencies between the notice of hearing and complaint:

1. The caption indicates alleged violations of ECL Article 17, while the body of the notice refers to Article 19.
2. The notice refers to law and regulations that are not referenced in the complaint: ECL §72-0201(7) and 6 NYCRR Part 481.8 (relating to failure to pay a fee); and 6 NYCRR Part 621.14 (addressing circumstances concerning permit issuance).

However, nowhere in the complaint is there a reference to the foregoing authority, the mention of the failure to pay a fee or a permitting issue.

Citing the State Administrative Procedure Act's requirement that a notice of hearing include "a statement of the legal authority and jurisdiction under which the hearing is to be held…" SAPA § 301(2), the failure of Respondent to appear in the matter and notwithstanding the correct citations of law and regulation in the complaint, the ALJ found that there was no way to determine whether the notice's defects caused confusion. As such, the motion was denied without prejudice.

In the Matter of *the Integration of Interests within an Individual Spacing Unit Pursuant to Environmental Conservation Law ("ECL") §23-0901(3) known as Dzybon 1; Eolin 1; Gillis 1; and Little 1.*

Interim Decision of the Commissioner
March 18, 2011

Summary of Decision

In an interim decision considering the applicability of the Permit Hearing Procedures of the DEC set forth in 6 NYCRR Part 624 to compulsory integration proceedings conducted pursuant to Title 9 of Article 23 of the ECL, the Commissioner ruled that:

1. A legislative hearing conducted pursuant to 6 NYCRR Part 624.4(a) is required in any matter referred to the DEC Office of Hearings and Mediation Services ("OHMS") for adjudication after a compulsory integration hearing (the process for establishing the status of a landowner within the spacing unit surrounding a proposed oil or gas well who does not enter into a lease with the well operator (an "uncontrolled owner")).
2. Uncontrolled owners within a spacing unit have automatic standing to be potential parties in any Part 624 proceeding subsequent to a compulsory integration hearing. Such uncontrolled owners will

be granted party status if the issues they raise are both substantive and significant.

3. Part 624 hearings should take place in a location in close proximity to the wells.

Background

Compulsory integration hearings establish the status of uncontrolled owners within spacing units surrounding an oil or gas well. Following such hearing, a final compulsory integration order is issued. However, such order would not be issued if the matter was held over or if the well operator or uncontrolled owners raised any issues as to the draft order. If that is the case, the matter may be referred to OHMS for further proceedings in accordance with 6 NYCRR Part 624. *Id.* at 3. However, Part 624 proceedings are denominated "permit hearing procedures" and are drafted primarily with permit applications in mind, rather than adjudication of substantive and significant issues referred from a compulsory integration hearing. Nevertheless, compulsory integration hearings arise from an application for a well drilling permit and department guidance provides that adjudication of issues arising from a compulsory integration hearing will be conducted pursuant to 6 NYCRR Part 624. *Id.* at 6, footnote 3.

The four matters considered in this Interim Decision were referred to OHMS for adjudication of various issues raised in the respective compulsory integration hearings. Chief ALJ James T. McClymonds ruled on five procedural issues, holding that when a matter is referred to OHMS after a compulsory integration hearing for adjudication of a substantive and significant issue:

1. a legislative hearing shall be conducted, pursuant to 6 NYCRR 624.4(a);

2. an issues conference shall be held, pursuant to 6 NYCRR 624.4(b);

3. all owners within the subject spacing unit are mandatory parties to any subsequent adjudication proceedings, pursuant to 6 NYCRR Part 624.5(a);

4. an automatic right to file an interim appeal from an ALJ ruling is allowed, pursuant to 6 NYCRR Part 624.5(e)(1)(v); and

5. the Part 624 hearings should be held in a venue in close proximity to the wells, pursuant to 6 NYCRR Part 624.3(b)(2). *Id* at 3-4.

Fortuna Energy, Inc., ("Fortuna"), the well operator, moved for leave to file an expedited appeal from various parts of the Chief ALJ's ruling, which motion was granted by the Commissioner. Fortuna raised four issues:

1. a Part 624 legislative hearing is duplicative and, therefore, unnecessary because the compulsory integration hearing under ECL 23-0901 serves the same purpose;

2. the Chief ALJ wrongly determined that uncontrolled owners are mandatory parties in a Part 624 adjudication following a compulsory integration proceeding;

3. a Part 624 adjudication does not extend or reopen the ECL 23-0901 election period for uncontrolled owners; and

4. Part 624 hearings that follow compulsory integration hearings should take place in Albany. *Id.* at 4-5.

As to the first issue raised by Fortuna, the Commissioner agrees with the Chief ALJ, ruling that a legislative hearing conducted pursuant to 6 NYCRR Part 624.4(a) is required in any matter referred to OHMS for adjudication after a compulsory integration hearing. *Id.* at 5. The Commissioner also found that a compulsory integration hearing is not the equivalent of a Part 624 legislative hearing and that the Part 624 legislative hearing is required notwithstanding the record established by the compulsory integration hearing from which the matter is referred. In his decision, the Commissioner notes that ECL 23-0901(3)(d) provides that "substantive and significant" issues related to the compulsory integration process shall be adjudicated. *Id.* at 6. Part 624 establishes the process for such adjudication, which process includes a legislative hearing open to the general public, where oral or written comments may be provided. The Commissioner found no reason to exclude the public from the opportunity to provide comments and further found that a legislative hearing would not delay the proceedings. In so finding, the Commissioner noted that the comments of the parties to the compulsory integration hearing would be incorporated into the record of the Part 624 hearing. *Id.* at 7.

Despite agreeing with the Chief ALJ, the Commissioner drew a distinction in his reasoning. In reaching his decision, the Chief ALJ noted that the integration hearing is presided over by a designee of the Director of the Division of Mineral Resources, while a Part 624 legislative hearing is conducted by an ALJ. The Chief ALJ underscored the duty of impartiality imposed upon ALJs by the State Administrative Procedure Act and the "trial-like" procedural safeguard of the Part 624 legislative hearing. While noting that the integration hearing may be conducted impartially, the Chief ALJ highlighted that the officer conducting such hearing is not under the same constraints as an ALJ, which constraints are "designed to protect the trial-like administrative adjudicatory process." *Id.* at 8.

The Commissioner clarified, ruling that "[t]o the extent that any language in the ruling might be read as suggesting that participants in a public hearing conducted by Department staff are not afforded every due process safeguard appropriate to the respective proceeding, I wish to dispel that notion." *Id.* The Commissioner also noted that

a Part 624 legislative hearing is not a trial and does not enjoy the same due process safeguards as the evidentiary aspect of a Part 624 adjudicative hearing.

With respect to the second issue raised by Fortuna, the Commissioner did not accept the Chief ALJ's ruling that uncontrolled owners within a spacing unit are mandatory parties in any subsequent Part 624 proceeding. Rather, the Commissioner found that well operators and uncontrolled owners have automatic standing to participate in the issues conference of a Part 624 proceeding that follows a compulsory integration hearing. In order for the party's issues to be adjudicated, the issue must be substantive and significant. The party raising the issue has the burden of proof. *Id.* at 14.

The Chief ALJ ruled that Part 624 proceedings arising from compulsory integration hearings are "multi-applicant" proceedings and that as such, uncontrolled owners are mandatory parties. The Commissioner characterized the Chief ALJs approach as an attempt to fit the compulsory integration process into the standard procedure of Part 624 because under 6 NYCRR 624.5(a) the applicant and DEC staff are mandatory parties. However, as noted above, compulsory integration proceedings are not permit application proceedings, "they are adjunct to an application for a permit to drill a well." *Id.* at 10. Notwithstanding this, the Commissioner noted that "uncontrolled owners have significant mineral interests that are directly affected by compulsory integration, and their interests should be recognized in subsequent proceedings under Part 624." *Id.* at 10-11. As such, the Commissioner found that such parties should have automatic standing in a Part 624 proceeding.

The Commissioner set forth the procedure for identifying and advancing issues for adjudication:

1. Objectors raise "substantive and significant" issues by oral presentation on the record at the compulsory integration hearing, articulating the reasons supporting each issue, which support may be in written form. *Id.* at 11.

2. If an objector disputes a proposed term of the integration order, or with the information provided to it prior to the integration hearing by the well operator, the matter may be referred to OHMS. *Id.*

3. Once a matter is referred to OHMS and noticed, any other member of the public may seek to intervene in the proceeding upon the filing of a petition consistent with 6 NYCRR Part 624.5(b). The ALJ will then rule on party status. The Commissioner notes that if an uncontrolled owner did not participate in the compulsory integration proceeding and seeks to raise issues once the matter has been referred by staff for adjudication, the uncontrolled owner would have to satisfy the standards for filing a late petition. *Id.* at 13.

4. After referral to OHMS, the objector may advance the matter to administrative adjudication by demonstrating to the ALJ that its dispute is substantive and significant. To this end, the objector will submit a petition setting forth the reasons why and making offers of proof on whether the issue or issues are substantive and significant. *Id.* at 12.

5. The ALJ will hear the offers of proof and rule on whether the issue or issues raised are substantive and significant at the Part 624 issues conference. *Id.* at 13.

6. Appeal may be made to the Commissioner. *Id.* at 12.

The Commissioner asserts that "in a typical Part 624 proceeding, the applicant has the burden of proof on all issues that proceed to adjudication." *Id.* at 13. However, because in this context the parties are not necessarily "applicants" but are uncontrolled property owners, the traditional Part 624 burden of proof must be adjusted. *Id.* The Commissioner cites the standard contained in Section 306(1) of the State Administrative Procedure Act as being more appropriate: "[e]xcept as otherwise provided by statute, the burden of proof shall be on the party who initiated the proceeding." As the parties who raise subsequent and significant issues "initiate" the Part 624 proceeding, the Commissioner assigns them the burden of proof. *Id.*

With respect to the third issue, the Commissioner notes that the Chief ALJ reserved decision on whether a Part 624 adjudication could extend or reopen the ECL 23-0901 election period, that issue is not before him on appeal. On the fourth and final issue, the Commissioner agrees with the Chief ALJ that Part 624 hearings should take place in a location in close proximity to the wells. *Id* at 6. The Commissioner noted that "[c]onvening a Part 624 proceeding close to the well promotes public participation. In most if not all of these matters, Albany is far from the well locale, and this distance can hamper and diminish public participation." *Id* at 15.

The Commissioner noted that this interim decision applies to pending matters referred for adjudication, but for which no notice of hearing has been published, and to all matters subsequently referred to OHMS. *Id.* at 15.

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Recent Decisions and Legislation in Environmental Law

Recent Decisions

Alcoa Power Generating, Inc. v. Federal Energy Regulatory Commission, No. 10-1066, 2011 WL 1642442 (D.C. Cir. 2011)

Facts

Section 401(a)(1) of the Clean Water Act ("CWA") provides "that State certification shall be waived with respect to such Federal application if the State certifying agency 'fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request….'"[1] Plaintiff, Alcoa Generating, Inc. ("Alcoa"), filed an application with defendant, the Federal Energy Regulatory Commission (the "Commission"), to renew the license associated with its Yadkin Project (the "Project") facilities in North Carolina.[2]

The Project, which "falls within the scope of Section 401(a)(1) [of the Clean Water Act] as one that 'may result in any discharge into the navigable waters,'"[3] was subject to state certification by the North Carolina Department of Environmental and Natural Resources' Division of Water Quality (the "Division of Water Quality") before the Commission could proceed with licensing.[4] The Division of Water Quality issued a certification (the "Certification") on the last day of the Section 401(a)(1) one-year period, and contained a condition that Alcoa post a surety bond of $240 million to cover improvement costs associated with the Project.[5] "The condition further stated that '[t]his Certification is only effective once the required performance / surety bond is in place.'"[6] After Alcoa submitted the certification to the Commission, a North Carolina Administrative judge issued a preliminary injunction staying the certification.

Procedural History

Plaintiff filed a petition for a declaratory order contending that North Carolina waived its Section 401 authority by failing to act within the prescribed one-year period "because the effectiveness clause of the bond condition rendered the 'purported certificate incomplete.'"[7]

Issue

"[D]oes a state waive its Section 401 certification authority when it issues a certification within the one-year period stating that it is not effective until the applicant satisfies a condition that can be satisfied, if at all, only outside of the one-year period?"[8]

Rationale

The Court reasoned that, since the purpose behind Section 401's waiver provision is to prevent delay of a federal licensing proceeding, it follows that there would be no waiver "if a certification would allow the Commission to proceed with licensing."[9] The court further explained, based on North Carolina's own assertions, that Alcoa erroneously construed the effectiveness clause as a condition precedent to licensing.[10] In actuality, the effectiveness clause only exists to ensure that Alcoa posts the required bond and in no way delays "the federal licensing proceeding beyond Section 401's one-year period."[11]

Conclusion

The issuance of a certification, which states that it is not effective until the applicant satisfies a condition that can only be satisfied after the one-year period, does not, in and of itself, operate as a waiver of the state certification requirement and is, in fact, compliant with Section 401 of the CWA.[12]

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Endnotes

1. *Alcoa Power Generating Inc. v. Fed. Energy Regulatory Comm'n*, No. 10-1066, 2011 WL 1642442 at *1 (D.C. Cir 2011).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at *2.
6. *Id.*
7. *Id.*
8. *Id.* at *4.
9. *Id.* at *9.
10. *See id.*
11. *Id.*
12. *See id.* at *10.

* * *

Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1129 (9th Cir. 2011)

Facts

In the late summer of 2007, a wildfire ravished approximately 27,000 acres in the Beaverhead-Deerlodge National Forest in Montana.[1] In July of 2009, the Chief Forester of the Forest Service, by way of an Emergency Situation Determination, authorized a project for the salvage logging of trees on 1,652 of the 27,000 acres that were burned.[2] The Forest Service's stated purpose for the salvage project was "to recover and utilize timber from trees that are dead or dying as a result of the [wildfire] or forest insects and disease and reforest the harvested units with healthy trees appropriate for the site."[3] The Forest Service provided species-specific guidelines for determining the likelihood of mortality.[4] A further purpose of the project was to cut trees infested with dwarf mistletoe to

prevent transmission to new trees—trees infested with dwarf mistletoe were to be cut down regardless of their likelihood of mortality.[5] Uninfested live trees were only to be cut if required by safety concerns.[6] Prior to authorizing this salvage project, the Forest Service in April released a preliminary Environmental Assessment (EA) for public comment.[7] A short time after the project was commenced the Forest Service issued a final EA with a Decision Notice and a Finding of No Significant Impact.[8] The Forest Service concluded that an Environmental Impact Statement was not required because the project would not have a significant effect on the quality of the human environment.[9]

The significance of permitting salvage logging by an Emergency Situation Determination (ESD)[10] is that the logging is allowed to commence immediately without any of the delays that might have resulted from the Forest Service's administrative appeals process. The Chief Forester stated that her reason for utilizing an ESD for the commencement of this project was primarily economical, acknowledging that "delay to implementing the project until after administrative appeals have been reviewed and answered will result in a substantial loss of economic value to the [federal] government" since the winter weather would almost certainly prevent all the trees from being logged before the end of the fall season.[11] By the time logging could recommence the following summer, the Chief Forester estimated that there could be a potential loss to the government of up to $70,000.[12]

Procedural History

Alliance for the Wild Rockies (AWR) filed suit in federal district court alleging violations of the Appeals Reform Act (ARA), the National Forest Management Act (NFMA), and the National Environmental Policy Act (NEPA) and requested a preliminary injunction on further actions under the ESD. The district court denied the request, concluding that "after reviewing the parties' filings, the Court is convinced Plaintiffs do not show a likelihood of success on the merits, nor that irreparable injury is likely in the absence of an injunction."[13] The district court also denied AWR's motion for a stay and injunction pending appeal. As a result, logging commenced in August of 2009, and approximately half of the planned logging was completed before winter weather prevented further activity.[14]

Issues

Whether there was an abuse of discretion on the part of the district court that would warrant a reversal of the district court's denial of a preliminary injunction. In answering this main issue, however, the Court must also determine what standard to apply in determining whether a preliminary injunction should be issued.

Rationale

Under the standard for preliminary injunction established in *Winter v. Natural Resources Defense Council*, plaintiffs must established that irreparable harm is likely, not just possible, in order to obtain a preliminary injunction.[15] In *Winter*, the court established a four-part test: "a plaintiff seeking a preliminary injunction must (1) establish that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest."[16]

The Ninth Circuit and other circuits have applied a different standard to preliminary injunction requests than that which was applied in *Winter*—a "sliding scale." The sliding scale approach balances the elements of the preliminary injunction test "so that a stronger showing of one element may offset a weaker showing of another. For example, a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits."[17] The Ninth Circuit itself applies a version of the sliding scale known as the "serious questions" test, under which a preliminary injunction could be issued where the likelihood of success is such that "serious questions going to the merits were raised and the balance of hardships tips sharply in [the plaintiff's] favor."[18] Under the *Winter* four-part test there is no balancing and all of the elements of the preliminary injunction test must be conclusively shown.[19] However, the U.S. Supreme Court in *Winter* did not explicitly discuss the validity of the sliding scale approach.

The Ninth Circuit here ultimately held that the "serious questions" approach survives *Winter*, but the Court noted that the four elements discussed in *Winter* must be present in some degree.[20] Put another way, "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest."[21] In support of its holding, the Ninth Circuit quoted a Second Circuit decision, which states that "[w]e have found no command from the Supreme Court that would foreclose the application of our established 'serious questions' standard as a means of assessing a movant's likelihood of success on the merits."[22] The Court also discussed dicta from the Seventh Circuit, Tenth Circuit, and the D.C. Circuit that called for the preservation of the flexibility of the sliding scale approach.[23]

The Court applied the *Winter* four-part test with the balancing of elements under the "serious questions" test. Based on its analysis of the facts before it, the Court concluded that AWR "has shown that there is a likelihood of irreparable harm; that there are at least serious questions on the merits concerning the validity of the Forest

Service's Emergency Situation Determination; that the balance of hardships tips sharply in its favor; and that the public interest favors a preliminary injunction."[24] For these reasons the district court's denial of a preliminary injunction was reversed.

Conclusion

The Court of Appeals for the Ninth Circuit issued an order reversing the district court and directing it on remand to issue the preliminary injunction requested by AWR, on the grounds that the district court erroneously applied the *Winter* standard instead of the "serious questions" standard.[25] In addition, AWR sufficiently satisfied the "serious questions" test.

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Endnotes

1. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1129 (9th Cir. 2011).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 1130.
9. *Id.*
10. 36 C.F.R. § 215.10(c) defines an Emergency Situation as "a situation on National Forest System (NFS) lands for which immediate implementation of all or part of a decision is necessary for relief from hazards threatening human health and safety or national resources on those NFS or adjacent lands; or that would result in substantial loss of economic value to the Federal Government if implementation of the decision were delayed."
11. *Id.* at 1130.
12. *Id.*
13. *Id.*
14. *Id.* at 1131.
15. *Id.* at 375-76.
16. *Id.* at 374.
17. *Alliance for the Wild Rockies*, 632 F.3d at 1131 (citations omitted).
18. *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003).
19. *Winter*, 555 U.S. at 374.
20. *Alliance for the Wild Rockies*, 632 F.3d at 1135.
21. *Id.*
22. *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 37-38 (2d Cir. 2010).
23. *Alliance for the Wild Rockies*, 632 F.3d at 1131-1134.
24. *Id.* at 1135.
25. *Id.* at 1139.

