NYSBA FALL/WINTER 2013 | VOL. 33 | NO. 2

The New York Environmental Lawyer

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

Message from the Outgoing Chair


Carl Howard

As I write my Outgoing Message my term as Chair has expired. I thoroughly enjoyed working for this wonderful Section and urge others to accept the honor should it be offered. It is a lot of time and effort, but the experience and rewards make it worthwhile. You will work with similarly motivated and dedicated fellow officers willing to devote four short years to the effort. I am the last of the five-year officers (an important trivia answer that, no doubt, will surface in future NYSBA crossword puzzles). In my case I want to thank my fellow officers, First Vice-Chair Kevin Reilly, Treasurer Terresa Bakner, and Secretary Michael Lesser. As I step aside (and

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Message from the Incoming Chair


Kevin Reilly

First, I wanted to commend the Outgoing Chair, Carl Howard, for his successful year. I especially enjoyed the Fall Meeting in beautiful Lake Placid. As I write this column, I am happy to report that the state of the Section is good, although subject to some challenges which we are taking in hand. I am joined in the Cabinet by officers who not only have deep Section experience but who also bring considerable legal experience from a variety of backgrounds to the task. Our Vice-Chair Terresa Bakner, of Whiteman Osterman & Hanna, brings to the table a ready knowledge of current environmental issues from the perspective of a practicing lawyer who repre-

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Inside

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join as Co-Chair the Global Climate Change Committee with Michael Gerrard, Ginny Robbins and Kevin Healy) all the officers move up a step and Kevin becomes the new Chair, while Laurie Silberfeld joins the Cabinet as Secretary. We are in good and capable hands.

I have spent a good deal of my time as Chair focused on the threat of climate change. Together with Megan Brillault and Kristen Wilson of the Pollution Prevention Committee (P2), I developed a Questionnaire and I asked you all to complete it. About 1% of you did so (109 of approximately 1,100). I shared with you all via email the results of that survey. I was heartened to hear back from so many of you that you share my concern about climate change and that you were doing what you could to reduce your carbon footprint. My message was that we must fight this threat on every front. We must do what we can as individuals every minute of every day and the Questionnaire was designed to help highlight all the things we do every day that have carbon implications. Once we have taken the threat and the fight to heart we are more likely to advance the political representatives who share our values who will promote and enact the legislation we need but are not getting. Politicians follow, they do not lead. We need to lead and many of us are doing so and must continue to do so until we succeed.

Recently, there have been some encouraging developments. The four most recent EPA Administrators appointed by Republican Presidents, William Ruckelshaus (twice), Lee Thomas, William Reilly, and Christine Whitman, jointly published an opinion piece in the *New York Times* (Aug. 2, 2013) in which they said, "There is no longer any credible scientific debate about the basic facts: our world continues to warm, with the last decade the hottest in modern records, and the deep ocean warming faster than the earth's atmosphere. Sea level is rising. Arctic Sea ice is melting years faster than projected."

Given the intransigence of the Republican Party in Washington, this is no small statement. And as an EPA employee nearing three decades of service, I am proud of my Agency and the good work we do. Many of our regulations and programs have been challenged in court but what has emerged is the most effective enforcement program in the world, and our air, water and natural resources, human health and the environment are the better for it. Now we likely will enter a much bigger battle as we move, out of necessity, toward the regulation of greenhouse gases.

The former Administrators went on to say:

> a market-based approach, like a carbon tax, would be the best path to reducing greenhouse-gas emissions, but that is unachievable in the current political gridlock in Washington. Dealing with this political reality, President Obama's June climate action plan lays out achievable actions that would deliver real progress. He will use his executive powers to require reductions in the amount of carbon dioxide emitted by the nation's power plants and spur increased investment in clean energy technology, which is inarguably the path we must follow to ensure a strong economy along with a livable climate.

I agree. So, while the Republican Party is obstructing any legislation favorable to moving away from fossil fuels and toward sustainable energy, it is heartening to hear such clear statements from my former bosses. And yet, when climate change was first accepted as a concern by the majority (63%) of those surveyed in 1989, twenty-five years later guess what percentage of those surveyed thought it was a problem? Seventy percent? Sixty-five? Try fifty-eight! Fifty-eight! While the science continues to present the reality of climate change into a proven fact, the forces manufacturing doubt, based on nothing but empty propaganda, dangerous, irresponsible propaganda, have been winning. Astounding.

The most recent report of the Intergovernmental Panel on Climate Change states in the strongest language they have used to date that it is 95% to 100% confident that human activity is the primary influence on planetary warming. As the world's leading scientists continue to issue increasingly clear statements, together with the steady bombardment of record weather-related warm spells, draughts, fires, floods, storms, and other disasters, more and more people get the message that this is real and we have to deal with it. And so there remains hope that our elected officials will feel the heat and enact the kind of legislation we need (i.e., a carbon tax).

One important action we can all undertake was not mentioned in the Questionnaire and that is to divest entirely from any holding we may have in any company involved in the use or production of fossil fuels. Many colleges and universities and other responsible bodies have taken this important step. In fact, the divestiture movement has gained traction on over 300 college campuses. Six of these institutions—San Francisco State University Foundation, Hampshire College, Unity College, Sterling College, College of the Atlantic, and Green Mountain College—have announced plans to divest. Others have divested, too, including cities such as Seattle, San Francisco, Providence, and a church (The United Church of Christ). I would like to have our Section formally request that NYSBA divest and I hereby extend the idea and the

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Message from the Incoming Chair

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sents a wide variety of clients. Mike Lesser, formerly of the Department of Environmental Protection where he supervised its Superfund and Brownfield programs, and presently of counsel to Sive, Paget & Riesel, has a prodigious memory of our policy decisions and events over the past couple of decades, joined with an expert's keen insight into contamination and cleanup problems. Mike also has kept our focus on some emerging trends in our Section's finances which I will address momentarily. The newest member of the Cabinet is our secretary, Laurie Silberfeld, who is Vice President and General Counsel of the Hudson River Park Trust. In that capacity, Laurie not only advises on conservation and recreational matters, but also has to bring administrative skills to the task. Howard Tollin, an expert in environmental insurance, is our representative on the House of Delegates and in that capacity keeps us informed of matters that are engaging the Bar Association at large. I am also especially happy to have Phil Dixon as a member of the Cabinet. Phil was Chair when I joined the Cabinet and is serving as liaison to the Section Council. Phil, who wears his emeritus status lightly, declines to retire from Section activities. Among other of his own contributions, Phil successfully solicits financial contributions from the several organizations that have generously sponsored our Fall and Annual meetings. The combined experiences and perspectives of these officers have ensured robust and productive discussions during our monthly Cabinet meetings. As I write this column, we are preparing for our Fall meeting at Jiminy Peak, which is being co-sponsored by the Municipal Law Section. Our Section's meeting co-chairs are Terresa Bakner, Mike Lesser, and Dominic Cordisco, aptly described by someone as a dream team. They have made significant efforts and judging by the speakers and topics, I anticipate an impressive success.

This column is addressed mostly to Section administration. We started with a Cabinet Retreat in July, for which Chazen Engineering in Poughkeepsie generously provided the space, with the goal of closely examining Section operations, flagging problems and proposing solutions. I recalled that we had a weekend Executive Committee Retreat a few years ago when Ginny Robbins was Chair, which was very productive. The time seemed right for another roundtable discussion. Section finances occupied a significant part of the discussion. Mike Lesser, as Treasurer, has consistently been drawing our attention to a growing imbalance between revenues and expenses, as had Terresa Bakner as Treasurer before him. Although I am loath to cite a Tea Party sound byte, we cannot spend money we don't have, and we have less than we did only a few years ago. Although various budget items are causative factors, some of which we have cut while others are under review, budgeting for the Annual Meeting in January has presented the greatest recent challenge. As such, the manner in which we conduct what has actually become a two-day conference, with the reception and business meeting on Thursday evening, followed by an increasingly expensive lunch on Friday, is being reconsidered. Because Lori Nicoll of the Bar Association's Meetings Department negotiated a favorable deal for January 2014, final decisions can be deferred, but only temporarily since the present arrangement is a one-off. We will have to tackle the economics of 2015's Annual Meeting before the close of this year. Members may be aware that a major hurdle has been the status of the Bar Association as a lobbyist, which imposes on it, and on us, onerous rules that effectively ended our prior arrangement whereby Proskauer Rose hosted our Thursday evening events for several years. The result has been that the cocktail reception and the accompanying business meeting recently have been venued in the hotel, under the umbrella of the Bar meeting, as contrasted with a private event which government lawyers attend. The costs have proven to be exorbitant, not easy to control, and in just the past couple of years, increasingly hard to justify. Alternatives are being explored. Similarly, we are considering alternatives to the Friday lunch and the accompanying program, and how and where we conduct the Executive Committee meeting. This is only in the discussion phase, but the economics of the meeting have to be faced. On the revenue side, membership, and the correlating dues, is a significant variable. The better we are at retaining members, and in finding new members, the more likely it will be given a high priority.