* * *

Building Industry Ass'n of Washington v. Washington State Bldg. Code Council, __ F.3d __ (W.D.Wash. 2011), 2011 WL 485895

Facts

This decision arrives in the aftermath of the *Air Conditioning Heating and Refrigeration Inst. v. City of Albuquerque*[1] case, and similarly concerns energy efficiency standards required for new construction under state legislation.[2] In an attempt to satisfy energy use and efficiency standards set by the Energy Policy and Conservation Act[3] (EPCA), Washington's legislature adopted a building energy code that, among other things, promotes "super efficient, low-energy use," building design regulations.[4]

The 2006 building energy code sets minimum standards for the design of new buildings by regulating exterior envelopes, HVAC selection, water heating, and other equipment for efficient energy use and conservation.[5] The 2006 code involved a two-step process; first, builders had to follow general requirements for "insulation, moisture control, air leakage control, and mechanical systems including duct sealing, water and heating." Second, builders chose between three compliance pathways: Chapter 4 offered a system analysis pathway in which a computer simulation would demonstrate that the "anticipated annual energy use" of a prospective design was less than that of a "target home"[;] Chapter 5 offered a "building envelope tradeoff performance pathway" where builders were allowed to trade off the thermal efficiency of one building envelope component for another to reach desired heat loss targets; and Chapter 6 offered a "prescriptive requirements pathway" where builders were required to meet prescribed minimum efficiency standards for all listed components or systems used in the home.[6]

The 2009 amendments to the building energy code proposed a 15% reduction in energy consumption.[7] Reduction was achieved by modifying the pathway option found in Chapters 4, 5, and 6 of the 2006 code to reduce energy use by 7% in combination with additional requirements found in the newly added Chapter 9.[8] Chapter 9 requirements may be met by showing a proposed design's 8% anticipated use reduction from that of an existing home.[9] Additionally, table 9-1, found in Chapter 9, provides builders with thirteen options from which they may select to gain energy use-credits and achieve minimum requirements.[10] Table 9-1 provides credit options for the efficiency of a building's exterior, home heating equipment, and other energy consuming devices found in homes.[11]

Procedural History

In May 2010, plaintiffs sued the Washington State Building Code Council seeking injunctive relief from enforcement of Chapter 9.[12] In July 2010, the NW Energy Coalition, Sierra Club, Washington Environmental Council, and Natural Resource Defense Council were granted a

motion to intervene.[13] A joint motion for summary judgment was then filed, requesting dismissal of all plaintiffs' claims.[14] Plaintiffs responded with a motion for summary judgment and a reply to defendant's motion, emphasizing Chapter 9's failure to meet the preemption exemption requirements expressly stated in the EPCA.[15]

Issue

Whether Chapter 9 of Washington's 2009 building energy code is expressly preempted by the ECPA and the supremacy clause or if the building energy code is in compliance with the preemption exemption standards found in 42 U.S.C. § 6297 (f)(3).

Rationale

The EPCA express preemption clause prohibits "'State regulation concerning energy efficiency, energy use, or water use' of a 'covered product'"[16] including central air conditioners, heat pumps, water heaters, direct heating equipment, furnaces, and boilers.[17] However, 42 U.S.C. § 6297 (f)(3) allows State laws regarding energy use or efficiency of the aforementioned products to be exempted from preemption if they meet the seven listed requirements, four of which are challenged by the plaintiffs.[18] The plaintiffs claim that Chapter 9 fails to meet requirements (B), (C), (E), and (F); under (B), exemption is only possible if the Code does not require that the covered products exceed federal energy efficiency standards; under (C), exemption is only possible if credits awarded by the Code are given on a one-for-one equivalent energy use or equivalent cost basis; under (E), exemption is only possible if the Code provides an equal number of credit options that do not require the use of covered products in excess of federal efficiency standards; and under (F), preemption is only possible if the Code's overall objective is identified as an estimated total consumption of energy using an equivalent amount of energy.[19]

As to the exemption under 42 U.S.C. § 6297 (f)(3)(B), the court held that Chapter 9 does not mandate compliance through use of covered products in excess of federal efficiency standards.[20] First, the court found that although Chapter 9 includes credit options that do require the use of covered products exceeding federal efficiency standards, plaintiffs failed to demonstrate that Chapter 9 could only be met by using such products.[21] Likewise, Chapter 9 also met the requirements of the exemption under 42 U.S.C. § 6297 (f)(3)(E) by providing nine options out of the thirteen that did not require use of covered products.[22] The argument that the high cost of the nine options "'functionally'" required use of covered products was unpersuasive in this hypothetical context because the EPCA does not ask the state legislature to consider financial cost equivalency.[23] The court also held that the exemption under 42 U.S.C. § 6297 (f)(3)(C) was met, because the ambiguous statutory phrase "equivalent cost basis" was preceded by the word "or" meaning that properly calculated credits might be validly given without consideration of builders' equivalent costs.[24]

As to the exemptions under 42 U.S.C. § 6297 (f)(3)(C) and (F), the court found that the credits outlined in table 9-1 sufficiently provided "one-for-one equivalent energy use" options for builders.[25] Defendants offered the testimony of Thomas Eckman, the chair of the Regional Technical Forum,[26] who sufficiently demonstrated that the Chapter 9 credit options were calculated in accordance with the "industry standard for analyzing building code energy efficiency savings."[27] Testimony offered by the plaintiffs was deemed inadmissible because plaintiffs failed to show that it was "based on sufficient facts or data," or "the product of reliable principles and methods," or that such principles and methods were applied reliably to the facts of the case.[28]

In sum, the court decided that while the Chapter 9 credits entailed some disparity, the variations did not rise to such a level that Chapter 9 could be deemed inconsistent with the purpose of 42 U.S.C. § 6927 (f)(3).[29] Thus, the objective of Chapter 9 is specified in total energy consumption based on sufficiently accurate estimates of equivalent energy use.[30]

Conclusion

The court dismissed all claims against the defendant and held that Chapter 9 of the Washington State building energy code is not preempted by 42 U.S.C. § 6927 (f)(3).[31] This decision comes in stark contrast to the *City of Albuquerque* case and the decision to award defendant's motion for summary judgment may be vulnerable on appeal.

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Endnotes

1. *Air Conditioning Heating and Refrigeration Inst. v. City of Albuquerque*, __ F.Supp.2d __, 2008 WL 5586316, at *9 (D.N.M. Oct. 3, 2008) (granting Plaintiffs motion for preliminary injunction on the grounds that volumes I and II of the Albuquerque Energy Conservation Code are likely preempted by the Energy Policy and Conservation Act (EPCA) because the Albuquerque Code requires efficiency standards to meet a higher standard than required by the federal EPCA).
2. *Building Industry Ass'n of Washington v. Washington State Bldg. Code Council*, __ F.3d __, 2011 WL 485895, at *4 (W.D.Wash. 2011).
3. *Id.* The EPCA as amended by both the National Appliance Energy Conservation Act of 1987, Public Law No. 100-12, and the Energy Policy Act of 1992, Public Law No. 100-486.
4. *Id.* at *2.
5. *Id.* at *3.
6. *Id.*
7. *Id.* at *4.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at *5.

12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at *8 (quoting 42 U.S.C. § 6927).
17. 42 U.S.C. § 6927 (d)–(f).
18. *Building Industry Ass'n of Washington*, 2011 WL 485895, at *8.
19. *Id.* at *4.
20. *Id.* at *9.
21. *Id.*
22. *Id.* at *13.
23. *Id.* at *14.
24. *Id.* at *13.
25. *Id.* at *10.
26. *Id.* The Regional Technical forum was created at the request of Congress to develop standardized methods for verifying conservation savings.
27. *Id. (*citation omitted)
28. *Id.* (quoting *U.S. v. Redlightning*, 624 F.3d 1090, 1111 (9th Cir. 2010)).
29. *Id.*
30. *Id.* at *15.
31. *Id.*

* * *

Camardo v. City of Auburn, No. 2011-0259, 2011 WL 1549459 (Sup. Ct., Cayuga Co. Apr. 21, 2011)

Facts and Procedural History

Plaintiff filed an Article 78 action, pursuant to the State Environment Quality Review Act (SEQRA), challenging the City of Auburn's negative declaration regarding a proposed Center for Performing Arts.[1]

SEQRA requires all agencies considering undertaking, funding, or approving an action to consider whether the action will have a significant impact on the environment.[2] If the agency finds that the proposed action may have a "significant adverse impact" on the environment, SEQRA requires that the agency prepare an Environmental Impact Statement (EIS).[3] Here, the proposed activity entailed demolition, transfer, and construction.[4]

Plaintiff claimed that the negative declaration was issued before the City took the requisite "hard look" at possible environmental and other consequences that would result from the project.[5] Moreover, plaintiff claimed that the City failed to involve the State Departments of Health and Labor, restricted public participation in the decision-making process, improperly amended the environmental assessment form the day before the City Council voted to issue the negative declaration, and changed the project description after the vote was taken.[6]

Issue

The issue was whether the City's negative declaration for the proposed CCC-Center for Performing Arts met the requirements of review under SEQRA.[7]

Rationale

An agency has met the requirements of SEQRA as long as it "identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination."[8] The court may only consider the record before the agency and may not "weigh the desirability of any action or choose among alternatives…."[9] To comply with SEQRA, the agency does not have to address every alternative or method to lessen the impact on the environment.[10] The reasonableness of the agency's action depends on the particular circumstances.[11]

Conclusion

The Supreme Court of Cayuga County dismissed the plaintiff's petition.[12] The court held that the City met all of its obligations under SEQRA.[13] The City's failure to involve other agencies such as the State Departments of Health and Labor did not violate SEQRA, because such agencies had no jurisdiction over the proposed action.[14] Furthermore, the court held the City had acted properly in issuing the negative declaration and the plaintiff's disagreement with the conclusions reached by the City Council did not provide the plaintiff with grounds to challenge it.[15]

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Endnotes

1. *Camardo v. City of Auburn*, No. 2011-0259, 2011 WL 1549454, at *1 (Sup. Ct., Cayuga Co. Apr. 21, 2011).
2. NY CLS ECL § 8-0101 (LexisNexis 2011).
3. *Camardo* at *2 *quoting* 6 N.Y. Comp. R. & Regs. Tit. 6 § 617.1 (McKinney 2011).
4. *Id.* at *3.
5. *Id.* at *1.
6. *Id.* at *1-2.
7. *Id.* at *1.
8. *Id.* at *3 *quoting Matter of Spitzer*, 100 N.Y.2d 186, 190 (2003).
9. *Camardo* at *3 *quoting Chinese Staff & Workers Assn. v. City of New York*, 68 N.Y.2d 359, 364 (1986).
10. *Id.* at *3 (citing *Matter of Nevill v. Koch*, 79 N.Y.2d 416, 424-425 (1992)); *Matter of Har Enter. v. Town of Brookhaven*, 74 N.Y.2d 524, 549 N.Y.S.2d 638 (1989)).
11. *Id.*
12. *Camardo* at *4.
13. *Id.* at *3.
14. *Id.*
15. *Id.*

* * *

Celanese Corp. v. Eby Const. Co., Inc., 620 F.3d 529 (5th Cir. 2010)

Facts

In 1979, Martin K. Eby Construction Corporation ("Eby") contracted with the Coastal Water Authority of Texas ("CWA") to install an underground water pipeline in Harris County, Texas.[1] When constructed, Eby's pipeline would intersect with Celanese Corporation's ("Celanese") methanol pipeline.[2] When uncovering the area where the Celanese pipeline ran, an Eby employee unknowingly damaged the Celanese pipeline with a backhoe. As the employee was unaware of what he hit, no Eby employees knew that their work had damaged the Celanese pipeline, and no report of the incident was made at that time. However, over the course of time, stress corrosion cracking deteriorated the dented portions of the Celanese pipeline and "[e]ventually, one of the cracks in the dented area penetrated the wall of the pipe, allowing methanol to leak from the pipe during each methanol transfer."[3] Celanese ascertained the leak on October 1, 2002, and Celanese subsequently fixed the pipeline and worked with government agencies to clean up the area and prevent groundwater contamination.[4]

Procedural History

Celanese sued Eby in the U.S. District Court for the Southern District of Texas under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Texas Solid Waste Disposal Act (SWDA)[5] in order to recover cleanup costs.[6] Eby's liability hinged on whether it was an "arranger" under CERCLA and SWDA.[7] The district court held that Eby was not liable under CERCLA or SWDA because Eby was unaware that it damaged the pipeline and "Eby is not a person responsible for solid waste under the SWDA."[8] The district court entered a take-nothing final judgment on Celanese's suit.

Celanese moved to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e). That motion was denied by the district court. Celanese then appealed the judgment as well as the denial of its motion to alter or amend. Celanese argued on appeal that pursuant to negligence common law, Eby's CWA contract, and industry practice, Eby was obligated to investigate when it hit the pipeline and remedy any damage.[9] Celanese further alleged that Eby "consciously disregarded that obligation by failing to investigate the incident" and was liable under CERCLA and SWDA.[10]

Issues

1. Did Celanese waive its conscious disregard argument by failing to raise it at the trial level?
2. Is Eby liable as an arranger under CERCLA?
3. Is Eby liable as an arranger under SWDA?

Rationale

1. Waiver of the conscious disregard argument

The court first held as a threshold matter that Celanese waived its argument on a conscious-disregard theory because it was not raised before the district court.[11] Both the Joint Pretrial Order and Verdict Form indicated that Celanese argued a different theory to the district court. At the trial level, Celanese alleged that "Eby had actually known that it had struck and damaged the Celanese pipeline and then attempted to cover it up," never proposing any jury questions about conscious disregard.[12]

2. Arranger liability under CERCLA

Despite determining that Celanese could not prevail as a result of its waiver, the court held that, in the alternative, Celanese's conscious disregard argument did not demonstrate arranger liability under CERCLA.[13] Celanese's appeal implicated the third category of CERCLA, which makes Eby liable if it "'arranged for disposal' of methanol, which the parties agree[d] is a 'hazardous substance.'"[14] As CERCLA does not define "arrang[e] for," the court interpreted the phrase in accordance with its ordinary meaning, relying on *Burlington North & Santa Fe Railway Co. v. United States*[15] for guidance.[16]

In *Burlington*, the Supreme Court held that because in common usage "arrange" indicates "action directed to a specific purpose," an individual or corporation will qualify as a CERCLA arranger where "it takes intentional steps to dispose of a hazardous substance."[17] Knowledge that the entity's action will lead to a leak is not, by itself, sufficient to create arranger liability. The entity must "'take [] intentional steps' or 'plan[] for' the disposal of the hazardous substance."[18]

The *Celanese* Court applied *Burlington* to find that Eby was not liable as a CERCLA arranger. It was undisputed that Eby did not intend to damage the methanol line, and did not even realize that it hit a pipeline. Even so, Celanese argued that Eby took intentional steps to dispose of the hazardous substance by "disregarding its obligations to investigate the incident and backfilling the excavated area."[19] The court declined to adopt this argument because in *Burlington*, an entity that had "actually arranged to ship hazardous chemicals under conditions that it knew would result in [] spilling" was not found to be an arranger.[20] The court held that it could not hold Eby liable as a CERCLA arranger when Eby did not even know that it damaged the methanol pipeline.

3. Arranger liability under SWDA

The court also held that Eby was not liable as an arranger pursuant to the SWDA, Texas' state law version of CERCLA.[21] As the Texas Supreme Court had not yet addressed SWDA after *Burlington*, the *Celanese* Court had to determine how the Texas Supreme Court would rule on this issue.[22] In *R.R. Street & Co., Inc. v. Pilgrim*[23] *Enter-*

prises Inc., the Texas Supreme Court indicated that courts should "look to 'federal case law for guidance in interpreting the term 'otherwise arranged' to dispose of solid waste.'"[24] The court held that the Texas Supreme Court would apply *Burlington* to a claim brought under SWDA and as a result, Eby was not liable as a SWDA arranger.[25]

Conclusion

The court held as a threshold matter that Celanese waived its conscious disregard argument by failing to raise it at the trial court level.[26] The court went on to hold that, even if Celanese had not waived its conscious disregard argument, in light of the Supreme Court's decision in *Burlington*, Eby was not liable as an arranger under either CERCLA or SWDA because it did not intend to dispose of the methanol, or plan for the disposal of the methanol.[27]

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Endnotes

1. *Celanese Corp. v. Eby Const. Co., Inc.*, 620 F.3d 529, 530 (5th Cir. 2010).
2. *Id.*
3. *Id.* (internal quotations omitted).
4. *Celanese*, 620 F.2d at 530.
5. V.T.C.A., Health & Safety Code § 361.344.
6. *Celanese*, 620 F.2d at 530-31.
7. *Id.* at 531.
8. *Id.* (internal quotations omitted).
9. *Id.*
10. *Id.* (internal quotations omitted).
11. *Celanese*, 620 F.3d at 531 (noting "arguments not raised before the district court are waived and will not be considered on appeal").
12. *Id.* at 531-32. The jury questions posed by Celanese were related to whether: (1) Eby's actions in 1979 caused the damage to the Celanese methanol line, (2) Eby had knowledge that it damaged the methanol line, and (3) Eby backfilled the pipeline knowing that its damage to the methanol line could lead to a future leak.
13. *Id.* at 532.
14. *Id.* (quoting 42 U.S.C. § 9607(a)(3)).
15. 129 S.Ct. 1870 (2009).
16. *Celanese*, 620 F.3d at 532 (internal quotations omitted).
17. *Id.* at 533.
18. *Id.* (*quoting Burlington*, 129 S.Ct. at 1879-80).
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 534.
23. *R.R. Street & Co., Inc. v. Pilgrim Enter. Inc.*, 166 S.W.3d 232 (Tex. 2005).
24. *Celanese*, 620 F.3d at 534 (quoting *R.R. Street*, 166 S.W.3d at 241).
25. *Id.*
26. *Id.* at 531-32.
27. *Id.* at 533-34.

* * *

State v. C.J. Burth Services, Inc., 79 A.D.3d 1298, 915 N.Y.S.2d 174 (3d Dep't 2010)

Facts

In 1987, two individuals (defendants) purchased real property in the City of Utica on which to operate an automobile repair business.[1] There was no indication when they bought the property that petroleum was being stored on it, but in 1992, it was discovered that the property had been previously used as a service station and contained several underground petroleum storage tanks.[2] When the defendants removed the tanks, they were found to be "corroded and riddled with holes."[3] The Department of Environmental Conservation (DEC) demanded that the defendants assume responsibility for any contamination of the soil from the corroded tanks.[4] The defendants, however, refused to take remedial action even after an environmental survey confirmed that the soil surrounding the tanks was contaminated.[5]

Procedural History

In 2002, the State of New York, as plaintiff in this case, commenced an action under Article 12 of the Navigation Law to recover cleanup costs from the defendants on the grounds that they were strictly liable for the petroleum discharged from the underground tanks.[6] The Supreme Court, Albany County, held that defendants were not strictly liable as dischargers solely because of their status as owners of their property.[7] It reasoned that since there was nothing in the record to show that defendants had knowledge of the underground tanks or the contamination when they purchased the property, defendants were not in a position of control over the site and so could not be held liable.[8] The State appealed the lower court's dismissal of the complaint.[9]

Issue

Whether defendants can be held strictly liable under Article 12 of the Navigation Law for contamination of their property from corroded underground petroleum storage tanks when the defendants had no knowledge of the existence of the tanks on their property when they purchased it, and did nothing to cause or contribute to the contamination.

Rationale

Section 181(1) of the Navigation Law makes "[a]ny person who has discharged petroleum" strictly liable for cleanup and remediation costs.[10] Section 172(8) defines a discharge as "any intentional or unintentional action or omission" that results in the release of petroleum.[11] Construing those provisions liberally, the Third Department reversed, holding that the defendants were strictly liable as dischargers under Article 12 of the Navigation Law, commonly known as the Oil Spill Act.[12]

The defendants' argument that they could not be held liable because they did not cause the discharge or control the site when the discharge occurred, and had no knowledge of the existence of the tanks or contamination when they purchased the property, was rejected. Strict liability under the Oil Spill Act "does not depend on fault or knowledge" but instead "turns on the owner's capacity to take action to prevent an oil spill or to clean up contamination resulting from a spill."[13] The rationale supporting this rule is that the owner of a system from which the discharge has occurred is the most likely to be in a position to immediately stop the discharge and take remedial measures, or to prevent discharges in the first place.[14] Thus, previous cases have held system owners strictly liable for remediation costs even where there is no evidence that the owner caused the discharge.[15] It has also been held that owners of a system from which petroleum has spilled are "dischargers" under section 172(8) even where the spill occurred before ownership began and the owners did not contribute to or have knowledge of the discharge.[16]

The defendant's argument that these holdings are inconsistent with a determination of the Court of Appeals in *New York v. Green* was also rejected by the court.[17] In *Green*, the Court of Appeals held that where a kerosene tank owned by a tenant contaminated the landlord's property, the landlord's liability could not be based solely on land ownership.[18] Rather, the landlord's liability as a discharger was based on its "failure, unintentional or otherwise, to take action in controlling the events that led to the spill or to effect an immediate cleanup."[19] The Court of Appeals' reasoning in *Green* for imposing liability on the landlord was to ensure the availability of responsible parties to reimburse the plaintiff for cleanup costs.[20]

Thus, strict liability under the statute need not be premised on ownership at the time of discharge; it "may be founded either upon a potentially responsible party's capacity to prevent spills before they occur *or* the ability to clean up contamination thereafter."[21] In this case, the landowners should have taken action to clean up the contamination resulting from the spill.

Additionally, the Oil Spill Act permits a faultless landowner who has been found liable under the Act to seek contribution from the party at fault.[22]

Conclusion

As owners of the contaminated property and the petroleum tanks, the defendants "are the parties best suited to effect the cleanup," and it "would be inconsistent with the statutory purpose of promoting prompt cleanups" to hold that the defendants could not be held liable "simply because the spill occurred before they owned the system."[23] Further, "[d]efendants here are not the mere victims of a 'midnight dumper' or an errant oil truck that spills fuel upon their property."[24] The defendants were held to be strictly liable as dischargers as a matter of law.[25]

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Endnotes

1. *State v. C.J. Burth Services, Inc.*, 79 A.D.3d 1298, 1299, 915 N.Y.S.2d 174 (3d Dep't 2010).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 1300.
11. *Id.*
12. *Id.*
13. *Id.* (citations omitted).
14. *Id.* (citations omitted).
15. *Id.* (citations omitted).
16. *Id.* at 1300-01.
17. *Id.* at 1301.
18. *Id.* (citing *New York v. Green*, 96 N.Y.2d 403, 407, 729 N.Y.S.2d 420 (2001)).
19. *Id.* at 1301.
20. *Id.* at 1301 (citing *New York v. Green*, 96 N.Y.2d at 407-408).
21. *Id.*
22. *Id.* at 1301 n.1.
23. *Id.*
24. *Id.*
25. *Id.*

* * *

Defenders of Wildlife v. Salazar, No. 09-77-M-DWM, 2011 WL 1345670 (D. Mont. 2011)

Facts

Plaintiffs, fourteen environmental organizations, brought suit against defendants, Idaho, Montana, and the National Rifle Association, challenging the U.S. Fish & Wildlife Service's 2009 Final Rule (the "Agency Rule"), which delisted the northern Rocky Mountain grey wolf from the endangered species list.[1] The Federal District Court for the District of Montana ruled in favor of the plaintiffs and vacated the Agency Rule, holding that it violated the express terms of the Endangered Species Act ("ESA").[2] Defendants appealed. While the underlying appeal was pending before the Court of Appeals, ten out of the fourteen plaintiffs, along with the federal defendants, reached a proposed settlement agreement and made a joint motion for an indicative ruling pursuant to Federal Rule of Civil Procedure ("FRCP") 62.1 to consider the

agreement.[3] "[H]owever, [the agreement was] contingent upon the Court partially staying its invalidation of the Agency's ruling"[4] and limiting its application to Montana and Idaho, which can be done pursuant to Rule 60(b) of the FRCP.[5] Ultimately, the settling parties wanted the Agency Rule to remain in place in Idaho and Montana "so that they could be taken under the states' management plans."[6] The four nonsettling parties opposed the motion for an indicative ruling, claiming that "a legal stay would sacrifice the[ir] [requested] relief"[7] due to the indefiniteness of the length of the stay, the management requirements, and their overall concern—the protection of the Rocky Mountain grey wolf.[8]

Procedural History

The District Court for the District of Montana ruled in favor of the Plaintiffs, and while the underlying appeal was pending before the Court of Appeals, the settling plaintiffs and federal defendants requested an indicative ruling pursuant to FRCP 62.1.

Issue

Whether the court can use its equitable discretion under FRCP 60(b) to leave an invalid rule in place where the relief requested would contravene the intent of the legislature?

Rationale

The court reasoned that the proposition propounded by the settling parties—staying the invalidation of the Agency's Final Rule, thus "excusing [the wolf in Montana and Idaho] from the ESA's protective provisions"—is in direct conflict with the rule of law.[9] Since congressional intent favors affording endangered species the "highest of priorities,"[10] "'requiring substantial compliance with the [ESA]'s procedures'" is the only way to safeguard congressional intent.[11] Therefore, although a reviewing court has the discretion to leave ESA protections in place pending a remand,[12] the Court "cannot exercise [that] discretion to allow what congress forbids."[13] Accordingly, the Court lacked the legal authority to grant the Rule 60(b) motion to stay the Court's remedy and put the wolves under state management.[14] Furthermore, even if the court had the legal authority to grant the Rule 60(b) motion, a balancing of the competing interest of the parties was evidence that equity did not demand the relief requested.[15]

Conclusion

The court may not use FRCP 60(b) discretion to stay a remedy, where the stay would contradict congressional intent.

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Endnotes

1. *Defenders of Wildlife v. Salazar*, No. 09-77-M-DWM, 2011 WL 1345670 at *1 (D. Mont. 2011).
2. *Id.*
3. *Id.* at *2, *3.
4. *Id.* at *1.
5. *Id.* at *2.
6. *Id.* at *6.
7. *Id.* at *3.
8. *Id.* at *7.
9. *Id.* at *5.
10. *Id.* at *6.
11. *Id.* (quoting *Sierra Club v. Marsh*, 816 F.2d 1376, 1384 (9th Cir. 1987)).
12. *Id.* at *6.
13. *Id.* at *9.
14. *Id.*
15. *See id.* at *7.

* * *

El Paso Natural Gas Co. v. United States, 632 F.3d 1272 (D.C. Cir. 2011)

Facts

This case concerned two sites on Navajo tribal lands that the Navajo Nation alleged were contaminated by uranium milling activities performed by the Federal Government during the World War II and Cold War eras.[1] The uranium milling process results in large amounts of radioactive waste known as uranium mill tailings.[2] Uranium mill tailings are a sandy waste produced during ore milling "from which only one to five pounds of usable uranium is extracted from every two thousand pounds of mined ore."[3] There was little official recognition of the serious threat to public health created by these tailings, which were often left at the milling sites in an "unstable and unprotected condition," until the early 1970s when most of these milling facilities either shut down or scaled back their production in response to a significant decline in demand for uranium.[4]

In 1978, Congress passed the Uranium Mill Tailings [Radiation] Control Act (UMTRCA) to provide for the disposal, long-term stabilization, and control of the hazardous mill tailings that were produced.[5] The Department of Energy (DOE) was charged with cleanup and remediation of abandoned sites or facilities containing mill tailings.[6] With regard to the control of the dangerous effects of the mill tailings, the Environmental Protection Agency (EPA) was charged with issuing generally applicable standards for both radioactive and non-radioactive hazards produced by uranium mill tailings.[7] The Act gave the Secretary of Energy until November 8, 1979, to designate uranium-processing sites that are in need of remedial action and to prioritize these sites.[8] The UMTRCA defines "processing site" to include both the mill site itself and "any other real property or improvement there-on which—(i) is in the vicinity of such site, and (ii) is determined by the Secretary…to be contaminated with residual radioactive materials derived from such site."[9] The case at bar

concerns two vicinity sites. The Act also contains a bar on judicial review of the Secretary of Energy's designations and priorities of affected sites.[10] Section 7912(d) of the Act provides that these decisions are to be treated as final.[11] Another provision of the Act which is relevant to this case is § 7915, which directs the Secretary to enter into cooperative agreements with Native American tribes regarding cleanup of designated processing sites on tribal lands.[12]

The two allegedly contaminated sites at issue in this case are located near the old Tuba City Mill, which had run the uranium mining operations in this area.[13] The site of the Tuba City Mill was designated in 1979, and cleanup was completed in 1990.[14] For this site, a cooperative agreement was entered into with the Navajo Nation in 1985, as required by the Act.[15] In the early 2000s, the Navajo Nation discovered contamination at the Tuba City Landfill and the nearby Highway 160 site and wrote a letter to the DOE explaining that the sites needed remediation.[16] The Secretary of DOE, however, declined to take action expressing the belief that the sites had been contaminated by a source other than the Tuba City Mill.[17] The Navajo Nation, upon receiving DOE's response, shared the Secretary's conclusion with El Paso Natural Gas Company, the successor company to the Tuba City Mill.[18] Concerned about its own possible liability for harms caused by unremediated sites, El Paso brought suit against DOE in federal district court.[19] El Paso alleged that DOE's failure to designate the two sites as vicinity sites was arbitrary and capricious.[20] El Paso asked the court to issue a judgment declaring that the DOE, not El Paso, was "legally liable for the remediation costs and damage to the environment resulting from residual radioactive material…that emanated from…the Mill."[21]

Procedural History

The United States District Court for the District of Columbia dismissed the energy company's action for want of subject matter jurisdiction.[22] The District Court relied on a provision of the UMTRCA, which states that "designations made, and priorities established, by the Secretary [of Energy] under this section shall be final and not subject to judicial review."[23] In reaching this conclusion, it reasoned that because the definition of vicinity property was part of the definition of processing site, the decision to include a vicinity property was nothing more than a designation of scope or boundaries of the processing site and was therefore unreviewable.[24] With the Navajo Nation as an intervening party, El Paso appealed, arguing that the court did in fact have jurisdiction regardless of § 7912(d).[25]

Issue

Whether the UMTRCA bars federal judicial review of Secretary designations and prioritizations of uranium polluted sites.

Rationale

The Court begins its analysis by discussing the controlling presumption that Congress "intends judicial review of administrative actions" and points out that even where the statute expressly prohibits judicial review, as here, the presumption dictates that such provision be read narrowly.[26] Applying this presumption, the Court sets out to determine whether § 7912(d) of the UMTRCA overcomes the presumption and bars review of § 7912(e)(2) decisions to include additional vicinity property as part of a previously designated processing site.[27] The Court ultimately concludes that it does and such decisions are unreviewable by the courts.

Much of the contention between the two parties on this issue is over the interpretation of the language used by Congress in the Act.[28] El Paso, based on its interpretation of § 7912(d), argues that the ban on judicial review only applies to designations made during the first year after the Act goes into effect, and that the ban does not affect any designations made after that one-year time frame.[29] However, the Court disagrees with El Paso's interpretation and states that UMTRCA's legislative history reinforces the Court's conclusion that the ban on judicial review covers the Act in its entirety.[30] In support, the Court cites to a House Committee report that used the word "designation" to refer to the inclusion of vicinity properties under § 7912(d)(2).[31] Furthermore, the Court concludes that "[t]he statute unambiguously provides that the decision to include a vicinity property as part of a designated processing site pursuant to subsection (e)(2) is a 'designation[] made.'"[32]

Conclusion

The United States Court of Appeals for the District of Columbia affirmed the District Court's dismissal of El Paso's action on the grounds that the provision banning judicial review of designations made by the Secretary of DOE is controlling.

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Endnotes

1. *El Paso Natural Gas Co. v. United States*, 632 F.3d 1272, 1273 (D.C. Cir. 2011).
2. *Id.* at 1274.
3. *Id.* (citing H.R.Rep. No. 95-1480, pt. 1, at 11 (1978)).
4. *Id.*
5. *See id.*
6. *Fact Sheet on Uranium Mill Tailings*, U.S. NUCLEAR REGULATORY COMM'N, http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/mill-tailings.html (last visited Mar. 30, 2011).
7. *See id.*
8. *El Paso Natural Gas*, 632 F.3d at 1274 (citing 42 U.S.C. § 7912(a)(1), (a)(3)(b)) (the Act goes on to say in § 7912(e) that "notwithstanding the one year limitation contained in this section, the Secretary may, after such one year period, include any [vicinity property] as part of a processing site designated under this section if he determines

such inclusion to be appropriate to carry out the purposes of [UMTRCA]").

9. *Id.* (citing 42 U.S.C. § 7911(6)).
10. *Id.*
11. *Id.*
12. *Id.*; *see* 42 U.S.C. § 7915.
13. *Id.*
14. *Id.*
15. *See id.*
16. *Id.* at 1275.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* (citation omitted).
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 1275-76.
26. *Id.*
27. *Id.*
28. *See id*
29. *Id.*
30. *Id.* at 1277.
31. *Id.* (citing H.R. Rep. 95-1480, pt. 2, at 36).
32. *Id.* at 1277-78.

* * *

Town of Fenton v. Town of Chenango, 31 Misc.3d 1206(A), 2011 WL 1260083 (Sup. Ct., Broome Co. 2011)

Facts

The Town of Chenango, after following the appropriate approval process, relocated the discharge point from a wastewater treatment facility to a new extraterritorial location in the Chenango River, a common boundary between Chenango and the Town of Fenton.[1] At the time of the relocation, Fenton regulated the water flowing into its aquifer, which included the Chenango River.[2] Fenton claimed the wastewater flowed into the aquifer; thus, the discharge would fall under the jurisdiction of the regulation.[3]

Procedural History

This is the first judicial review of this issue.[4]

Issue

Is Chenango's wasterwater treatment facility discharge immune from Fenton's aquifer regulation?[5]

Rationale

Where there is a land dispute between localities, the Supreme Court of Broome County stated that courts use the *Monroe* balancing test, weighing the public interests advanced by the municipalities.[6] However, before addressing this test, the court looks to whether there is legislative intent supporting the imposition of the host government's regulations.[7]

Contrary to Fenton's assertion, the court found no such legislative intent in Sections 190 and 220(4) of the New York Town Law; therefore, the court addressed the ten *Monroe* factors utilized by the court to balance the interests of the municipalities.[8]

Going through the *Monroe* factors, the court found that all the factors weighed in favor of granting Chenango immunity.[9] In particular, the court found the wasterwater discharge plant and its subsequent discharge, served the public interest;[10] its current construction was the most viable;[11] and the imposition of Fenton's regulations could result in a temporary shutdown.[12] Additionally, the court found that Fenton had a full and fair opportunity to take part in determining the location of the discharge,[13] and its interest in ensuring clean water was not implicated as the water tests did not show the discharge would harm Fenton's water supply.[14]

Conclusion

The Supreme Court of Broome County granted Chenango's motion for summary judgment, finding that the wasterwater treatment facility's discharge is immune from Fenton's aquifer regulation.[15]

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Endnotes

1. *Town of Fenton v. Town of Chenango*, 2011 WL 1260083, at *1-2 (N.Y. Sup. Ct. Broome Co. 2011).
2. *Id.* at *1.
3. *Id.*
4. *Id.* at *3-4 (discussing previous actions).
5. *Id.* at *1.
6. *Id.* at *4.
7. *Id.* (quoting *Matter of County of Monroe*, 72 N.Y.2d 338, 343 (1988)).
8. *Id.* at *7-8.
9. *Id.* at *10.
10. *Id.* at *8-9.
11. *Id.* at *10.
12. *Id.* at *9.
13. *Id.* at *10.
14. *Id.* at *9.
15. *Id.* at *10.

* * *

Gerald Jayne v. Mark Rey, __ F.3d __ (D. Idaho 2011), 2011 WL 337941

Facts

This case arrives in the wake of the *National Wildlife Federation v. National Marine Fisheries Service*[1] case and concerns reliance on commitments made by an agency regarding future development in connection with land protected by the Endangered Species Act (ESA).[2] The 2001 Roadless Area Conservation Rule (Roadless Rule) was created by the Forest Service to protect Inventoried Roadless Areas (IRAs) within National Forests from road construction and timber harvesting.[3] In 2006, Idaho passed the Idaho Roadless Rule as a state-specific management tactic.[4] The Idaho Roadless Rule separates IRAs into different themes and allows different levels of use under each theme.[5] The 2006 Idaho Roadless Rule themes include "Wild Land Recreation" (WLR), "Primitive," "Special Areas of Historic or Tribal Significance," which provide protection equal to the 2001 Rule, and the "Backcountry / Restoration" (BCR), and "General Forest, Rangeland, Grassland" (GFRG), which allow more logging and road projects than the 2001 Rule.[6]

The BCR theme covers an area of 5.3 million acres where protections against temporary roads and logging are reduced in "community protections zones" in order to battle the threat of wildfire.[7] The BCR theme raises three restrictions to even out the reduced protections; first, all projects must generally retain large trees that are appropriately of the "forest type[;]" second, logging projects outside community protection zones must also retain large "forest type" trees, and the project must maintain or improve roadless characteristics over the long term; third, temporary road projects outside community protection zones to deal with "'significant risks'" of wildfire are anticipated to be infrequent.[8] The GFRG theme covers 400,000 acres managed according to the forest plan with the exception that roads may not be built to access new mineral or energy leases aside from specific phosphate deposits.[9] Specifically, this allowed construction "'in association with phosphate deposits'" in the Caribou-Targhee National Forest, while the 2001 Rule prohibited road construction related to new mineral leases.[10]

Prior to enactment of the Idaho Roadless Rule, the Forest Service (FS) consulted the Fish and Wildlife Service (FWS) in accordance with section 7 of the Endangered Species Act (ESA) after the rule was found likely to have an adverse effect on eight listed species.[11] The FWS issued a Biological Opinion stating that despite the noted adverse effects, the Idaho Roadless Rule was not likely to jeopardize the existence of any species.[12] In light of the Biological Opinion, the FS issued a Final Environmental Impact Statement (FEIS) and a Record of Decision (ROD) adopting Idaho Roadless Rule.[13]

Procedural History

Plaintiff filed suit challenging the validity of the Biological Opinion and the Final Environmental Impact Statement recorded in coordination with the Idaho Roadless Rule.[14] Plaintiff sought relief in the form of enjoining the Idaho Roadless Rule and requiring in its place application of the 2001 Roadless Area Conservation Rule. The court heard oral arguments and now rules on cross-motions for summary judgment.[15]

Issues

1. Whether the Biological Opinion filed in relation to the Idaho Roadless Rule violated the Endangered Species Act by allowing construction of temporary roads and logging in the habitat of caribou and grizzly bears.[16]

2. Whether the Forest Service incorrectly relied on an inaccurate assumption when estimating the impact of road building and logging allowed by the Rule.[17]

Rationale

Under section 7(a) (2) of the ESA, an agency action is prohibited if it is "likely to jeopardize the continued existence" of an endangered species, or likely to "result in the destruction or adverse modification" of habitat belonging to an endangered species.[18] Actions that may reasonably be expected to "directly or indirectly, [] reduce appreciably the likelihood of both the survival and recovery of a listed species" are prohibited by section 7.[19] The court held that the Idaho Roadless Rule could have an "indirect impact" on caribou and grizzly habitat if future road construction is "reasonably certain to occur" in those areas.[20]

As to the caribou found in the Idaho Panhandle National Forest (IPNF), the FWS relied on protections historically afforded by the National Forests' Long Range Management Plan (LRMPs), and written commitment from the IPNF to follow the best available science in protecting caribou habitat.[21] As to the grizzly bear found in the Cabinet-Yaak region and the Selkirk Recovery Zone, the FWS relied on written commitment from the FS Supervisor of the IPNF stating that because of the programmatic nature of the Idaho Roadless Rule, an Access Amendment would be added to establish guidelines for all future road projects specifically intended to minimize the effects on grizzly bears from motorized vehicles.[22]

The court held that the FWS could rely on promises from the IPNF to protect the caribou and grizzly bear that were not specific or binding because unlike *National Wildlife*[23] this case did not involve a project threatening "immediate negative affects" on the caribou and grizzly habitat.[24] In reviewing the promises in particular, the court held that they could not be deemed arbitrary or capricious without existing evidence to "cast doubt on

the commitments."[25] Thus, the court held that the FWS properly determined that future road construction was not likely to occur.[26]

Additionally, the court dismissed plaintiff's argument that the Forest Service improperly assumed that the amount of road building and logging under the more lenient BCR and CFRG themes would not increase substantially past that allowed by the 2001 Roadless Rule.[27] The Forest Service relied on logging and road projects that had occurred since the 2001 Rule and the existence of any reasonably foreseeable projects for the next 15 years to determine that fiscal reality did not indicate the likelihood of a major increase in road projects.[28] The court deferred to the Forest Services' interpretation that the majority of the BCR theme would limit logging similarly to the 2001 Roadless Rule, in accordance with the express intent that the Idaho Roadless Rule be treated as such.[29]

Conclusion

The court granted defendant's motion for summary judgment and dismissed plaintiff's summary judgment claim, finding that the FWS did not violate any of the challenged acts in creation of the Biological Opinion.[30]

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Endnotes

1. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv*., 524 F.3d 917, 936 (9th Cir. 2008) (finding that when drafting a Biological Opinion for a proposed plan that will have immediate negative effects on a listed species, promises of future action by an agency may only be relied upon if the promises of future action are specific and binding).
2. *Jayne v. Rey*, __ F.3d __ (D.Idaho 2011), 2011 WL 337941, *8.
3. *Id.* at *1.
4. *Id.* at *1-2.
5. *Id.* at *2.
6. *Id.*
7. *Id.* at *3.
8. *Id.* at *2.
9. *Id.* at *3.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at *3.
15. *Id.*
16. *Id.* at. *5.
17. *Id.* at *10 (see *8).
18. *Id.* at *7; *see also* 16 U.S.C. § 1536(a)(2).
19. *Jayne v. Rey*, 2011 WL 337941, at *7.
20. *Id.* at *9.
21. *Id.* at *5.
22. *Id.* at * 6.
23. *Id.* at *8 . *See generally, Nat'l Wildlife Fed'n* , 524 F.3d at 935-36 (finding that National Marine Fisheries Service improperly relied on an agency's promise to install certain structural improvements to a dam in forming a Biological Opinion which concluded that dams on the Columbia River would not jeopardize listed salmon despite noting that dam operations would have an immediate and significant negative impact on the species' habitat because the promise of future action was not specific and binding.)
24. *Jayne v. Rey*, 2011 WL 337941, at *8.
25. *Id.* at *9.
26. *Id.* at *10.
27. *Id.*
28. *Id.* at *11.
29. *Id.* at *12.
30. *Id.* at *14.