Also under continuing review will be our committee structure and operations. Committees are the backbone of our Section. Given the very eclectic nature of environmental law, we have numerous committees which feature a wide array of subject areas and which invite contributions from lawyers in many walks of life. That our Section has long been comprised of members enjoying a variety of professional backgrounds and intellectual interests also reflects the nature of the field. The combination of talented members and legal diversity has allowed a vibrant committee structure to flourish, which, in turn, has effectively served as a gateway to new members. Hence, it is critical to our Section's dynamism, relevance, and our efforts to retain and attract membership, that our committees stand out in what seems to be an increasingly competitive world where bar groups are vying for a shrinking base of lawyers who are professionally active outside of the office. Many legislative initiatives over the years started with our committees, which enhanced the relevance of the Section, that relevance being an attraction for newly minted lawyers; new members can be enticed into deeper Section involvement by offering them responsibilities in committee activities. New members, of course, deepen our talent pool and they often have the enthusiasm of youth, while their dues are also welcomed. Some committees are perennially productive, while others, likely reflecting the transient topicality of their subject areas, occasionally seem to be in search of a mission. We hope to find ways to facilitate the

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From the Editor-in-Chief

As I write this column our fellow Section members, colleagues, and friends at the USEPA are returning to their important work after a 16-day government shut down. The shutdown was the result of a failure of our legislators to come to agreement on a budget to fund the government. The agreement that was finally reached, putting government employees back to work, funds the federal government through January 15, 2014, and lifts the debt limit through February 7, 2014. The shutdown prevented USEPA from enforcing federal environmental laws and cleaning up almost two-thirds of the nation's superfund sites, not without consequences. The fact that this can happen again in just a few month is cause for concern.

The serious consequences of the shutdown on the work of USEPA was not highlighted by the media. Yet the closure left only a handful of "essential" personnel at the Agency active and allowed to carry on the important work of protecting the health and environment. USEPA's enforcement action was hit hard by the shutdown as staff scientists were not inspecting regulated facilities for violations of regulations and standards, meaning that new enforcement cases could not be initiated. The negotiation between USEPA and alleged violators were suspended; in several cases the delays caused setbacks in these negotiations.

In addition, and significantly, work at around 505 Superfund sites across the country was suspended. There are 807 sites so work at almost two-thirds of the nation's Superfund sites came to a halt. The sites that remained operational were limited to those that, if work stopped, there would be an immediate impact (i.e., contaminants would go directly to the drinking water). The dredging project underway at the Passaic River site continued, while the work at the Gowanus Canal site stopped just a few days after USEPA had announced it had finalized its plans for the cleanup. GE's dredging of the Hudson River continued on schedule during the shutdown. The work on the Hudson River is being conducted by private-sector crews with USEPA oversight. The USEPA project coordinator and another Agency employee were authorized to continue the oversight work through the shutdown, although the USEPA employee who handles outreach and press calls was furloughed.

Time lost and delays are harmful enough, but there are long-term impacts of the shutdown, as well. Young people, who should be looking at careers in the government, may be turned off by the possibility of layoffs, furloughs, going without pay, and poor job security. We are losing the baby boomers as they reach retirement age, and not having a pool of talented youth to fill their places as a result of the shutdown will harm the USEPA and other government agencies for years to come.

Write to your congressmen and women. Let's not allow the people in Washington to hijack our health and environment again in a few months.