* * *

Hamil Stratten Prop., LLC v. N.Y. State Dep't of Envtl. Conservation, 79 A.D.3d 747, 913 N.Y.S.2d 282 (2d Dep't 2010)

Facts

The petitioner / plaintiff in this Article 78 proceeding owns certain real property in Long Island City, which was contaminated by the previous owner who used the property to manufacturer adhesives for over 60 years.[1] To remediate the contamination, petitioner entered into a Brownfield Site Cleanup Agreement (BCA) with the New York State Department of Environmental Conservation (DEC) in 2004.[2] The DEC, however, terminated the agreement in August of 2007 for failure to substantially comply with the agreement's terms and conditions.[3] The petitioner contended that the DEC's decision was arbitrary and capricious. The petitioner also contended that its constitutional rights were violated when the DEC terminated the agreement without a hearing.

Issues

1. Whether the Department of Environmental Conservation's decision to terminate a Brownfield Site Cleanup Agreement for failure to comply with the agreement was arbitrary, capricious, or an abuse of discretion.
2. Whether a hearing is required under the constitution prior to a termination of a Brownfield Site Cleanup Agreement.

Rationale

The Appellate Court found that the DEC reasonably determined that the petitioner failed to substantially comply with the agreement. The court first looked at the Environmental Conservation Law, which provides that the DEC is authorized to terminate such an agreement "at any time during its implementation if the applicant fails to comply substantially with such agreement's terms and conditions."[4] When an administrative agency makes a de-

termination that involves factual evaluations in the area of the agency's expertise and is supported by the record, that determination must be accorded great weight and judicial deference.[5] The court, in applying this standard, concluded that the DEC's determination was not arbitrary, capricious, or an abuse of discretion.

With regard to the petitioner's contention that it was constitutionally entitled to a hearing prior to the termination, the court ruled that due process is satisfied if an opportunity for a hearing is given, regardless of whether the property owner took advantage of that opportunity.[6] Here, the court found that the petitioner had the opportunity for a pre-deprivation hearing in the form of dispute resolution, but the petitioner did not pursue that option.[7]

Conclusion

The Supreme Court, Appellate Division, held that the DEC properly terminated the Brownfield Cleanup Site Agreement with the owner of the contaminated property when the owner failed to substantially comply with the agreement and, therefore, the termination was not arbitrary, capricious, or an abuse of discretion. The court further found that the owner of the property had the opportunity for a pre-deprivation hearing, in the form of dispute resolution, but failed to properly pursue that action and, therefore, its constitutional rights were not violated.

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Endnotes

1. *Hamil Stratten Prop., LLC v. N.Y. State Dep't of Envtl. Conservation*, 79 A.D.3d 747, 913 N.Y.S.2d 282 (2d Dep't 2010).
2. *Id.* at 284.
3. *Id.*
4. N.Y. Environmental Conservation Law § 27-1409 (12) (ECL).
5. *Hamil Stratten Properties*, 913 N.Y.S.2d at 284 (citing *N.Y. Botanical Garden v. Bd. of Standards and Appeals of New York*, 91 N.Y.2d 413, 671 N.Y.S.2d 423, (1998)).
6. *Id.* at 285 (citing *Brody v. Village of Port Chester*, 434 F.3d 121, 131 (2d Cir. 2005)).
7. *Id.*

* * *

Metro. Taxicab Bd. of Trade v. City of New York, 615 F.3d 152 (2d Cir. 2010), *cert. denied*, 2011 WL 677133 (U.S. Feb. 28, 2011)

Facts

Plaintiffs, taxicab fleet owners, challenged New York City regulations that promoted the purchase of hybrid taxicabs by reducing the rates at which taxicab owners could lease their cabs to drivers if the taxicab was not a hybrid or clean diesel engine vehicle.[1]

The new regulations, passed by the City's Taxicab and Limousine Commission (TLC), disincentivized the use of non-hybrid and non-clean diesel taxicabs by reducing the maximum lease cap for cabs that were not hybrid or clean diesel over three phases, and simultaneously incentivized the use of hybrid and clean diesel taxis by increasing the maximum lease cap for those vehicles.[2] After all three phases of reductions were completed, the regulations would establish a fifteen dollar difference per shift between the amounts that taxicab owners could charge drivers to lease a hybrid or non-hybrid cab.[3] The regulations aimed to improve air quality, reduce use of fossil fuels, and lower carbon emission output.[4] In addition, the regulations shifted the cost of fuel from the drivers that paid for it, to the taxicab owners who decided which type of taxicab to purchase.[5]

Procedural History

The United States Court of Appeals for the Second Circuit upheld the issuance of a preliminary injunction against the enforcement of the regulations by the United States District Court for the Southern District of New York.[6]

Issue

Whether the City's taxicab regulation differentiating between hybrid and non-hybrid taxi vehicles improperly regulated a federally preempted subject matter.[7]

Rationale

The United States District Court for the Southern District of New York granted plaintiffs a preliminary injunction against the enforcement of the portion of the regulations that lowered the maximum lease cap for non-hybrid and non-clean diesel taxicabs, holding that the plaintiffs were likely to succeed on their claims that the rules were preempted under the federal Energy Policy and Conservation Act (EPCA) and the Clean Air Act.[8] Plaintiffs' expert testified, undisputed by the City, that the lease cap reduction would result in fleet owner profits being reduced by 65% to 75%.[9] The District Court found that due to this financial impact the regulation was effectively a *de facto* mandate that forced fleet owners to purchase hybrid taxicabs and that the mandate related to fuel economy standards and vehicle emissions, both fields which are preempted by federal legislation.[10]

The Second Circuit did not address whether the regulation acted like a mandate, finding that the regulation was preempted by the EPCA, rendering the mandate argument irrelevant.[11] The EPCA preemption clause prohibits state and local governments from adopting regulations related to fuel economy standards for automobiles covered by the statute.[12] The Second Circuit noted that when determining whether a local regulation relates to a preempted subject matter the court must examine whether the regulation references the subject matter or makes the existence of the subject matter "essential to the law's operation."[13] Under this test, the Court found that the TLC

lease cap changes impermissibly related to fuel economy because the regulations relied solely on fuel economy to determine the applicable lease cap and because there was no other plausible rationale for the regulations other than to improve fuel economy in New York City taxi fleets.[14]

Conclusion

The Second Circuit held that plaintiffs established a "likelihood, indeed a certainty, of success on the merits" in their challenge to the TLC lease cap regulations and affirmed the lower court's preliminary injunction on preemption grounds.[15] The City's subsequent petition for a writ of certiorari was denied by the United States Supreme Court.[16]

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Endnotes

1. *Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 154 (2d Cir. 2010), *cert. denied*, 2011 WL 677133 (U.S. Feb. 28, 2011).
2. *Id.* at 155.
3. *Id.*
4. *Metro. Taxicab Bd. of Trade v. City of New York*, 633 F.Supp.2d 83 (S.D.N.Y. 2009), *aff'd*, 615 F.3d 152 (2d Cir. 2010), *cert. denied*, 2011 WL 677133 (U.S. Feb. 28, 2011).
5. *Metro. Taxicab Bd. of Trade*, 615 F.3d at 155.
6. *Id.* at 158.
7. *Id.* at 156.
8. *Id.* at 155.
9. *Id.*
10. *Id.* at 155–56.
11. *Id.* at 158.
12. *Id.* at 156 (quoting 49 U.S.C. § 32919(a)).
13. *Id.* at 156 (quoting *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997)).
14. *Id.* at 157.
15. *Id.* at 158.
16. *Metro. Taxicab Bd. of Trade v. City of New York*, 2011 WL 677133 (U.S. Feb. 28, 2011).

* * *

National Fuel Gas Distribution Corp. v. Public Service Commission, 16 N.Y.3d 360 (2011)

Facts

This case centered on the distribution of insurance settlement funds, where the parent utility company allocated the funds to subsidiaries to cover environmental cleanup costs.[1] After a settlement in 1999, the parent utility company decided to distribute the settlement funds between the subsidiaries based upon a premiums paid methodology.[2] On administrative review, it was the Department of Public Services' ("DPS") position that this basis for distribution was unreasonable since this methodology "bore no relation to the amount of the settlement funds."[3] DPS argued the more appropriate allocation would have been based upon expenses; thus, more funds would be available to the subsidiary in this action, mitigating the rate-hike on consumers.[4] On appeal to the Public Services Commission ("PSC"), DPS also argued allocation should be based upon costs attributable to the subsidiary as per the 1996 report.[5]

Procedural History

The matter was first heard by an administrative law judge who found for the utility company and granted the requested rate hike. The PSC reversed and found that another methodology should have been used.[6] The Appellate Division reversed, restoring the administrative law judge's decision.[7]

Issue

Did DPS meet its burden of showing, on a rational basis, that the parent utility company acted imprudently, given the facts known at the time?[8]

Rationale

The Court of Appeals stated that a decision rendered by a utility will be considered prudent if it is reasonable given the facts at hand, and the decision will not be considered imprudent solely because there are other reasonable, and perhaps more beneficial, options.[9] Thus, PSC cannot benefit from hindsight, and it cannot find imprudence solely because an alternative is preferable.[10]

This cause of action boiled down to whether DPS reasonably showed imprudence on the part of the parent utility company.[11] The court found that DPS did not meet its burden.[12] The court arrived at this conclusion because DPS's sole witness provided conclusory testimony.[13] The witness stated the settlement agreement with the insurer was not based upon the premiums paid; however, no evidence was offered to that effect, nor was there any discussion as to why the factors leading to the settlement should have been followed to determine the allocation.[14] Additionally, the court found the parent utility company properly did not use a 1996 report for the allocation determination as the report offered only estimates and was made with the purpose of avoiding litigation, not determining the extent of contamination.[15]

Conclusion

The New York Court of Appeals affirmed the order of the Appellate Division, holding that when the PSC reviews a utility decision, DPS bears the initial burden of showing, upon a rational basis, that the utility acted imprudently in rendering the decision, given the facts known at the time.[16] Under this legal standard, the court found DPS proved no imprudence on the part of the parent utility company.[17]

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Endnotes

1. *National Fuel Gas Distribution Corp. v. Public Service Comm'n*, 16 N.Y.3d 360, 365 (2011).
2. *Id.*
3. *Id.* at 366.
4. *Id.*
5. *Id.* at 366-67.
6. *Id.*
7. *Id.* at 367.
8. *Id.* at 364.
9. *Id.* at 368-69.
10. *Id.* at 369.
11. *Id.*
12. *Id.* at 370.
13. *Id.* at 369-70.
14. *Id.*
15. *Id.* at 370-71.
16. *Id.* at 364.
17. *Id.* at 371.

* * *

In re N.Y. Constr. Materials v. N.Y.S. Dep't Envtl. Conservation, 2011 NY Slip Op. 3165; 2011 N.Y. App. Div. LEXIS 3109 (3d Dep't, April 21, 2011)

Facts

"Petitioners, individual producers of construction materials and providers of services that contract with the New York State University Construction Fund and the not-for-profit trade association that represents their interests," challenged the New York State Department of Environmental Conservation (DEC) regulations regarding diesel gas vehicle emissions and the agency's efforts to regulate emissions from state-purpose used vehicles.[1]

"In August 2006, the Legislature enacted the Diesel Emissions Reduction Act (DERA) to address the public health threat posed by diesel fuel combustion."[1] DERA requires that "diesel powered heavy duty vehicles 'owned by, operated by or on behalf of, or leased by' state agencies and certain public authorities are required to use ultra low sulfur diesel fuel…and the best available retrofit technology…in order to reduce the emissions of air pollutants."[2] In order to effect compliance, a three-year, phase-in timetable was established,[3] with the DEC in charge of promulgating the regulations as "necessary and appropriate to carry out DERA's provisions."[4] The regulations were delayed and by the time that the Department began, only 18 months remained in the phase-in period.[5]

Procedural History

The Supreme Court, Saratoga County, entered a judgment on April 26, 2010, dismissing petitioners' complaint, from which the present appeal was raised.[6] The Appellate Division, Third Department, of the Supreme Court of New York heard the appeal.

Issues

1. Whether the DEC was entitled to judicial deference in its "interpretation of the DERA language imposing diesel emission controls on vehicles operated 'on behalf of' respondent State of New York exceeds its authority."[7]
2. Whether "the regulations should be reformed to allow additional time for compliance."[8]
3. Whether the Department of Environmental Conservation "regulations are unconstitutional in that they may be retroactively applied," which petitioners argue violates the Ex Post Facto Clause of the United States Constitution.[9]

Rationale

On the first issue, the court found that judicial deference is not needed for the phrase "on behalf of, " since the legislation "lays out detailed requirements, defines several technical terms and specifies, among other things, a precise timetable for compliance, particular grounds on which the DEC may grant waivers, and details [w]hat the agency must include in annual reports."[10] This "degree of precision and detail contained in DERA plainly indicates the Legislature's intent to withdraw…policy determinations from the agency with regard to diesel emissions in vehicles used for state work."[11]

If a phrase is indefinable, it is defined by the jurisprudence of the state.[12] But "prior legal usage does not support the DEC's broad construction."[13] "If the Legislature did intend to extend DERA's applicability to such a broad class, language making such an intention explicit was available in prior legislation mandating diesel emission controls in privately-owned vehicles performing public work."[14] Instead, the Legislature chose specifically not to.[15]

The court disagreed with the idea of reforming the timetables for more time, since the "requirements were established when DERA was enacted in 2006 and have remained unchanged since then, placing private contractors with potentially-affected vehicles on notice."[16]

With respect to a possible violation of the Ex Post Facto Clause of the United States Constitution, the court found that no retroactive enforcement occurred.[17]

Conclusion

The Third Department held that the Legislature "did not intend to impose DERA requirements on vehicles other than those used by prime contractors under direct contract with state agencies and public authorities, as codified in 6 NYCRR 248-1.1 (b)(23),"[18] that private con-

tractors were placed on effective notice,[19] and that any suggestion that the Ex Post Facto Clause would be violated is mere conjecture and is not "ripe for judicial review" at this time.[20]

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Endnotes

1. *In re N.Y. Constr. Materials v. N.Y.S. Dep't Envtl. Conservation*, 2011 NY Slip Op. 3165; 2011 N.Y. App. Div. LEXIS 3109 (3d Dep't 2011).
2. *Id.*
3. *Id.*
4. *Id.* at *2.
5. *Id.*
6. *Id.* at *1.
7. *Id.* at *2.
8. *Id.* at *5.
9. *Id.*
10. *Id.* at *3-4.
11. *Id.* at *3.
12. *Id.*
13. *Id.*
14. *Id.* at *4.
15. *Id.*
16. *Id.* at *5.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at *6.

* * *

N.Y. State Superfund Coal. v. N.Y. State Dep't of Envtl. Conservation, 68 A.D.3d 1588, 892 N.Y.S.2d 594 (3d Dep't 2009), motion for leave to appeal granted, 15 N.Y.3d 712, 912 N.Y.S.2d 577 (Oct. 26, 2010)

Facts

The State Superfund Program creates a mechanism for cleanup of inactive hazardous waste disposal sites.[1] The enabling statute charges the Department of Environmental Conservation (DEC) with administration of the program, including authority to "promulgate rules and regulations necessary and appropriate."[2] The DEC amended the Superfund regulations in 2006 to restate the goal of a remedial program.[3] The statute provides that the goal "shall be a complete cleanup of the site through the elimination of the significant threat to the environment posed by the disposal of hazardous wastes at the site and of the imminent danger of irreversible or irreparable damage to the environment caused by such disposal."[4] The amended regulation requires restoration of the site "to pre-disposal conditions, to the extent feasible."[5] The regulation no longer specifies that restoration should be to the extent authorized by law.[6]

A coalition of property owners whose sites are or may be subject to the State Superfund Program challenged the amended regulations.

Procedural History

Plaintiff's Article 78 challenge to DEC Superfund regulations was successful in Supreme Court in 2008, and DEC appealed.[7] The Third Department reversed in December of 2009, holding that DEC's interpretation of the Superfund statute was reasonable and entitled to deference.[8] Now the Court of Appeals has granted leave to appeal to plaintiff.[9]

Issue

The issue is one of statutory interpretation: whether or not the DEC exceeded its statutory authority when it amended its regulations for carrying out the purposes of the State Superfund Program.

Rationale

The plaintiff argued that the DEC's amended regulation requires a more thorough cleanup than the Superfund statute mandates. It could be possible to eliminate a significant threat to the environment, thus complying with the law, without returning the site to pre-disposal conditions, as required by the regulation.[10]

The Third Department, in reversing, did not accept that argument for three reasons: (1) the Superfund statute is ambiguous because it refers to both a "complete cleanup of the site"[11] and elimination of a significant threat at the site, and an expert administrative agency's reasonable interpretation of an ambiguous statute is entitled to deference;[12] (2) the amended regulation does not require cleanup to pre-disposal conditions without qualification, only "to the extent feasible";[13] (3) under the statute, once the DEC has made the threshold determination that a significant threat to the environment exists, the broad definition of "inactive hazardous waste disposal site remedial program" allows considerable latitude in how remediation should be addressed;[14] (4) the Legislature has not acted to clarify or change the remedial goal even though the amended regulations have been in place since 2006.[15]

Conclusion

The Court of Appeals will soon consider whether the DEC's regulations, annulled by the Supreme Court and reinstated by the Third Department, are a reasonable interpretation of the Superfund statute.

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Endnotes

1. N.Y. Environmental Conservation Law Art. 27 tit. 13 (ECL).
2. ECL § 27-1313(3)(a).
3. N.Y. Comp. Codes R. & Regs. tit. 6, § 375-2.8(a) (N.Y.C.R.R.).
4. ECL § 27-1313(5)(d).

5. 6 N.Y.C. R. R. § 375-2.8(a).
6. *See* N.Y. Comp. Codes R. & Regs. former tit. 6, § 375-2.8(a) (2005).
7. *See N.Y. State Superfund Coal. v. N.Y. State Dep't. of Envtl. Conservation*, 68 A.D.3d 1588, 1588, 892 N.Y.S.2d 594 (3d Dep't 2009).
8. *Id.* at 1590.
9. *N.Y. State Superfund Coal. v. N.Y. State Dep't. of Envtl. Conservation*, 15 N.Y.3d 712, 912 N.Y.S.2d 577 (Oct. 26, 2010).
10. 68 A.D.3d at 1589.
11. ECL § 27-1313(5)(d).
12. 68 A.D.3d at 1589.
13. 6 N.Y.C.R.R. § 375-2.8(a).
14. 68 A.D.3d at 1590.
15. *Id.*

* * *

In re Oakleigh Thorne v. Vg. Of Millbrook, 920 N.Y.S.2d 369 (April 5, 2011)

Facts

Petitioners commenced an action challenging the Planning Board's issuance of a negative declaration pursuant to the State Environmental Quality Review Act (SEQRA),[1] and which granted "a conservation density development special use permit, preliminary site plan approval, and sketch-plan subdivision plat approval."[2]

"In July 2006, [developer] Blumenthal Brickman Associates submitted an application to the Planning Board of the Village of Millbrook for a conservation density development special permit, as well as site plan and subdivision approvals."[3] Three public hearings were held in early 2007; letters with concerns from the community were sent to the developer; and a revised set of plans were submitted in October 2008.[4] A public hearing on the new application was held after which three workshops were held by the Planning Board to assess any environmental impact that may arise from the application.[5] After the last of the three workshop sessions, the Planning Board issued a negative declaration pursuant to the SEQRA, which granted the special permit that was requested, provided a preliminary site plan approval, and a sketch-plan subdivision plat approval.[6]

Procedural History

The petitioners' action to review the Planning Board's ruling was commenced pursuant to CPLR article 78, and the Supreme Court out of Dutchess County denied the petition, effectively dismissing the proceeding on October 14, 2009 (upon a decision of the same court dated July 13, 2009).[7] The petitioners appealed to the Supreme Court of New York, Second Department of the Appellate Division.

Issues

"Whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasonable elaboration of the basis for its determination."[8]

Rationale

When looking at relevant areas of environmental issues, "[a] lead agency shall require an environmental impact statement where the proposed action 'may have a significant effect on the environment.'"[9] If there are not any "adverse environmental impacts or…the identified adverse environmental impacts will not be significant," then the agency may issue a negative declaration.[10] "[A] negative declaration may be properly issued…where, as here, the project has been modified during the initial review process to accommodate environmental concerns," and any modifications made "must negate the continued potentiality of the adverse effects of the proposed action."[11]

The Planning Board "rationally determined that the requirements for issuance of the special use permit were met,"[12] and that a referral to the Zoning Board was not required as the petitioners alleged.[13] Also, the provision of the Village of Millbrook Code which requires that the site plans conform to all Village laws applies only to the final site plans, not to preliminary site plans as the petitioners believed.[14] Lastly, the court found that "[t]he petitioners were not aggrieved by any insufficiency in the notice of the meeting of the Planning Board" on certain dates or "inaccessibility of the meeting to those with disabilities,"[15] nor was the challenge to notice raised before the Supreme Court on appeal.[16]

Conclusion

The Court concluded that the Planning Board appropriately looked at the environmental impact that the plans would have and "rationally determined that they had been mitigated such that there will be no adverse impacts or that such impacts will not be significant,"[17] that the conservation density development special use permit was properly granted, and that, along with there being no preservation of the notice issue, the "petitioners failed to meet their burden of establishing a violation of the Open Meetings Law."[18]

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Endnotes

1. *Oakleigh Thorne v. Vg. Of Millbrook*, 920 N.Y.S. 2d 369, 369 (2d Dep't, 2011).
2. *Id.* at 370.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 371.
7. *Id.* at 370.
8. *Id.* at 371.
9. *Id.*

10. *Id.*
11. *Id.*
12. *Id.* at 372.
13. *Id.*
14. *Id. See also* Village of Millbrook Code § 230-44[E].
15. *Oakleigh Thorne* at 920 N.Y.S. 2d at 372.
16. *Id.*
17. *Id.*
18. *Id.*

* * *

Matter of Prand Corp. v. Town Bd. of Town of E. Hampton, 78 A.D.3d 1057, 911 N.Y.S.2d 468 (2d Dep't 2010)

Facts

The Town Board of the Town of East Hampton ("Town Board") adopted a comprehensive plan establishing guidelines for land use on May 6, 2005 ("2005 Comprehensive Plan"). Following its approval, the Town Board established a committee that recommended certain amendments to the town's Open Space Preservation Law ("Open Space Amendments").[1] As a condition to the approval of a subdivision in three residential zones, the Open Space Amendments proposed to augment the percentage of real property reserved for the preservation of open space.[2] In exchange, the Open Space Amendments lessened the land-clearing restrictions on the resultant subdivided lots.[3]

The Town Board, acting as the lead agency, characterized the proposal of the Open Space Amendments as an "unlisted action" under the State Environmental Quality Review Act (SEQRA).[4] The primary objective of SEQRA is to inject environmental considerations into the decision-making process at an early stage by requiring all government agencies to prepare an environmental impact statement (EIS) for all intended or approved actions which may have a significant effect on the environment.[5] Since SEQRA leaves the environmental impact determination to the discretion of the governmental agency, the threshold for preparing an EIS is relatively low.[6]

After preparing an environmental assessment form (EAF), the Town Board concluded that the Open Space Amendments would not have any significant adverse impacts on the environment. Three days following the Town Board's review of the EAF, the Town Board issued a negative declaration pursuant to SEQRA, thereby dispensing with the requirement to prepare an EIS and enacted the Open Space Amendments as Local Law No. 25 (2007) of the Town of East Hampton ("Local Law No. 25").[7]

Procedural History

The plaintiffs, owners of three parcels of undeveloped real property in the town, filed this hybrid action pursuant to Civil Practice Law and Rules (CPLR) Article 78 seeking, among other things, the annulment of Local Law No. 25 on the grounds that it was "arbitrary, capricious, unlawful…and was adopted in violation of the substantive and procedural requirements of SEQRA," and a judgment declaring that both Local Law No. 25 and Local Law No. 16 (2005) of the Town of East Hampton ("Local Law No. 16") were null and void.[8] The Supreme Court, Suffolk County dismissed the portion of the proceeding related to Local Law No. 16 as untimely and granted the CPLR Article 78 petition insofar as the annulment of Local Law No. 25 on the basis that its enactment violated SEQRA.[9] The Supreme Court remanded the issue to the Town Board for a complete SEQRA review. The Town Board appeals the lower court's decision regarding Local Law No. 25.[10]

Issue

Whether the Town Board identified the relevant areas of environmental concern implicated by Local Law No. 25 and granted them the requisite "hard look" and "reasoned elaboration" required by SEQRA.

Rationale

SEQRA limits the scope of judicial review of a lead agency's threshold determination to whether the determination was "made in violation of lawful procedure, was effected by an error of law or was arbitrary and capricious or an abuse of discretion."[11] A court must review the record to decide whether an agency identified the significant areas of environmental concern and granted them a "hard look" and "reasoned elaboration" when determining whether a lead agency has complied with SEQRA.[12]

Local Law No. 25, specifically the relaxed land-clearing limits, raised several of the significant environmental impact criteria, including: (1) a considerable increase in the possibility of soil erosion, flooding and drainage problems; (2) elimination of large amounts of vegetation; (3) significant interference with the area's natural resources; (4) a material conflict with the town's comprehensive plan; (5) damage to the existing character of the community; and (6) a substantial increase in the intensity of the land use.[13]

The Supreme Court, Appellate Division held that the Town Board had inappropriately issued a negative declaration by not taking the mandatory "hard look" at the relevant environmental criteria revealed in the EAF.[14]

Conclusion

The Supreme Court, Appellate Division affirmed the lower court's decision to annul Local Law No. 25 as related to the plaintiffs' property.[15]

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Endnotes

1. *Matter of Prand Corp. v. Town Bd. of Town of E. Hampton*, 78 A.D.3d 1057, 1058, 911 N.Y.S.2d 468 (2d Dep't 2010).
2. *Id.* at 1058-59.
3. *Id.* at 1059.
4. *Id.*
5. *Id.*
6. *Id.* at 1059-60.
7. *Id.* at 1059.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 1060.
13. *Id.*
14. *Id.*
15. *Id.*

* * *

Riccelli Enter., Inc. v. N.Y. State Dep't of Envtl. Conservation, 30 Misc.3d 573, 915 N.Y.S.2d 439 (Supreme Ct., Onondaga Co. 2010)

Facts

Plaintiff is one of the top suppliers of sand, gravel, trucking services, labor, and other materials used by contractors to New York State, regional, and public authorities, as well as municipalities and the private sector.[1] The plaintiff sought to have a portion of the Diesel Emissions Reduction Act (DERA)[2] declared null and void, challenging it on the grounds that the regulations exceed the statutory delegation of authority granted to the Department of Environmental Conservation (DEC) by the legislature.[3] In addition, in a declaratory judgment action, plaintiff challenged the legality of certain regulations promulgated by the defendant, the DEC, under DERA. Specifically, the plaintiff sought an order declaring DERA unenforceable and asked the court to schedule implementation for 48 months if the retrofit requirement is found to apply to privately owned vehicles.[4] Pursuant to DERA, any heavy duty vehicle powered by diesel that is "owned by, operated by or 'on behalf of' or leased by a state agency shall be powered by ultra low sulphur diesel fuel…[and] must use the best available retrofit technology (BART) for reducing the emissions of pollutants."[5] In response, the DEC moved to convert the action to a CPLR Article 78 proceeding, which would make the action untimely and, therefore, dismissable.[6]

Issue

Whether a privately owned and operated vehicle is to be considered to be operated "on behalf of" a state agency or public authority when the owner is a contractor who does business with a public authority.

Rationale

In its decision, the court looked at the legislative intent behind DERA. In doing so, the court found that while the statute specifically requires regulations for a procedure for implementation, it does not authorize the Commissioner of the DEC to determine who should be regulated, which is left to DERA itself.[7] Specifically, DERA limits the target class to "any diesel powered heavy duty vehicle that is owned by, operated by or on behalf of, or leased by a state agency and state and regional public authority with more than half of its governing body appointed by the governor."[8] As a result of this, the statute, and not the DEC, determines who is covered. Further, the court found that the legislature did not intend to have the meaning of an agency relationship to be expanded to include contractors and that unless the legislature acted to include any contractor doing business with the state or its affiliates, those regulated are limited to contractors with a direct, prime agency relationship with a state agency or state authority.[9] Therefore, the plaintiff established that it was entitled to judgment on its claim that the regulations were ultra vires and in excess of the DEC's jurisdiction.[10] However, the court also found that the plaintiff was not entitled to determinations that the regulations constituted an impermissible ex post facto law in violation of the New York State and U.S. Constitutions, but that only the portion of the regulation in which the Department exceeded its authority was to be declared void.[11]

Conclusion

The regulation established by the DEC was declared ultra vires, in excess of jurisdiction and beyond the statutory delegation of the authority set forth by the legislature.[12]

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Endnotes

1. *Riccelli Enters, Inc. v. N.Y. State Dep't. of Envtl. Conservation*, 30 Misc. 3d 573, 575, 915 N.Y.S.2d 439 (Supreme Ct., Onondaga Co. 2010).
2. N.Y. Environmental Conservation Law § 19-0323 (ECL).
3. *Riccelli Enters, Inc.*, 30 Misc. 3d at 575.
4. *Id.*
5. *Id.* at 577.
6. *Id.* at 575.
7. *Id.* at 578-79.
8. ECL § 19-0323(3).
9. *Id.* at 580-81.
10. *Id.* at 579.
11. *Id.* at 584.
12. *Id.* at 584-85.

* * *

Town of Waterford v. N.Y. State Dep't Envtl. Conservation, 77 A.D.3d 224, 906 N.Y.S.2d 651 (3d Dep't 2010)

Facts

The New York State Department of Environmental Conservation (DEC), and the Environmental Protection Agency (EPA), have collaborated on the cleanup of the Hudson River ("the river") since 1983.[1] In 2002, a plan to dredge the river to remove sediment laden with PCBs was approved by EPA, which served as the lead agency on the project.[2] Many downstream towns and villages voiced concerns about the potential contamination of their water supply as a result of the cleanup.[3] EPA then directed General Electric Company (GE), the major contributor of PCBs to the river, to prepare a report "evaluat[ing] the contingency measures available to provide municipalities with water if their drinking water was adversely affected by this project."[4] After the report was published, the Town of Waterford ("Waterford"), a municipality in Saratoga County that draws its drinking water from the Hudson River, filed a Freedom of Information Law (FOIL) request. In the FOIL request, Waterford sought records from DEC about how such alternative sources of water would be made available and what standards would be used to determine if there was an acceptable level of PCBs in the town's water supply.[5]

In response, some documents were provided, while others were withheld pursuant to FOIL exemptions.[6] Waterford filed an administrative appeal.[7] In its final determination, DEC decided that the remaining documents did not have to be disclosed because of an applicable FOIL provision that exempts inter-agency or intra-agency "opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making."[8] Other documents were withheld because they allegedly contained confidential settlement negotiations between DEC, EPA, and GE that DEC claimed were also exempt from disclosure under FOIL.[9]

Procedural History

Waterford brought an action pursuant to CPLR Article 78 seeking a judgment directing DEC to disclose the documents.[10] The lower court partially granted Waterford's application, holding that the inter-agency / intra-agency exemption was not applicable to a federal agency like EPA and documents withheld on those grounds should be disclosed.[11] However, the court also held that those documents designated as created during settlement negotiations may be withheld.[12] Both parties appealed the judgment.[13]

Issues

1. Does FOIL's inter-agency or intra-agency exemption for deliberative materials apply to communications between state and federal government agencies?
2. Are documents created as part of settlement negotiations exempt from disclosure under FOIL?

Rationale

1. Exemption of inter-agency and intra-agency materials under FOIL

Waterford sought disclosure of the inter-agency materials on the theory that the exemption only applied to materials exchanged between state and municipal government agencies, not between federal and state agencies.[14] This argument was supported by the fact that the definition of "agency" in the statute only included state and municipal agencies.[15] The court, however, determined that the exemption could apply to communications between federal and state agencies.[16]

The court held that even though government agencies must, as a general rule, make their records public upon request, the public interest is better served by allowing for "an open and frank exchange of ideas" regarding the PCB cleanup.[17] The court noted that the exemption designed for inter-agency and intra-agency communications was meant to allow for the open exchange of ideas necessary for government policy making.[18]

Although the court acknowledged the limited scope of the term "agency" as used in the statute, it also looked to the constructions of the phrase "inter-agency or intra-agency materials." The court, following case precedent, interpreted the term to consist of "communications between state agencies and outside entities that, like the EPA, do not fall within the literal definition of 'agency' contained in the statute."[19] The court also looked to FOIL's federal counterpart, the Freedom of Information Act (FOIA), which has a similar provision that was found to apply to communications between federal agencies and outside entities.[20]

The court held that the legislative purpose of the inter-agency or intra-agency FOIL exemption could only be effectuated by looking to the nature of the relationship that existed between the entities and "asking whether the communication in question [was] exchanged as part of the deliberative process of decision-making."[21] The court held that these documents may fall under the intra-agency / inter-agency FOIL exemption, and remitted the issue to the Supreme Court to engage in an in camera review to discern whether these documents are exempt under Public Officers Law § 87(2)(g).[22]

2. Exemption of Documents Created as Part of Settlement Negotiations

DEC also did not disclose certain documents because they were claimed to be part of confidential settlement ne-

gotiations.[23] The court found that these documents were improperly withheld because there was no specific state or federal statute that exempted them from disclosure.[24] The court noted that although Civil Practice Law and Rules (CPLR) § 4547[25] prevents documents created as part of settlement negotiations from being used as evidence of liability, it says nothing about disclosure of such documents in response to a FOIL request.[26]

Conclusion

The court held that the DEC had to disclose the documents that did not fall within the inter-agency / intra-agency exemption, including those related to settlement negotiations.[27] The case was remitted to the Supreme Court for in camera review to determine if the remaining withheld documents fell under the inter-agency or intra-agency exemption.[28]

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Endnotes

1. *Town of Waterford v. N.Y. State Dept. of Envtl. Conservation*, 77 A.D.3d 224, 229, 906 N.Y.S.2d 651, 656 (3d Dep't 2010).
2. *Id.* at 226.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 226-27 (quoting N.Y. Public Officers Law § 87).
9. *Id.* at 227.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 230-31.
16. *Id.* at 232.
17. *Id.* at 229.
18. *Id.* at 229-30.
19. *Id.* at 230-31; *See Matter of Xerox Corp. v Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S.2d 488 (1985); *Matter of Sea Crest Constr. Corp. v. Stubing*, 82 A.D.2d 546, 549, 442 N.Y.S.2d 130 (2d Dep't 1981).
20. *Town of Waterford*, 77 A.D.3d at 231.
21. *Id.* at 232.
22. *Id.* at 233.
23. *Id.*
24. *Id.*
25. N.Y. Civil Practice Law & Rules § 4547 (CPLR).
26. *Waterford*, 77 A.D.3d at 233.
27. *Id.* at 233, 235-36.
28. *Id.* at 233.

* * *

Tribeca Cmty. Ass'n v. NYC Dep't of Sanitation, 2011 NY Slip Op 2959, 2011 N.Y. App. Div. LEXIS 2887 (1st Dep't, Apr. 14, 2011)

Facts

Plaintiff-petitioner, the Tribeca Community Association, challenged the location chosen by defendant-respondent Department of Sanitation of the City of New York (DSNY) for a three-district sanitation garage and regional salt shed on the West Side Highway in Manhattan.[1] DSNY was joined as a defendant-respondent by Friends of Hudson River Park, who had contracted with the City in 2005, to set deadlines for the removal of sanitation facilities from Gansevoort Peninsula.[2]

Petitioner sought to invalidate the 2005 settlement between the City and Friends of Hudson River Park, claiming the members of the Association had standing and that the applicable statute of limitations was six years.[3] Furthermore, petitioner claimed that DSNY's analysis of alternatives to the proposed project was insufficient and DSNY had engaged in improper segmentation in its analysis to make parts of the project appear to be less environmentally damaging than the whole.[4]

Procedural History

The 1st Appellate Division upheld the New York County Supreme Court's denial of plaintiff-petitioner's motion for injunctive and declaratory relief, and grant of defendant-respondent's cross motions dismissing this combined declaratory judgment action and proceeding brought pursuant to CPLR Article 78.[5]

Issue

Whether the Tribeca Community Association could successfully challenge the location chosen by the DSNY for a three-district sanitation garage and regional salt shed on the West Side Highway in Manhattan.[6]

Reasoning

The Supreme Court had correctly applied a four-month statute of limitations to dismiss petitioner's causes of actions seeking to invalidate the 2005 settlement agreement.[7] Although the petitioner argued for the application of the six-year statute of limitations applicable to actions challenging the legality of contract, the Court stated petitioners were challenging the City respondent's approval of the project after land use and environmental reviews, not the execution of the settlement agreement.[8] Further, the petitioner lacked standing to challenge the 2005 settlement agreement.[9]

In addition, the Court found that DSNY had considered a reasonable range of alternatives as demonstrated by the rejection of sites that were not large enough to accommodate the proposed buildings, were incompatible with surrounding land uses, had no ready access to arte-

rial roadways and truck routes, or were too far from the districts to be served.[10] Moreover, DSNY was not required to consider every conceivable alternative.[11] There was also no evidence that DSNY had engaged in improper segmentation in its analysis to make the environmental burden appear to be less harmful than it truly would be.[12]

Conclusion

The 1st Appellate Division held that the petitioner could not invalidate a 2005 settlement agreement setting deadlines for the removal of sanitation facilities from the Gansevoort Peninsula, and that the petitioner's other challenges to the location selected by DSNY for a three-district sanitation garage and regional salt shed were meritless.[13]

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Endnotes

1. *Tribeca Cmty. Ass'n v. NYC Dep't of Sanitation*, 2011 NY Slip Op. 2959, 2011 N.Y. App. Div. LEXIS 2887, at *1 (1st Dep't Apr. 14, 2011).
2. *Id.*
3. *Id.* at *1, 2.
4. *Id.* at *3.
5. *Id.* at *1.
6. *Id.*
7. *Id.* at *1, 2.
8. *Id.* at *1–2.
9. *Id.* at *2.
10. *Id.*
11. *Id.* (citing *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 417 (1986)).
12. *Id.*
13. *Id.*

* * *

U.S. Magnesium, LLC v. Envtl. Prot. Agency, 630 F.3d 188 (D.C. Cir. 2011)

Facts

In this case the owner of a magnesium plant petitioned for review of a United States Environmental Protection Agency (EPA) action listing the plant on the National Priorities List for Superfund sites.[1] The magnesium plant at issue in this case is owned and operated by U.S. Magnesium, L.L.C., and is located about 40 miles outside of Salt Lake City, Utah.[2] The plant had been "producing [] magnesium since 1972, creating chlorine gas and hydrochloric acid as by-products."[3] As part of its waste disposal process, the by-products and other waste were transported to waste holding pools through a network of ditches.[4] In 2008, the EPA conducted a Hazard Ranking System (HRS) evaluation on the magnesium plant.[5] As part of the HRS process, the EPA was required "to analyze four waste 'pathways': groundwater migration, surface water migration, soil exposure, and air migration."[6] The results of the analysis were then plugged into a formula to obtain the HRS site score.[7] The EPA calculated scores for air migration and soil exposure and determined that the score surpassed the threshold to qualify a site for listing on the National Priorities List.[8]

Procedural History

After publishing the proposed listing of the site and answering public comments, the EPA officially added the site to the National Priorities List.[9] U.S. Magnesium then challenged the listing as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[10] U.S. Magnesium claimed that the EPA erred in using multiple sources of on-site air migration pollution rather than using only the highest scoring source.[11]

Issue

The main issue for the court was whether the EPA erred in combining multiple air migration pollution sources when determining the HRS score for the magnesium plant.[12]

Rationale

To calculate the air migration score, the EPA multiplied the plant's air "release" score by the site's "total waste characteristic factor."[13] U.S. Magnesium took issue with the fact that the site's "total waste characteristic factor" largely resulted from the waste storage ponds while a sum of the sources was used in calculating the score.[14]

Looking to the HRS proscribed procedures, the court recognized that the pathway score for a site is calculated by a system of multiplication across multiple sources.[15] This is the exact system that U.S. Magnesium has objected to in suggesting that each air pollution source be evaluated individually.[16] The court noted that a pathway is defined as a "[s]et of HRS factor categories combined to produce a score to measure relative risks posed by a site in one of four environmental pathways."[17]

The code specifies that an air pathway score is to be calculated by multiplying the likelihood of release, waste characteristics, and target scores.[18] If a hazardous release has been identified through observation, as it was in this case with the release of chlorine gas, the assigned likelihood of release score will be 550.[19] Therefore, the EPA properly assigned a likelihood of release score of 550.[20]

The waste characteristic score is calculated as the product of waste toxicity / mobility and waste quantity.[21] The HRS directs the EPA to assign a quantity value to each of the air pollution sources and take the sum to get the total waste quantity value for the air pathway.[22] U.S. Magnesium argued that the quantity score should be based on the highest score from a single source rather than the sum of all sources.[23] The court concluded that

U.S. Magnesium's argument was completely contrary to the explicit direction under the HRS system and that the EPA was correct in taking the sum of the waste quantity from the holding ponds, stacks, and other sources rather than using the highest value from a single source.[24]

Conclusion

The EPA followed the HRS standards precisely in scoring the air pathway.[25] As a result the HRS score was well above the threshold for inclusion on the National Priorities List and U.S. Magnesium's petition for review of the listing was denied.[26]

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Endnotes

1. *U.S. Magnesium, L.L.C. v. Envtl. Prot. Agency*, 630 F.3d 188, 189 (D.C. Cir. 2011).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. 40 C.F.R. 300. App. A § 2.11 (2011).
7. *U.S. Magnesium*, 630 F.3d at 189-90.
8. *Id.* at 190.
9. *Id.*
10. *Id.* at 190 (citing 5 U.S.C. § 706(2)(a)).
11. *Id.* at 190-91.
12. *Id.* at 190.
13. *Id.*
14. *Id.*
15. *Id.* at 191.
16. *Id.*
17. *Id.* (citing 40 C.F.R. 300, App. A, § 1.1).
18. *See* 40 C.F.R. 300, App. A, § 6.0.
19. *U.S. Magnesium*, 630 F.3d at 191.
20. *Id.*
21. *Id.*
22. *Id.* at 192.
23. *Id.* at 193.
24. *Id.*
25. *Id.* at 192.
26. *Id.* at 194.