Miriam E. Villani

CHECK US OUT ON THE WEB

http://www.nysba.org/Environmental

From the Issue Editor

This issue contains an interesting mix of articles addressing Superfund arranger liability, renewable energy, petroleum spills, and the affects of climate change. I often look at my practice as a mix of cleaning up old messes such as Superfund sites and spills, and newer developing issues such as renewable energy and climate change. This issue contains two articles in each category.

The first article by David J. Freeman and Harry H. Clayton IV examines recent cases applying the rule for arranger liability that was outlined by the Supreme Court in *Burlington Northern & Santa Fe Railway Company v. United States*. The article is instructive largely because it describes how the same court could provide very different analyses of arranger liability when faced with significantly different transactions.

The article by Edward Hyde Clarke, first place winner of the 2013 William R. Ginsberg Memorial Essay Contest, examines New York State initiatives in the development of renewable energy. The State has set ambitious goals for the development of renewable energy resources and has used a number of regulatory initiatives to encourage development. Mr. Clarke examines the major initiatives and how effective they have been, and makes suggestions for going forward.

The next article addresses changes in the petroleum business and how retailers and distributors can reduce the risk of litigation by creating compliance and monitoring programs as if they were preparing for litigation. The article provides advice regarding how to manage environmental consultants and contains specific advice regarding setting up compliance and monitoring programs.

The fourth article discusses the role of insurance in protecting small island states from the rise in sea level that is expected to occur as a result of climate change. Maria Antonia Tigre discusses both the technical and legal aspects of the expected rise in sea level. She also discusses regulatory initiatives and the developing case law in the area. It is interesting to note that to some extent, the lack of regulatory activity has resulted in attempts to use the common law tort system as a means of regulation and redress.

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

Aaron Gershonowitz

From the Student Editorial Board: With EPA Uncertainty, New York Must Lead

After more than a week of the government shutdown, and a Congress unable to work with the President of the United States, it is clear that this will be a reoccurring theme. At this point the shutdown is most likely (hopefully) over, but the tense relationships and underlying policy beliefs of lawmakers are surely still well-entrenched in the nation's capital. While the focus has been on health care and Obamacare catches all the headlines, I would argue that Republican lawmakers are just as much waging a war on environmental regulation.

During the shutdown, the EPA had to furlough much of its staff. Since the Agency has been brought to a standstill, the EPA is not performing important inspections, not working on regulations, unable to support state programs, and has a much more limited ability to respond to environmental disasters.

This is about more than a government shutdown. This is a highlight of the challenges that the regulatory agency faces in the overall political climate. In order for the government to get back up and running, both parties will ultimately have to agree to cuts from the budget and reductions in spending. I am sure that one of the first agencies that will be discussed with regard to cuts will be the EPA, as evidenced by public statements made by lawmakers and various reports out of D.C.

Given the uncertainty of the federal government's ability to protect our natural resources, it is that much more important that New York continue to lead by example in terms of environmental protection and that New Yorkers stay involved. Although New York is often criticized as having overly burdensome environmental regulations, these regulations go through a rigorous process and involve public participation from attorneys, organizations, companies, not-for-profits, and everyday residents. Rather than leave environmental policy up to short-sighted elected officials who are always running for re-election, we as residents of New York and as community members must stay engaged in the process. State regulation gives us this opportunity, and it is up to us to ensure that New York regulatory bodies are protecting our environment.

Sound public policy can hardly come from such acts of brinksmanship. I refuse to believe that anyone can negotiate in good faith when the country's credit rating and overall reputation in the world is brought to the edge of disaster every couple of months. No matter how long the shutdown lasts, we will all have to keep an eye on the future impacts and adjust to the environmental policy climate that results.

Edward Hyde Clarke on behalf of the SEB
Albany Law School '14

EPA Update

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

I. Introduction

Chris Saporita

Marla E. Wieder

Joseph A. Siegel

The past year has proved challenging for EPA on many fronts. From undertaking significant response actions throughout the NY / NJ area as a result of Hurricane Sandy (while coping with the closure of EPA's NYC office due to the resulting power outage), to the agency-wide furloughs due to sequestration, the October government shutdown (when 94% of the agency was forbidden to work), and not the least of which is managing the agency's everyday workload on a severely compromised budget. The current prognosis for the 2014 fiscal year budget is less than encouraging.