* * *

United States v. S. Union Co., 630 F.3d 17 (1st Cir. 2010)

Facts

This case raises an issue of first impression on appeal. The case deals with the issue of whether federal criminal enforcement is operable under the Resource Conservation and Recovery Act (RCRA), where federally approved state hazardous waste storage regulations have been violated.[1]

Southern Union, a natural gas company conducting business in Rhode Island, was convicted of storing hazardous waste without a permit. The waste in this case was mercury, which has been defined by the federal government as hazardous and highly toxic.[2] Specifically, Southern Union had stored approximately 140 pounds of mercury at a mostly abandoned gas manufacturing plant in Pawtucket, Rhode Island.[3] Between 2001 and 2004, as part of its business, Southern Union was removing outdated mercury-sealed gas regulators (MSRs) from its customer's homes and replacing them with new ones.[4] The old MSRs were taken to the rundown gas manufacturing plant in Pawtucket where they were stored in plastic bags, inside plastic children's play pools.[5] The mercury was being stored without a permit, inside a dilapidated brick building that had been the target of numerous break-ins.[6] In 2004, Southern inventoried its stockpile of mercury but made no attempt to obtain a hazardous waste storage permit or arrange for recycling of the material.[7] Late in 2004, local youths broke into the storage site and proceeded to spread the mercury around the site and in and around a nearby apartment complex, costing Southern over $6 million in cleanup expenses.[8]

In 2007, a federal grand jury convicted Southern on one count of storing hazardous waste without a permit under RCRA.[9] After the jury verdict, Southern motioned for a judgment of acquittal arguing that the federal government had no authority to enforce the state's regulations pertaining to small quantity generators, stating that they were broader in scope than the federal RCRA program and were therefore not part of the federally authorized and enforceable state program.[10] The district court denied the motion, citing that judicial review of EPA authorization of state hazardous waste programs is precluded in criminal proceedings for enforcement by 42 U.S.C. § 6976(b). Southern Union appealed the district court's ruling.

Issue

Can federal criminal enforcement be used under RCRA where state hazardous waste storage regulations have been violated?

Rationale

The court of appeals recognized that RCRA "regulates the 'treatment, storage, and disposal of solid and hazardous waste' in order to minimize…the harm done by that waste."[11] RCRA, codified at 42 U.S.C. § 6901 et seq., specifically makes it a federal crime to knowingly store hazardous waste without a permit.[12] Additionally, 42 U.S.C. § 6926 directs the EPA to authorize state-run hazardous waste programs with the requirement that the state program be consistent with the federal program.[13] The court interpreted those provisions as providing for

federal criminal enforcement of federally authorized state regulations under RCRA.[14] Southern argued that the Rhode Island regulations being enforced were not part of the federally authorized state plan because they provide a "greater scope of coverage" than the federal program and, therefore, are not part of the federal program.[15] Answering this, the court looked to the "2002 rule" published by the EPA, which specifically dealt with the differences between the Rhode Island program and the federal program. The 2002 rule stated that the major difference between the two programs was that the Rhode Island program was going to regulate conditionally exempt small quantity generators (CESQGs) whereas the federal program did not.[16] The court noted that Southern erred in relying on the federal permit exemption for small quantity generators where EPA's 2002 rule specifically stated that Rhode Island regulations would require a permit and that the tighter regulation would be federally enforced.[17] Additionally, the court looked to 42 U.S.C § 6976(b) in concluding that Southern was precluded from challenging federal criminal enforcement of the federally authorized state regulation.[18] Section 6976 specifically prohibits judicial review of EPA's 2002 rule in civil or criminal enforcement proceedings where the administrator's action could have been reviewed before under § 6976.[19] Southern had an opportunity to challenge the 2002 rule before it was enacted but did not.[20]

Conclusion

The First Circuit affirmed the district court's conviction of Southern Union. The court found that the Rhode Island regulations had been specifically authorized by the EPA's 2002 rule and that Southern failed to challenge the rule at the appropriate time.

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Endnotes

1. *United States v. S. Union Co.*, 630 F.3d 17, 21 (1st Cir. 2010).
2. 40 C.F.R § 261.33(f).
3. *Southern Union Co.*, 630 F.3d at 22.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 23.
8. *Id.* at 23–24.
9. *Id.* at 24.
10. *Id.*
11. *Id.* at 25 (quoting *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996)).
12. 42 U.S.C. §§ 6921–6939(f) (2010).
13. *Southern Union Co.*, 630 F.3d at 25 (quoting 42 U.S.C. § 6926(b)).
14. *Id.* (citing *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 44 (1st Cir. 1991)).
15. *Id.* (citing 40 C.F.R. § 271.1(i)(2)).
16. *Id.* "A hazardous waste generator qualifies as a conditionally exempt small quantity generator (CESQG) for a given month if it produces less than 100 kilograms of hazardous waste in that month and has accumulated no more than 1000 kilograms on-site." *Id.* at n.3.
17. *Id.* at 26.
18. *Id.*
19. 42 U.S.C. § 6976(b).
20. *Southern Union Co.*, 630 F.3d at 26.

* * *

Veltri v. N.Y. State Office of the State Comptroller, 81 A.D.3d 1050, 916 N.Y.S.2d 315 (3d Dep't 2011)

Facts

Petitioner Veltri purchased real property in Rochester in 1989 from A.R. Gundry. Under the purchase agreement, Gundry was required to remove all underground storage tanks (USTs) from the property except for one 1,000-gallon heating oil UST.[1] This provision was added to the agreement because, prior to the purchase, the company that leased the property from Gundry, Leaseway Transportation, reported spills on the property to the Department of Environmental Conservation (DEC) and removed several USTs from the property. Following the removal of all USTs, petitioner purchased the property in an "as is" condition.[2]

In 2005, to prepare the property for sale, the petitioner had an environmental assessment conducted. The assessment revealed that a 4,500-gallon UST (hereinafter orphan tank) was contaminating the soil and groundwater on the property. [3] Petitioner complied with the Monroe County Department of Health and DEC's order to remove the orphan tank and contaminated soil. The petitioner applied for reimbursement from the New York Environmental Protection and Spill Compensation Fund (Fund) for damage to his real property, loss of income, and legal costs. The Fund denied the application because "the petitioner was strictly liable as owner of the system from which the discharge occurred."[4] The Fund also concluded that "even if the contamination did not occur while petitioner was the owner, but was instead discharged from USTs that were removed prior to him taking title to the property, his claim for reimbursement was untimely."[5]

Procedural History

Petitioner brought a CPLR Article 78 proceeding seeking to annul the Fund's determination in the Supreme Court of Albany County. The Supreme Court dismissed the petition because it found that the Fund's determination was rational. This decision arises from petitioner's appeal of the Supreme Court's dismissal.

Issues

1. Whether there is a rational basis in the record for the Fund's determination that petitioner owned the orphan tank?
2. Whether the Fund correctly determined that the petitioner's application was untimely?

Rationale

The petitioner argued that he is not liable for any contamination caused by the orphan tank because he had no knowledge of the orphan tank's existence and, therefore, no control over the events leading to the discharge.[6] However, the petitioner's liability as a discharger is predicated on whether he owns the orphan tank from which the discharge occurred, regardless of his fault or knowledge.[7] The Third Department examined whether there was support in the record that petitioner owned the orphan tank.[8] The Court found that the petitioner failed to provide evidence that the purchase agreement excluded fixtures such as the orphan tank that was in the ground at the time of the purchase. Therefore, as title owner of the property and thus the orphan tank, the petitioner is strictly liable as a discharger.[9]

The petitioner's alternative argument was that the contamination resulted from discharges from the USTs removed from the property before his purchase of it.[10] Under section 182 of the Navigation Law, all claims of reimbursement from the Fund "shall be filed with the administrator not later than three years after the date of discovery of damage nor later than ten years after the date of the incident which caused the damage."[11] Any discharge from the USTs occurred prior to their removal from the property in 1988. The petitioner did not file a claim for reimbursement until June 2007, which was more than ten years after the discharge occurred.[12]

Conclusion

The Third Department concluded that there was a rational basis for the Fund's determination that petitioner owned the orphan tank because petitioner presented no evidence that the purchase agreement excluded fixtures such as the orphan tank. The Court also held that the Fund correctly determined that petitioner's application was untimely because it was filed more than ten years after the discharge of contaminants onto the property occurred.

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Endnotes

1. *Veltri v. N.Y. State Office of the State Comptroller*, 81 A.D.3d 1050, 916 N.Y.S.2d 315, 316 (3d Dep't 2011).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 1050.
7. *Id.*; *see also White v. Regan*, 171 A.D.2d 197, 199-201, 575 N.Y.S.2d 375 (3d Dep't 1991).
8. *Veltri*, 81 A.D.3d at 1050.
9. *Id.*
10. *Id.*
11. N.Y. Navigation Law § 182.
12. *Veltri*, 81 A.D.3d at 1050.

* * *

Wilderness Soc'y v. U. S. Forest Serv., 630 F.3d 1173 (9th Cir. 2011)

Facts and Procedural History

Plaintiffs, two conservation groups, challenged the United States Forest Service's adoption of a travel plan for the Minidoka Ranger District of the Sawtooth National Forest in Idaho.[1] The Wilderness Society and Prairie Falcon Audubon, Inc., claimed that the Forest Service violated the National Environmental Policy Act (NEPA) by "failing to prepare an Environmental Impact Statement" (EIS) or consider "reasonable alternatives" when designating over one thousand miles in the forest for use by motorized vehicles.[2] Three recreational groups moved to intervene in the proceedings and the United States District Court for the District of Idaho denied intervention of right and permissive intervention.[3] The recreation group appealed this decision to the Ninth Circuit, which granted en banc review.[4]

Issue

The Ninth Circuit addressed the continued use of the federal defendant rule and whether private parties and state and local governments may intervene of right in proceedings regarding the federal government's compliance with NEPA.[5]

Rationale

Precedent in the Ninth Circuit established the "federal defendant" rule, followed by the lower court in denying intervention, which "categorically precludes private parties and state and local governments from intervening of right as defendants on the merits of NEPA actions."[6] The rationale behind this rule is that because NEPA "binds only the federal government," other parties lacked a "significantly protectable interest warranting intervention of right" as defendants.[7] The rule has barred intervention by private parties in litigation regarding the federal government's compliance with NEPA.[8]

Pursuant to Federal Rule of Civil Procedure (FRCP) 24(a)(2), a party may intervene by right if it claims "an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the

movant's ability to protect its interest, unless existing parties adequately represent that interest."[9] In reconsidering the federal defendant rule, the Ninth Circuit found the rule to be inconsistent with FRCP 24(a)(2).[10] FRCP 24(a)(2) requires the intervening party to have an interest related to the property or transaction in question, not necessarily, as the "federal defendant" rule required, to have an interest in the underlying legal claim or liability.[11] The Court also noted that the rule is contradictory to the Court's otherwise broad and liberal policy that favors allowing intervention for "practical and equitable" reasons.[12] Additionally, the Ninth Circuit observed that only one other circuit, the Seventh Circuit, follows the "federal defendant" rule, and that circuit extends the rule beyond NEPA.[13]

Conclusion

The Ninth Circuit held that the federal defendant rule for intervention of right in NEPA litigation is no longer applicable, reiterating that a party may intervene of right where it has an "interest protectable under some law" and there exists a "relationship between that legally protected interest and the claims at issue."[14] The Court reversed the District Court's holding and remanded the issue for reconsideration.[15]

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Endnotes

1. *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1176 (9th Cir. 2011).
2. *Id.*
3. *Id.* at 1176–77.
4. *Id.* at 1177.
5. *Id.* at 1176.
6. *Id.* at 1177 (citations omitted).
7. *Id.* (citations omitted).
8. *Id.* at 1177–78 (citations omitted).
9. *Id.* at 1177 (quoting Fed. R. Civ. P. 24(a)(2)).
10. *Id.* at 1178.
11. *Id.* at 1178–79.
12. *Id.* at 1179.
13. *Id.* at 1180.
14. *Id.*
15. *Id.* at 1181.

Recent Legislation

N.Y. Public Service Commission Opens Proceeding to Evaluate Cost Allocation for Cleanup of Former Manufactured Gas Plant Sites between Utilities and the Public.

Summary

On February 17, 2011, the New York State Public Service Commission (PSC) instituted a proceeding "to review and evaluate the treatment of the [s]tate's regulated utilities' Site Investigation and Remediation (SIR) Costs" incurred during the cleanup of former manufactured gas plant (MGP) sites.[1] The principal issue being explored by the proceeding is to determine whether New York energy consumers should bear sole responsibility for these costs, which could total in excess of $2 billion, or whether the utilities' shareholders should bear some fraction of that expense.

Background[2]

Manufactured gas was a common energy source from the late 19th century through the first half of the 20th century. It was largely generated from coal or oil, and used for lighting, heating, and cooking. As energy demand rapidly increased toward the turn of the 20th century, manufactured gas plants were constructed throughout the state, generally near the site of consumption and close to a body of water. By 1972, all of the plants in the state had closed, having been made obsolete by interstate natural gas pipelines and electricity. DEC has identified 221 former MGP sites, and estimates that up to 300 may exist.[3]

The sites require extensive remediation due to contamination from the byproducts of the gas manufacturing process. These byproducts contain polycyclic aromatic hydrocarbons (PAHs)[4] and a family of volatile organic compounds, which notably includes benzene,[5] sometimes in concentrations high enough to meet the legal definition of hazardous waste.[6] Because the byproducts were often stored underground and near water sources, and because the sites are so old, soil infiltration, groundwater contamination, and pollution of adjacent water bodies can be extensive.

The vast majority of the sites are currently owned by gas utilities, typically as successor-owners of the contaminated properties.[7] DEC has obtained cleanup agreements with or orders against utilities for 207 of those sites, with at least another 14 pending; 39 site cleanups have been completed. The total cost for all cleanups is expected to be far in excess of $2 billion.

Issue

The PSC has traditionally allowed regulated utilities to fully recover prudently incurred SIR costs through energy rates charged to end-use consumers.[8] However, the PSC is concerned that this policy does not adequately protect consumers, because neither DEC nor the utilities may have adequate incentive to minimize SIR costs.

Discussion

This proceeding seeks to find a means by which the public can be protected from paying potentially excessive and imprudent costs of MGP site cleanups. Under the current practice, DEC and the utility agree upon a remedy[9] for a contaminated site, and the utility is responsible

for the implementation. The utility then requests permission from the PSC to recover all SIR costs through its rates, effectively passing those costs through to consumers. Because the utility would not ultimately be responsible for SIR costs, the concern is that they do not have adequate incentives to keep those costs to a minimum in the public's interest.[10]

As stated in the February 17 Order, the PSC will be working with the utilities and other interested parties to address four concerns: "1) the current and future scope of the utility SIR programs in the [s]tate, 2) the current cost controls utilized by utilities and opportunities to improve such controls, 3) the appropriate allocation of costs, and 4) methods to recover costs determined to be appropriately borne by ratepayers in a way that minimizes their impact as much as possible."[11] Other than allowing utilities 100% SIR cost recovery from consumers, one cost-control strategy under consideration and employed elsewhere has been to make utility shareholders partially responsible for the costs. This has been done in California; closer to home, Niagara Mohawk's shareholders will now be responsible for 20% of SIR costs incurred over and above the rate year allowance agreed in the utility's recent rate case before the PSC.[12] The PSC has requested that the proceeding "move forward in an expeditious manner" and conclude by the end of 2011.[13]

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Endnotes

1. Case 11-M-0034, Proceeding on Motion of the Commission to Commence a Review and Evaluation of the Treatment of the State's Regulated Utilities' Site Investigation and Remediation (SIR) Costs, Order Instituting Proceeding, at 6 (issued Feb. 18, 2011) (hereinafter "Feb. 17 Order").
2. For an easy-to-read summary of the history and cleanup procedures, see N.Y.S. Dep't of Envt'l Conservation, New York State's Approach to the Remediation of Former Manufactured Gas Plant Sites, (hereinafter "DEC Summary"), available at http://www.dec.ny.gov/docs/remediation_hudson_pdf/nysmgpprogram.pdf.
3. DEC keeps site-specific information, including the responsible utility; see MGP Sites in New York State, N.Y. State Dep't of Envtl. Conservation, http://www.dec.ny.gov/chemical/24921.html.
4. There is evidence that exposure to PAHs is especially dangerous for pregnant women. See, e.g., Office of Solid Waste, U.S. Envt'l Protection Agency Polycyclic Aromatic Hydrocarbons (PAHs) Fact Sheet (Jan. 2008), http://www.epa.gov/osw/hazard/wastemin/minimize/factshts/pahs.pdf; Key Findings & Interventions, Columbia Center for Children's Environmental Health, http://ccceh.hs.columbia.edu/findings.html.
5. According to DEC, "[b]enzene has been found to cause cancer in laboratory animals, and has been designated by USEPA as a known human carcinogen as well." DEC Summary, Appendix A.
6. DEC Summary at 3.
7. DEC currently has agreements with Central Hudson Gas & Electric, Consolidated Edison of N.Y., National Grid (acquiring KeySpan & Niagara Mohawk), N.Y. State Electric & Gas (NYSEG), Orange & Rockland Utilities, Rochester Gas & Electric, and National Fuel Gas. MGP Sites in New York State, N.Y. Dep't of Envtl. Conservation, http://www.dec.ny.gov/chemical/24921.html.
8. Feb. 17 Order at 3.
9. While the cost of the remedy is a factor considered by DEC, protection of public health and the environment are the primary objectives.
10. The PSC could also disallow imprudently incurred costs during a ratemaking proceeding or a prudence case, but this would be a post hoc approach.
11. Feb. 17 Order at 2.
12. Case 10-E-0050, Niagara Mohawk Power Corporation, Order Establishing Rates for Electric Service (issued Jan. 24, 2011), at 106.
13. Feb. 17 Order at 5.

* * *

A300: Hydro-Fracking

In order to afford the State of New York and its residents an opportunity to review a report to be issued by the EPA on the effects of hydraulic fracturing, defined as the fracturing of rock by man-made fluid-driven fracturing techniques for the purpose of stimulating natural gas or oil well production, Assembly Bill A300 would place a moratorium on the acceptance, disposal, or processing of drilling fluid or drill cuttings in the state, where the fluid or cuttings have been used in a hydraulic fracturing process.[1]

Under the Act, the moratorium would not be rescinded until the New York State Department Environmental Conservation (DEC) has provided the Governor and State legislature with proof that it is capable of administering and enforcing the regulation of hydro-fracking fluids, drill cuttings, and soil disposal, as well as monitoring and inspecting operations and facilities relating to the hydro-fracking process.[2] The moratorium would expire 120 days after the EPA issues its report or the DEC provides the requisite proof to the Governor and legislature, whichever is later.[3]

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Endnotes

1. A.300-A, 234th Leg. Sess. (2011), *available at* http://assembly.state.ny.us/leg/?default_ fld=%0D%0A&bn=A+300&term=2011&Text=Y.
2. *Id.*
3. *Id.*

* * *

Amendment to Pesticide Application Notification Requirements

The New York legislature enacted amendments to the requirements for pesticide application notification in Chapter 324 of the Laws of 2010. New York Environmental Conservation Law § 33-1005(3)(a)(v) added two words to the message used for notification purposes for pending pesticide applications.[1] This change, and the additional

amendment to the statute below, expanded the scope of the special requirements for pesticide application to include notice to those on the affected property, not just the neighboring properties.[2]

Effective February 9, 2011, the new message must identify that the pending pesticide application will be done on a neighboring property or the posted premises.[3] Previously, the requirement was to provide notification only that a neighboring property would be affected.[4] Now, the law includes the premises on which the notice is posted and/or distributed. Further, the law amends the Commissioner's requirements for promulgating rules and regulations regarding the notification message, expanding how it may be delivered to include the premises on which the pesticides will be applied, not just the neighboring property.[5]

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Endnotes

1. *See* N.Y. Environmental Conservation Law § 33-1005(3)(a)(v) (ECL).
2. *Id.*
3. *Id.*
4. ECL § 33-1005(3)(a)(v) (prior to 2010 amendment).
5. ECL § 33-1005(4).