On a positive note, in July, after much debate and relentless questioning, the U.S. Senate finally confirmed Gina McCarthy, the former Assistant Administrator for EPA's Office of Air and Radiation, as EPA's new Administrator, ending the longest period in history where EPA was without an Administrator. During her impressive 30 year career, Gina McCarthy has been a leading advocate for common-sense strategies to protect public health and the environment and we are very fortunate to have her at the helm. For more on how EPA plans on meeting the myriad of challenges ahead, see: http://www2.epa.gov/aboutepa/epas-themes-meeting-challenge-ahead.

This article offers a curated (if not comprehensive) selection of significant agency actions, many with local import, that were taken between February 1 and September 30, 2013.

II. Superfund, Wastes and Toxic Substances

A. Superfund News

On May 21, 2013, EPA added nine hazardous waste sites to the National Priorities List and proposed an additional nine sites for listing. Sites added to the NPL in our area include the Matlack, Inc. Site (a former chemical transportation business) in Woolwich Township, N.J. and the Riverside Industrial Park Site, a seven acre industrial site along the Passaic River, in Newark, N.J.[2]

In the Summer, three bills intended to increase the role of the states in Superfund cleanups received a modicum of publicity. The bills addressed issues such as the superfund's financial assurance requirements, preventing EPA from reviewing solid waste requirements whenever it believed necessary, increased reporting requirements for facilities holding high amounts of flammable or explosive materials (the only component that received bipartisan support), additional consultation with states on removal and remediation actions, expanded state authority in placing sites on the NPL, and requiring federal entities to follow state and local laws during a superfund cleanup. EPA, the White house and many Democrats criticized the bills as unnecessary and for "potentially causing more red tape and slowing the Superfund cleanup process."[3]

In August, EPA updated its RE-Powering Mapping and Screening Tool, which will now provide preliminary screening results for renewable energy potential at 66,000, up from 24,000, contaminated lands, landfills, and mine sites across the country. The RE-Powering America's Land Initiative, started by EPA in 2008, encourages development of renewable energy on potentially contaminated land, landfills and mine sites when it is aligned with the community's vision for the site.[4] Since RE-Powering's inception, more than 70 renewable energy projects have been installed on contaminated lands or landfills. For more on the RE-Powering Mapper, see: http://www.epa.gov/renewableenergyland/rd_mapping_tool.htm.

1. Progress in New York

As discussed in our prior article, on December 27, 2012, EPA announced a proposed cleanup plan for the Gowanus Canal Superfund Site in Brooklyn. On September 30, 2013, just hours before the government shutdown, EPA finalized its cleanup plan for the site. The cleanup plan will require the removal of contaminated sediment and the capping of dredged areas. The plan also includes controls to reduce sewage overflows and other land-based sources of contamination from compromising the cleanup. With community input, EPA has decided on the option in the proposed plan that will require the disposal

of the least contaminated sediment at a facility out of the area rather than building a disposal facility in the water near Red Hook. The cost of the cleanup plan is currently estimated to be $506 million.

EPA has divided the Gowanus Canal cleanup into three segments that correspond to the upper, middle and lower portions of the canal. For the first and second segments of the canal, EPA's plan requires dredging of approximately 307,000 cubic yards of highly contaminated sediment. In addition, in areas of the deep sediment that are contaminated with liquid coal tar, which bubbles up toward the surface, the sediment will be stabilized by mixing it with cement or similar binding materials. The stabilized areas will then be covered with multiple layers of clean material, including an "active" layer made of a specific type of absorbent material that will remove PAH contamination that could well up from below, an "isolation" layer of sand and gravel that will ensure that the contaminants are not exposed, and an "armor" layer of heavier gravel and stone to prevent erosion of the underlying layers from boat traffic and currents. Finally, clean sand will be placed on top of the "armor" layer to restore the canal bottom as a habitat.