* * *

American Alternative Fuels Act of 2011, S.937

The American Alternative Fuels Act of 2011 was introduced to the Senate on May 10, 2011, and was referred to the Committee on Energy and Natural Resources.[1] Subsequently, on June 7, 2011, hearings concerning the bill were held.[2] Senator John Barrasso of Wyoming sponsors this bill along with multiple co-sponsors.[3] The purpose of this bill is to repeal certain barriers to domestic fuel production as well as to create laws which help facilitate the production of domestic fuel such as algae-based fuel incentives.[4]

This bill seeks to repeal § 526 of the Energy Independence and Security Act of 2007.[5] This section prohibits Federal agencies from entering into "a contract for procurement of an alternative or synthetic fuel unless the contract specifies that the lifecycle greenhouse gas emissions associated with the production and combustion for the fuel be less than or equal to such emission from the equivalent conventional fuel production from petroleum sources."[6] Secondly, this bill would also entail removing § 1112 of the National Aeronautics and Space Administration Authorization Act of 2008,[7] as a conforming amendment based on the desired repeal of 42 U.S.C. 17142.[8]

In addition, § 1702 of the Energy Policy Act of 2005[9] would be amended by adding a reporting requirement for domestic Loan Guarantee applications designed to expedite the loan process.[10] Included within these reports would be a description of each reason for the delay, the name and office of the official who has reviewed the application, as well as a detailed schedule for completion of the application review.[11]

Algae-based fuel incentives would be added to § 211(o)(2)(B) of the Clean Air Act[12] based on expectation of carbon dioxide control.[13] The bill also provides an amendment to § 1703(b) of the Energy Policy Act of 2005[14] by adding loan guarantees for natural gas production facilities if the gas is produced from a solid feedstock through a gasification process and the gas is produced in a manner, that captures at least 90 percent of the carbon produced.[15] Chapter 141 of title 10[16] would also be amended by adding provisions, that provide the Department of Defense the authority to enter into multi-year contracts for the purchase of alternative fuels for up to 20 years if certain terms are included within the contract.[17]

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Endnotes

1. The Library of Congress, *Bill Summary & Status: 112th Congress (2011-2012): S.937: All Information*, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN00937:@@@L&summ2=m&.
2. *Id.*
3. *Id.*
4. American Alternative Fuels Act of 2011, S.937, 112th Cong.
5. *Id.* § 3.
6. 42 U.S.C. 17142.
7. S.937 § 3.
8. *Id.*
9. 42 U.S.C. § 16512.
10. S.937 § 4.
11. *Id.*
12. 42 U.S.C. § 7545(o)(2)(B)).
13. S. 937 § 5.
14. 42 U.S.C. § 16513(b).
15. S.937 § 6.
16. 10 U.S.C. §§ 2381–2410(q).
17. S.937 § 7.

* * *

Proposed Ban on Commercial Taking of Hudson River Striped Bass

Senator Mark Grisanti (R, District 60) introduced a bill to amend the Environmental Conservation Law by prohibiting striped bass from being removed from the Hudson River for commercial purposes.[1] The bill was introduced on the Senate floor on April 14, 2011, and then referred to the Committee on Environmental Conservation.[2] If adopted, the bill would amend section 11-1321 of the Environmental Conservation Law.[3]

For purposes of this provision, "Hudson River" refers to the span of river between the George Washington Bridge in New York City and the federal dam in Troy.[4] The bill also restricts the taking of striped bass from any tributaries that lead into the outlined section of the river from the tributary to the first barrier that would be impassable to any fish.[5] While expressly allowing the taking of striped bass for recreational purposes,[6] any taking of striped bass with the intent of selling the fish is strictly prohibited by the proposed legislation.[7] Upon adoption, the ban on harvesting striped bass would take effect in 120 days and be effective until April 1, 2015.[8]

Following a study conducted by a Temporary Advisory Committee (TAC), required by Chapter 29 of the Laws of 2000 and delivered to the New York State Department of Environmental Conservation Commissioner, the TAC returned a decision of "no consensus" on reopening the striped bass commercial fishery.[9] The results of the TAC's study represent the general unease with regard to the toxicity of striped bass farmed in the Hudson River, as well as concerns with the impact that Hudson striped bass would have on the striped bass market at-large.[10] The Hudson River is contaminated with Polychlorinated Biphenyls (PCBs) that have been shown to be the cause of several cognitive and developmental problems and studies have shown that such pollutants can be absorbed by the aquatic life in the river.[11] Furthermore, there is a fear that the introduction of Hudson striped bass into the national striped bass market could lead to consumer uncertainty as consumers would have no way of knowing if the bass they are consuming originated in the polluted waters of the Hudson, which in turn could lead to a complete loss of confidence in the entire striped bass market.[12]

The Committee Report also considered possible local economic implications of permitting commercial fishing of the Hudson striped bass. It was reported that the impact on the local market for recreational fishing of striped bass could be severely damaged by a depletion of the striped bass population due to commercial fishing.[13] Local New York communities rely on the revenues that are derived from anglers from across the state, and even the nation, who wish to catch "stripers."[14]

Due to the concerns and uncertainties regarding the impact that commercial fishing of the striped bass would have on public health, the nation's striped bass market, and local economies, a continued ban on commercial taking of the fish is necessary.[15]

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Endnotes

1. S.B. 4633, 234th Leg., Reg. Sess. (N.Y. 2011).
2. *Id.*
3. *Id.*
4. *Id.* § 10(b)(i).
5. *Id.*
6. *Id.* § 1(10)(c).
7. *Id.* § 1(10)(b)(ii).
8. *Id.* § 2.
9. N.Y. Comm. Rep., S.4633, 234th N.Y. Leg. Sess. (Apr. 20, 2011).
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*

* * *

Enforcement of Solid Waste Contracts

A recent trend of solid waste haulers encountering problems with landfills refusing to accept their loads of solid waste in violation of their waste disposal contracts has prompted new legislation.[1] Assemblyman Alan Maisel (D, District 59) is the main sponsor of this bill known as A.7847, which seeks to amend the Environmental Conservation Law and direct the Department of Environmental Conservation to create rules and regulations which would prohibit solid waste management facilities from breaching contracts with solid waste transporters.[2] This bill would take effect immediately upon adoption.[3] Introduced on May 19, 2011, the bill was sent to the Committee on Environmental Conservation where it awaits further review.[4]

At least one company, County Waste, has contracts with both Ontario and Seneca Meadows landfills to dispose of the waste that they collect.[5] In late 2010, County Waste trucks were turned away from both landfills in violation of the waste disposal contract already in effect.[6] Landfill management explained that because they were accepting waste from Canada, they would not be able to accept County Waste's loads for the last two months of the year.[7] County Waste was left with no viable options for disposal for the rest of 2010.[8]

The proposed bill would amend section 27-0703 of the Environmental Conservation Law.[9] The bill would require the Department of Environmental Conservation to create and enforce "rules and regulations prohibiting any solid waste management facility from failing to fully comply with the provisions of any contract with a person engaged in the collection of solid waste in this state."[10] The bill qualifies the enforcement of such contracts to be limited to occasions where the reason for the breach of the waste disposal contract is due to the landfill's acceptance of out-of-state solid waste, at the expense and denial of in-state waste haulers.[11]

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Endnotes

1. N.Y. Comm. Rep., A.7847, 234th N.Y. Leg Sess. (May 21, 2011).
2. A.7847, 234th N.Y. Leg Sess.
3. *Id.* § 1.
4. *See*, http://assembly.state.ny.us/leg/?default_fld=&bn=A07847&term=2011&Summary=Y&Actions=Y.
5. *Supra* note 1.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Supra* note 2.
10. *Id.*
11. *Id.*

* * *

Federal Responsibility to Pay for Stormwater Programs

On January 4, 2010 the proposed amendment to Section 313 of the Federal Pollution Control Act was signed by President Obama and became Public Law No. 111-378.[1] This Amendment to the Clean Water Act, encompassed within the Federal Pollution Control Act, was created to clarify federal responsibility for stormwater pollution by defining "reasonable service charges" under section 1323(c).[2]

Section 1323 requires governmental entities to be held equally responsible for any discharge or runoff of pollutants as non-governmental entities would be, pursuant to all federal, state, interstate, local, and administrative requirements, including "the payment of reasonable service charges."[3] Prior to the Bill's proposal, it was unclear whether federal agencies were required to pay fees imposed by localities for the treatment and management of polluted stormwater runoff that emanated from government facilities or properties.[4] The amendment clarified, pursuant to §1323(c), that federal agencies must pay for "reasonable service charges," which include payment or reimbursement for the costs associated with "any stormwater management program."[5]

The effect of Public Law No: 111-378 is that federal facilities that contribute to stormwater pollution of surface waters are treated like all other facilities in that area, and must pay their respective share to protect and maintain those affected waters.

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Endnotes

1. An Act to Amend the Federal Water Pollution Control Act to Clarify Federal Responsibility for Stormwater Pollution, S. 3481, 111th Cong. (2010).
2. Federal Responsibility to Pay for Storm Water Programs, Pub. L. No. 111-378, 124 Stat. 4128 (2011).
3. Federal Water Pollution Control Act, 33 U.S.C. § 1323 (2011).
4. *Legislative Watch January 6, 2011*, SWITCHBOARD: NATURAL RESOURCES DEFENSE COUNCIL BLOG, http://switchboard.nrdc.org/blogs/legwatch/legislative_watch_january_6_20.html (last visited Mar. 30, 2011).
5. Federal Water Pollution Control Act, 33 U.S.C. § 1321 (2011).

* * *

The Fracturing Responsibility and Awareness of Chemicals Act, S.587

On March 15, 2011, Senator Robert P. Casey, Jr. introduced Senate Bill 587, the Fracturing Responsibility and Awareness of Chemicals Act ("FRAC Act"), to the Senate.[1] As of April 12, 2011, the FRAC Act had been referred for hearings before the Senate Subcommittee on Water and Wildlife within the Committee on Environment and Public Works.[2] The Act amends Sections 1421(b) and 1421(d) of the Safe Drinking Water Act ("SDWA") "to repeal a certain exemption for hydraulic fracturing, [among] other purposes."[3]

Regulations under the SDWA establish minimum requirements for State underground injection programs in order to prevent the endangerment of drinking water sources.[4] Where underground injection programs are to be authorized by issuance of a state permit, the applicant seeking the permit must certify to the state that the underground injection program will not endanger any drinking water sources.[5] Other minimum requirements include inspection, monitoring, recordkeeping, and recording of the underground injection but no other disclosures are required before, during, or after the commencement of hydraulic fracturing ("hydro-fracking") operations.[6]

The SDWA defines underground injection as "the subsurface emplacement of fluids by well injection" but excludes "the underground injection of fluids or propping agents (other than diesel fuels) used during [hydro-fracking] operations."[7]

The FRAC Act proposes striking paragraph (1) of 42 U.S.C. 300h-6(a)(d) and would redefine the term "underground injection."[8] The term "underground injection" would include the underground injection of fluids or propping agents used in hydro-fracking operations for oil and gas productions.[9] The FRAC Act would exclude the injection of natural gas for underground storage, an exclusion which currently exists under the code.[10]

Also, the FRAC Act would require persons seeking to conduct hydro-fracking operations to disclose to the state the chemicals they intend to use before commencement of their operations on leased land—or portions thereof.[11] In addition, after hydro-fracking operations have been conducted on leased land—or portions of leased land—a list of chemicals used in each underground injection must be disclosed to the state.[12] Disclosure of such information must be made publicly available including access to such information via an internet website.[13] Exempt from required public disclosure are "any proprietary chemical

formula"[14] but should a medical professional determine a medical emergency exists, the "chemical formula or specific chemical identity of a trade-secret chemical used in [hydro-fracking] must be immediately disclosed to the State."[15]

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Endnotes

1. The Library of Congress, *Bill Summary & Status: 112th Congress (2011–2012): S.587: All Information*, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/D?d112:1:./temp/~bdZcKi:@@@C|//home/LegislativeData.php?n=BSS;c=112|.
2. *Id.*
3. Fracturing Responsibility and Awareness of Chemicals Act, S. 587, 112th Cong. (2011).
4. Safe Drinking Water Act, 42 U.S.C. § 300h-6(a)(b)(1) (2005).
5. *Id.* § 300h-6(a)(b)(1)(B)(i).
6. *Id.* § 300h-6(a)(b)(1)(C).
7. 42 U.S.C. § 300h-6(a)(d)(1).
8. Fracturing Responsibility and Awareness of Chemicals Act, S. 587, 112th Cong.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*

* * *

Hydro-Fracking Disclosure, S. 3765

Senate Bill 3765 seeks to amend the New York State General Obligations Law regarding contracts for hydraulic fracturing, or "hydro-fracking," which the Act defines as "the fracturing of rock by man-made fluid-driven fracturing techniques for the purpose of stimulating natural gas or oil well production."[1] The Act provides that no contract relating to hydro-fracking may prohibit the disclosure of chemicals used in the process, or diminish payment to any contracting party for the inclusion of a provision disclosing the chemicals used in the process.[2]

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Endnotes

1. S.3765, 234th Leg. Sess. (2011), *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=S03765&term= 2011&Text=Y.
2. *Id.*

* * *

New York State Healthy and Green Procurement Act, A. 6366

The New York State Healthy and Green Procurement Act would amend the State finance law, Economic Development Law, and Environmental Conservation Law to include a healthy and green procurement program.[1] The Act would make it a policy of the State of New York to purchase "commodities, services and technologies" ("commodities") that minimize potential adverse impacts on public health and the environment when compared with competing commodities.[2]

All state agencies and authorities ("agencies") would be required under the Act to meet or exceed certain minimum specifications regarding recycled content, waste reduction, energy efficiency, and green buildings.[3] For instance, paper supplies would be required to meet or exceed the EPA's recommended minimum post-consumer material content percentages.[4] Agencies must seek to reduce waste in products and packaging, as well as promote double-sided printing.[5] All commodities for which the DOE has issued energy efficiency recommendations must meet or exceed those recommendations.[6] Agencies would be required to seek reductions in energy and petroleum consumption, adhere to ENERGY STAR building criteria, seek out office space and real estate investments in buildings with ENERGY STAR ratings, and follow the PSC's standard to increase the purchase of renewable energy so that at least 25 percent of energy used by the agencies' buildings will be renewable energy by 2015.[7] Certain projects with a construction cost of $2 million or more would be required to comply with building standards at least as stringent as those prescribed by the U.S. Building Council LEED Silver rating.[8]

However, nothing would be construed under the Act to require the procurement of a commodity that does not meet the utility requirements of the agency or the procurement of a commodity which exceeds the cost of an alternative available commodity by more than 10 percent.[9]

The Act would also require the commissioner to assign an individual within the Office of General Services to serve as the State Healthy and Green Procurement Officer, who would assist the commissioner in carrying out duties relating to healthy and green procurement, including: the identification of "priority categories" of commodities and services; the creation of healthy and green supplies lists; the development of the environmental audit program; the design and implementation of training and education programs; and the preparation and submittal of an annual report.[10] Each agency would also be required to assign an individual to serve as the agency's sustainability and green procurement coordinator.[11]

For each priority category identified and recommended, the commissioner would be required to approve specific commodities as consistent with the health and green procurement policy, minimum specifications, and environmentally preferable purchasing criteria, which would then be added to a healthy and green procurement supply list ("list") for each category.[12]

When an agency seeks to procure a commodity within a priority category for which a list has been created, the Act would require the agency to purchase it from the list.[13] However, when an agency wants to purchase a commodity within a priority category for which a list has been created, but the commodity does not appear on the list, the agency must then obtain a waiver from the commissioner, unless the commodity is being purchased from a list of preferred sources (a list maintained by the commissioner).[14] A waiver may be granted when no commodity on the alternative list meets an agency's performance standards, and the agency requesting the waiver has shown that it has (1) tested each commodity on the supply list and none meet the agency's performance standards; (2) closed the use of the commodity and developed a plan to minimize its use and protect employees and the public from exposure to any priority toxic substances; and (3) prepared a plan to investigate alternatives to the selected commodity during the waiver period.[15]

An agency would be allowed to purchase a commodity through a process that does not comply with the requirements when the purchase is necessary to respond to an emergency which endangers public health or safety, so long as a report containing certain information is filed within seven days of the purchase.[16]

The Act requires the review of all procurement regulations and procedures, and the development of metrics and methods for measuring progress and collecting data regarding the State's Healthy and Green Procurement Policy. It would also require the development of a training program for public staff involved in procurement, as well as an outreach program to inform contractors and vendors about the healthy and green procurement program.[17] It also provides that the commissioner must submit an annual report regarding the program to the Governor, speaker of the assembly, and temporary president of the senate.[18]

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Endnotes

1. *See* A. 6366-A. 234th N.Y. Leg. Sess. (2011), *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=A06366&term=2011&Text=Y.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*

* * *

Wanted: Oil and Gas Lessees in Alaska!

Currently before the House of Representatives' Subcommittee on Energy and Environment is bill H.R. 49, the American Energy Independence and Price Reduction Act (the "Act").[1]

Representative Don Young of Alaska introduced the Act on January 5, 2011, with the intent for the Secretary of the Interior to "implement a competitive leasing program that will result in an environmentally sound program for the exploration, development, and production of the oil and gas resources on the Coastal Plain of Alaska."[2] Changes to prior legislation would include repealing title 16 of the United States Code § 3143, the Alaska National Interest Lands Conservation Act of 1980, which prohibited oil and gas production and leasing from the Arctic National Wildlife Refuge (ANWR).[3] The provisions of this bill are to be implemented by the Secretary of the Interior.[4] If passed, this bill might lead to a slight decrease in dependency on foreign oil.

The Act focuses heavily on environmental protection of the coastal plain; this section is the largest in the proposed legislation.[5] The Act proposes that the provisions be implemented using a "no significant adverse effect on fish and wildlife, their habitat, subsistence resources, and the environment" standard, which is unclear based solely on the legislation.[6] In addition, the Act requires the use of the "best commercially available technology for oil and gas exploration."[7]

The total amount of acreage to be utilized for oil and gas production is limited to 2,000 acres of the coastal plain.[8] Site-specific analysis is to be conducted regarding the possible effects that oil and gas exploration may have on the environment and the wildlife found there, as well as consultation with agencies having jurisdiction regarding the plan of exploration.[9] Other significant provisions include field crew briefings regarding the environment and a hazardous materials tracking system with an annual waste management report to monitor the disposal of toxic wastes.[10] Additionally, the Act mandates "fuel storage and oil spill contingency planning," promotes facility planning aimed at avoiding unnecessary duplication of facilities, and encourages the consolidation of facilities.[11]

This Act allows for some flexibility regarding oil and gas drilling. For example, there are provisions mandating

seasonal limitations and closings of portions of the coastal plain to protect wildlife such as caribou during breeding season and other migratory species.[12] Additionally, the Secretary may designate certain areas as "Special Areas," characterized as being so unique "as to require special management and regulatory protection."[13] Special Areas may be excluded from the leasing program, thus disallowing surface occupancy of the area.[14] However, land deemed a Special Area may still be subject to leasing via horizontal drilling from the surrounding lease sites.[15]

The environmental safety provisions support provisions dealing with specified terms of the lease program. Lease sales are to be conducted through a bidding process in which the lands selected by the Secretary are those thought to hold the highest potential for gas and oil exploration.[16] In addition, the Act provides that lessees assume all liability for any adverse effects to the land as a result of oil and gas exploration, and prohibits leases from being sold, exchanged, or transferred to another party without the permission of the Secretary.[17] This is important as it protects against a qualified lessee transferring the lease to another party who might not meet the requirements of the lease, or who might not be a qualified lessee. Furthermore, lessees are prohibited from exporting oil obtained under the lease.[18]

Other key provisions include the issue of easements for the transportation of oil and gas by the Secretary and a method for filing a complaint regarding any provision of the legislation, including a judicial outline of the complaint process.[19]

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Endnotes

1. American Energy Independence and Price Reduction Act, H.R. 49, 112th Cong. (2011), < http://thomas.loc.gov/cgi-bin/bdquery/D?d112:1:./temp/~bdYcVu:@@@C|/home/LegislativeData.php|.
2. American Energy Independence and Price Reduction Act, H.R. 49, 112th Cong.
3. *Id.* § 3(b); 16 U.S.C. § 3143 (2011).
4. *See* H.R. 49.
5. *Id.*
6. H.R. 49 § 3(a)(2), § 7(a)(1).
7. *Id.* § 7(a)(2).
8. *Id.* § 7(a)(3).
9. *Id.* § 7(b)(1–3).
10. *Id.* § 7(d)(13); § 7(d)(16).
11. *Id.* § 7(d)(14); § 7(f)(2)(A)(B).
12. *Id.* § 6(a)(2); § 7(d)(2).
13. *Id.* § 3(e)(1).
14. *Id.* § 3(e)(3).
15. *Id.* § 3(e)(4).
16. *Id.* § 4(c); § 4(d).
17. *Id.* § 5(b).
18. *Id.* § 6(a)(8).
19. *Id.* § 8(a); § 10(a).

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The Reducing Regulatory Burdens Act of 2011

On March 31, 2011, the House of Representatives passed House Resolution 872, the Reducing Regulatory Burdens Act of 2011.[1] The bill is sponsored by U.S. Representative Bob Gibbs of Ohio's 18th District and was introduced in March 2, 2011.[2] The Act seeks to amend section 3(f) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") and section 402 of the Federal Water Pollution Control Act ("FWPCA") to amend the permit requirement for discharge of pesticides authorized for sale, distribution, or use under the aforementioned acts.[3]

FIFRA prohibits any person from distributing or selling any pesticide that is not registered under the Act.[4] The registration of pesticides must be with the Administrator of the EPA, who has the power, under the Act, to regulate the use of unregistered pesticides to inhibit any unreasonable adverse effects to the environment.[5] In comparison, FWPCA controls the discharge of pollutants into navigable waters in each state and provides for the Administrator to issue permits that meet the applicable requirements under this statute.[6]

In order to lessen the registration burden imposed by these two laws, the Reducing Regulatory Burdens Act of 2011 prohibits an Administrator from requiring a permit to discharge an authorized pesticide into navigable waters from a point source.[7] A "point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel conduit, well…from which pollutants are or may be discharged."[8]

There are exceptions to this amendment. For instance, a discharge of a pesticide that violates FIFRA that is meant to protect water quality would require a permit if the discharge "would not have occurred but for the violation or the amount of pesticide or pesticide residue contained in the discharge is greater than would have occurred without the violation."[9] Further exceptions include stormwater discharges, industrial discharges, and discharges related to the operation of a vessel.[10]

Related legislation is now before the Senate to amend FIFRA to improve the use of certain registered pesticides.[11] Similar to the House bill, the Senate legislation amends FIFRA by inserting a no-permit requirement for pesticides authorized under the Act but also extends the no-permit requirement to the use of a biological control organism in accordance with the Plant Protection Act.[12]

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Endnotes

1. The Library of Congress, *Bill Summary & Status: 112th Congress (2011-2012): H.R.872: All Information*, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h872.
2. *Id.*
3. Reducing Regulatory Burdens Act of 2011, H.R. 872, 112th Congress (2011).
4. Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136a(f).
5. *Id.*
6. Federal Water Pollution Control Act, 33 U.S.C § 1342.
7. H.R. 872.
8. 33 U.S.C. § 1362; 40 C.F.R. § 122.
9. H.R. 872.
10. *Id.*
11. The Library of Congress, *Bill Summary & Status: 112th Congress (2011-2012): S.716: All Information*, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s718.
12. *Id.*

* * *

Remote Net Metering by Farm and Non-Residential Customers, A.6270B

On June 1, 2011, Governor Andrew Cuomo signed into law a remote net metering bill, A.6270B,[1] amending the Public Service Law in order to expand net metering to farm and non-residential customer-generators. The Assembly bill, which was adopted by the Senate, was sponsored by Assemblyman Crespo from the Bronx.

Under the new law, farmers who install solar or farm waste electricity generating equipment can apply the net metering credits that equipment generates to any of the meters on property they own within the same service territory and load zone.[2] The bill also applies to customers who install windmills on land used for agricultural purposes; those customers can apply their net metering credits to any meters they own within the same service territory and load zone as well.[3] Farmers and agricultural landowners who have multiple electric meters within the same service territory will be able to apply net metering credits to their meter that gets the highest use first, then to the other meters.[4] If these customers generate more energy than they consume in a given month, any extra net metering credits will roll over to the next month.[5]

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Endnotes

1. A6270-B, 2011 N.Y. Leg. Sess.; *see also* N.Y. PUB. SERV. LAW § 66-j(3)(e) (McKinney 2011).
2. N.Y. PUB. SERV. LAW § 66-j(3)(e).
3. *Id.* § 66-l(3)(e).
4. *Id.*
5. *Id.*

* * *

Safe Chemicals Act of 2011, S.847

Senate Bill 847, sponsored by Senator Frank Lautenberg of New Jersey along with a number of co-sponsors, was introduced on April 14, 2011.[1] The bill was then referred to the Committee on Environment and Public Works.[2] The amendments this bill seeks to introduce to the Toxic Substances Control Act (TSCA) are to ensure that risks from chemicals are adequately understood, and in turn, appropriately managed.[3]

Currently, TSCA does not require any minimum data set, even for new chemicals.[4] If passed, the Safe Chemicals Act of 2011 would necessitate the identification of the minimum data set that would apply to a particular chemical or a category of chemical substances.[5] The minimum data sets would have to include the necessary information for the Administrator of the Environmental Protection Agency (EPA) to adequately assess the level of risk associated with the chemical substance.[6] The submission of minimum data sets would now be required as a result of the amendment, although some exceptions would be available, such as if the Administrator determines the chemical substance is equivalent to a chemical substance for which data has been submitted.[7] The data submitted would be made available to the public through an Internet website.[8]

The standing law does not set forth any specific criteria for the EPA to prioritize the regulation of chemicals when considering the risks involved with the manufacturing, processing, use, distribution in commerce, and disposal of various chemicals.[9] Under the proposed Safe Chemicals Act of 2011, chemicals would be divided up into three groups: Priority Class 1, Priority Class 2 and Priority Class 3.[10] If a substance were to be labeled a Priority Class 1 chemical, that chemical would require immediate risk management.[11] A Priority Class 2 chemical would require safety standard determinations, and finally a Priority Class 3 chemical would require no immediate action.[12] It is important to note that currently the EPA carries the burden of proof to show that a chemical is harmful before it can be regulated,[13] but the Safe Chemicals Act of 2011 would shift that burden to the manufacturers and processors of the chemical to show that it complies will the appropriate safety standard.[14]

Under the current law, the Administrator is limited to commencing a civil action when attempting to rectify an imminent hazard.[15] The bill would grant further power to the EPA by allowing the Administrator to issue an order when necessary to protect the health of people or the environment.[16] With respect to the disclosure of data to the public, a manufacturer may designate data, that the manufacturer believes to be entitled to confidential treatment.[17] An amendment to this section would require the manufacturer to provide a justification for each claim for confidentiality and a certification that the information is not otherwise publicly available.[18]

The Safe Chemicals Act of 2011 would also provide for aid to "hot spots"—where certain geographic areas, whether a county, city, or neighborhood, are found to be suffering from disproportionate exposure to one or more toxic chemicals.[19] The exposure would be disproportionate if considered significantly high when compared to average exposure to the same chemical(s) throughout the United States.[20] Once areas have been identified through various collections of data,[21] the Administrator would be required to devise a course of action in order to reduce the exposure to the chemical.[22]

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Endnotes

1. Safe Chemicals Act of 2011, S. 847, 112th Cong.
2. The Library of Congress, *Bill Summary & Status: 112th Congress (2011-2012): S.847: All Information*, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/D?d112:1:./temp/~bdGTKy:@@@L&summ2=m&|/home/LegislativeData.php|.
3. S. 847.
4. 15 U.S.C. § 2603.
5. S. 847 § 5.
6. *Id.*
7. *Id.*
8. *Id.*
9. 15 U.S.C. § 2605.
10. S. 847 § 7.
11. *Id.*
12. *Id.*
13. 15 U.S.C. § 2605(a).
14. S. 847 § 7.
15. 15 U.S.C. § 2606(a)(1).
16. S. 847 § 8.
17. 15 U.S.C. § 2613(c)(1)(A).
18. S. 847 § 14(5)(1)(B).
19. *Id.* § 34(a).
20. *Id.*
21. *Id.* § 34(c).
22. *Id.* § 34(f).

* * *

Setting Standards of Safety in the Pipeline Industry

Currently before the House of Representatives' Subcommittee on Energy and Power is bill H.R. 22, the Pipeline Safety and Community Empowerment Act of 2011 (the "Act").[1]

Representative Jackie Speier of California introduced the Act on January 5, 2011, in an effort to improve minimum standards regarding pipeline safety, and provide information about pipeline equipment and facilities to communities.[2] The provisions of this bill are to be implemented by the Secretary of Transportation for the Department of Transportation (DOT).[3]

The Act consists of ten sections, six of which add new provisions to title 49 of the United States Code, and two sections amending the current law. One significant provision of the Act refines promoting public awareness of the current law to require owners and operators of pipeline facilities to notify property owners and residents located within 2,000 feet of a pipeline transmission of the proximity of the line.[4] Additionally, this provision requires that a web site and toll free telephone number be put in place to implement such notice to property owners and residents.[5] Furthermore, another section of the Act also involves the dissemination of information to the public by requiring that all minimum standards and procedures of the federal pipeline safety regulatory program be readily available at no cost.[6]

Upon passage, the Act would also call for several changes to pipeline equipment. The Secretary shall stipulate minimum standards requiring that owners and operators of new pipeline facilities, and existing facilities located within ten miles of significant earthquake fault lines, install automatic or remote shutoff valves which would lower risk in case of a rupture.[7] In addition to the automatic shutoff valves, all pipeline facilities must be equipped with leak detection systems.[8] More specifically, leak detection systems at hazardous liquid pipeline facilities must be capable of continuous detection; systems at natural gas line transmission facilities must provide rate of pressure measurements every 24 hours, and concerning remote pipelines there must be increased aerial surveillance.[9]

Other provisions put forth by the Act include changes to inspection routines, and further detailed considerations regarding the areas in which pipelines are transmitted. For example, the current law requires that periodic inspections be performed on all pipelines either using an internal inspection device (referred to as "smart pigs"), or by some other equally effective method of inspection.[10] However, the amended law would add a temporal factor, requiring that inspections are conducted every five years using smart pigs.[11] Other methods of inspection would only be utilized in segments of the pipeline where smart pigs cannot be used, such as high pressure segments; the Secretary may also prohibit the operation of a segment under high pressure if it cannot be inspected.[12] In addition, the Act would create new considerations for determining if a pipeline transmission area is of high consequence by analyzing the seismicity of the area, the age of the pipeline, and whether the pipeline can be inspected using the most up to date smart pigs.[13]

Moreover, the Act would also include a few administerial changes. For example, owners and operators of

pipeline facilities must provide updated information and changes regarding the facility not only to the Secretary and state officials but to local emergency responders as well.[14] Additionally, the Act gives the Secretary the authority to conduct proceedings for noncompliance by pipeline facility owners and operators regarding the mandatory public education programs set out in title 49 U.S.C. § 60116.[15]

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Endnotes

1. Pipeline Safety and Community Empowerment Act of 2011, H.R. 22, 112th Cong., < http://thomas.loc.gov/cgi-bin/bdquery/D?d112:1:./temp/~bd3eYU::|/home/LegislativeData.php|.
2. *See* Pipeline Safety and Community Empowerment Act of 2011, H.R. 22, 112th Cong.
3. 49 U.S.C. §§ 101–115.
4. H.R. 22, § 3.
5. *Id.*
6. *Id.* § 7.
7. *Id.* § 6.
8. *Id.* § 8.
9. *Id.*
10. 49 U.S.C. § 60102(f)(1–2).
11. H.R. 22, § 5.
12. *Id.*
13. *Id.* § 9.
14. *Id.* § 4.
15. *Id.* § 10.

* * *

State Smart Growth Public Infrastructure Policy

Titled "State Smart Growth Public Infrastructure Policy," Chapter 43, Section 1 of the Laws of 2010 became effective September 29, 2010.[1] Although "Smart Growth" has been a buzzword for most of the past decade,[2] this legislation is a new legal tool designed to limit development sprawl. The law was passed with the intent of:

> minimizing unnecessary costs of sprawl development including environmental degradation, disinvestment in urban and suburban communities and loss of open space induced by sprawl facilitated by the funding or development of new or expanded transportation, sewer and waste water treatment, water, education, housing and other publicly supported infrastructure inconsistent with smart growth public infrastructure criteria.[3]

The statute applies to both state agencies and local "municipal centers" where mixed-use and clustered development and infrastructure will be most environmentally and economically feasible.[4]

Under this new law, state agencies and local municipal centers must demonstrate that proposed development is consistent with the State's Smart Growth Criteria.[5] State agency approval, and if necessary, financing will be predicated upon the analysis incorporated into a written statement detailing consistency with the criteria or justification for failing to meet the designated criteria.[6] In reviewing and making determinations about consistency between proposed projects and the State's criteria, each state agency chief executive officer will be assisted by an appointed committee.[7] These committees are charged with soliciting input and feedback from affected, or potentially affected, community stakeholders.[8] However, as an enforcement mechanism, the statute specifically does not create a private right of action for failure to comply with the process.[9]

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Endnotes

1. Environmental Conservation Law §§ 6-0101 et seq. (ECL).
2. *SmartGrowth History*, NEW YORK STATE DEP'T OF STATE, http://smartgrowthny.org/history.shtml (last visited Mar. 30, 2011) ("The term "Smart Growth" was coined by former Maryland Governor Parris Glendening during his first gubernatorial campaign. He used the phrase to denote a smarter, more sustainable alternative to the sprawling development taking place in his state. Governor Glendening subsequently secured passage of the first comprehensive state Smart Growth law in 1997.").
3. ECL § 6-0105.
4. *Id*, § 6-0103.
5. *Id*, § 6-0107 (2)(a)-(j).
6. *Id*, § 6-0107 (3).
7. *Id*, § 6-0109.
8. *Id.*
9. *Id.* § 6-0111.

Message from the Outgoing Chair

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walader, Wickersham & Taft LLP when CERCLA was young. Mr. Moorman provided a historical perspective of CERCLA practice in those early years to mark that landmark legislation's 40th anniversary.

Annual Meeting (January 27-28, 2011)

The Annual Meeting brought another significant challenge to event planning—Central New York lake effect snow on New York City streets. However, the weather did not discourage attendance at our Section's first Thursday night business meeting that was coupled with a Section-wide cocktail reception. We greeted NYSDEC Commissioner-Designate, Joe Martens, who made his first public comments after being selected by Governor Cuomo. We were also proud to present at the meeting special Section awards on the Section's 30th anniversary to four of the Section's extraordinary members—Rosemary Nichols, Gail Port, Lou Alexander, and Walter Mugdan.[4]

The CLE program on Friday on Climate Change had as its highlight Mike Gerrard's stunning visual perspective of the impact of climate change on the Marshall Islands. At lunch, I was proud to welcome a fellow Central New Yorker, Rick Fedrizzi, who made his way up from Washington, DC to speak with his infectious enthusiasm on all things LEED[5] as President and Founder of the U.S. Green Building Council. Other highlights included the opportunity to write an article that appeared in the *New York Law Journal* during bar week and attendance at the NYSBA President Younger's dinner on Saturday night where legendary District Attorney Robert Morgenthau was honored.

Legislative Forum (May 18, 2011)

It seems that no subject has dominated the agenda of environmental issues or triggered the level of passion like the issue of expanded use of hydrofracking to access natural gas in the Marcellus Shale. So, naturally, that was the topic selected by the Section's Legislation Committee's Co-Chairs (Mike Lesser, Jeffrey Brown, and Drew Wilson) for this year's Legislative Forum.

We were thrilled to have a sellout crowd at the NYSBA Bar Center in Albany for the panel discussion that offered presentations by the Hon. Mark Grisanti, NYS Senator, 60th Senate District; Paul Hartman, Director of State Government Relations, NY Chesapeake Energy Corporation; Eugene Leff, Deputy Commissioner, NYSDEC; Stephen B. Liss, Legislative Counsel, Office of Hon. Robert K. Sweeney, and Kate Sinding of the Natural Resources Defense Council. The perfect capstone to the day was our luncheon speaker, NYSDEC's recently appointed General Counsel Steve Russo, who in his remarks underscored that he is bringing to his position an enthusiasm and an open-mindedness that will serve well both the private and public environmental bars.

Personal Observations

The Section events recounted above only tell a small part of the story of my year as Chair. I want to thank the members of my Section Cabinet and the NYSBA staff who supported my initiatives and channeled my enthusiasm as we had ambitious agendas at our monthly Section Cabinet calls and our Executive Committee meetings with heavy e-mail traffic in between.

Among other things:

- We had some extraordinary challenges including the development of a response to the crisis of confidence prompted by former Governor Paterson's firing of then NYSDEC Commissioner Pete Grannis;
- We saw our journal, *The New York Environmental Lawyer*, under the leadership of Editor-in-Chief Miriam Villani become the first Section Journal to be offered in electronic form;
- The Section's Global Climate Change Committee arranged for a group of Pace Law students to prepare a comprehensive report (January 2011) on the status of the implementation of the recommendations made by the NYSBA Task Force on Global Warming in its report entitled *Taking Action in New York on Climate Change* (January 2009);
- Thanks to Kevin Ryan and Mark Chertok, who serve as co-chairs of the Section's Environmental Impact Assessment Committee, the Section submitted a comprehensive memorandum to NYSDEC, commenting on the changes proposed to the SEQRA Environmental Assessment Form. This was followed by the Section's submission of a memorandum in support of proposed legislation to amend the State's Tax Increment Financing (TIF) law, which is designed to facilitate redevelopment of blighted areas. This second initiative was prompted by Section member Ken Kamlet with the support of Dave Freeman and Larry Schnapf, co-chairs of the Section's Hazardous Waste / Site Remediation Committee;
- We conducted some outreach to the Environmental Law Societies of Pace, Cornell, and the University of Buffalo. Law students are the future of our Section and we need to continue this more focused initiative to promote membership in our Section; and

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- We re-formed the Brownfields Task Force and gave it several topics for consideration as part of its mission to find ways to revitalize the State's Brownfields Cleanup Program.

In February, I had the opportunity to give the ethics lecture as part of the 2011 National Environmental Law Moot Court Competition hosted by Pace Law School. Then in May, I had the honor of representing the Section at the swearing in of NYSDEC Commissioner Martens at the Governor's Mansion. The opportunity that I had at these events to meet fellow professionals in the environmental field underscored for me the breadth of environmental experience and passion that we are fortunate to have here in New York.

I thank the members of the Section who participated in the Section-sponsored activities and helped to sustain the collegiality and professional exchange that benefits the environmental bar and this great State of New York. This is the strength of the Section—the ability to learn from one another regardless of our professional differences. Or as the Bard would say:

And do as adversaries do in law,
Strive mightily, but eat and drink as friends.

William Shakespeare—The Taming of the Shrew
(Act 1, Scene 2)

And that is all that I have to say about that—other than *Thank you for the opportunity*.

Barry R. Kogut
Bond, Schoeneck & King, PLLC[6]

Endnotes

1. "The Square Deal" Labor Day speech to the New York State Agricultural Association, Syracuse, New York (7 September 1903).
2. See http://www.syracusecoe.org/coe/.
3. See http://www.bire.org/institute/dennings.php.
4. Section award winner, Gail Port, was not able to be in attendance because she was at a dinner honoring one of of our former Section Chairs, Bob Kafin. We need to continue to offer our gratitude to those that came before us and present their accomplishments as a model to the next generation of environmental lawyers. In that regard, I want to thank Section member John French, who pushed at our Annual Meeting to have the Section send a letter of congratulations to John Adams of the Natural Resources Defense Council for being given a Presidential Medal of Freedom. President Obama remarked, "If the planet has a lawyer, it's John Adams." I do not think that there could have been a better accolade given to an environmental lawyer.
5. LEED stands for "Leadership in Energy and Environmental Design."
6. Bond has a long tradition of service to the New York State Bar Association. I was proud to continue that tradition and grateful for the support provided by my colleagues at the firm.

Message from the Incoming Chair

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informed discussion of important environmental issues. To this end, the Section has in the past contributed comments and recommendations on a variety of topics, from the new proposed Environmental Assessment Form to tax increment financing for redevelopment of environmentally blighted areas, and had as the topic for its May 2011 Legislative Forum the development of natural gas deposits in the Marcellus Shale. And currently, under the leadership of Dave Freeman and Larry Schnapf, the Section's Brownfields Task Force is developing recommendations for the improvement of the Brownfields Cleanup Program and related mechanisms for spurring the redevelopment of contaminated properties.

This effort also involves less formal paths of communication, such as the quarterly meetings that the Section Cabinet has had with DEC's General Counsels, first Alison Crocker and now Steve Russo, to explore issues of interest and to see where the Section can be helpful to DEC in performing its role.

I look forward to working with all of you in the Section in the exciting year ahead.

Philip H. Dixon

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

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