For the third segment of the canal, EPA requires the dredging of approximately 280,000 cubic yards of contaminated sediment and capping of the area with active, isolation and armor layers and a layer of sand to help restore habitat. The plan also requires removing contaminated material placed in the 1st Street turning basin of the canal decades ago and restoring approximately 475 feet of the former basin. In addition, EPA is requiring the excavation and restoration of the portion of the 5th Street turning basin beginning underneath the 3rd Street Bridge and extending approximately 25 feet to the east of the bridge.

The final plan includes various methods for managing the contaminated sediment after dredging, depending on the levels of contamination. The methods include transporting the dredged sediment that is highly impacted by liquid coal tar away from the area to a facility where it will be thermally treated for the removal of the organic contaminants and then put to beneficial reuse such as a landfill cover, if possible. For the less contaminated sediment, treatment includes stabilization of the sediment at a facility out of the area, followed by beneficial reuse.

In addition, the final plan requires controls to significantly reduce the flow of contaminated sewage solids from combined sewer overflows into the upper canal. These overflows are not being addressed by current New York City upgrades to the sewer system. Without these controls, contaminated sewage solid discharges would recontaminate the canal. EPA is requiring that combined sewer overflow discharges from two major outfalls in the upper portion of the canal be outfitted with retention tanks to reduce the volume of contaminated sewage solid discharges. It is estimated that a reduction of 58% to 74% of these discharges will be needed to maintain the effectiveness of the cleanup. The final locations of these tanks will be determined during the design phase of the project.

Contaminated land sites along the canal, including three former manufactured gas plants, are being addressed by the New York State Department of Environmental Conservation (NYSDEC), in coordination with EPA. Other potential sources of continuing contaminant discharges to the canal have been referred to the state of New York and will be investigated and addressed as necessary.[5]

Also in September, EPA proposed to delete the Ludlow Sand & Gravel site in Paris, New York from the NPL as the site no longer poses a threat to human health or the environment after a successful cleanup of soil and ground water. The site was placed on the NPL in September 1983 and cleanup work was completed in 2007. Subsequent monitoring and assessment of the site confirms that the cleanup was effective and the site can be deleted from the list. If EPA does not receive significant dissenting comments and/or no significant new data are submitted during the public comment period, this deletion will be effective on December 2, 2013.[6]

In April 2013, General Electric (GE) began the fourth season of dredging in the Upper Hudson River. The dredging began south of the village of Fort Edward, New York around Griffin Island and will continue south in the main stem of the river to the Thompson Island Dam. Additional dredging is planned between Champlain Canal Lock 5 and 6 near the towns of Northumberland and Schuylerville. The historic dredging project targets approximately 2.65 million cubic yards of PCB-contaminated sediment from a 40-mile stretch of the upper Hudson River between Fort Edward and Troy, New York. At the end of the 2012 dredging season, the project was nearly half-way to its target with more than 1.3 million cubic yards removed since the project began in 2009. The dredging goal for 2013 is 350,000 cubic yards. The rest of the cleanup is expected to take three to five more years to complete.[7]

In April, EPA issued several cleanup plans for sites in New York. First, EPA issued a proposed plan for the cleanup at Eighteen Mile Creek Superfund Site in Lockport, New York. EPA's plan seeks to clean up nine properties, relocate residents from five of the properties, and demolish an industrial building at the former Flintkote Plant site as part of the first phase of cleanup at the site. The residential properties located on Water Street are contaminated with PCBs and other contaminants, including lead and chromium.

Eighteen Mile Creek has a long history of industrial use dating back to the 1800s when it was used as a source of power. The site was placed on the Superfund NPL in March 2012. Investigations at the site have revealed that sediments, soil and ground water in and around the creek and nearby properties are contaminated with a combination of pollutants, including PCBs, lead and chromium.

EPA's proposed plan addresses the first phase of the cleanup. The second phase will address contaminated creek sediments and soil at several industrial and commercial properties in the creek corridor. The third phase will address contaminated sediment in the creek from Lockport to its discharge to Lake Ontario. The proposed plan and more information about the site is available online at http://www.epa.gov/region02/superfund/npl/18milecreek/.[8]

Second, EPA issued a proposed plan to clean up an area of contaminated groundwater within the New Cassel/Hicksville Groundwater Contamination Superfund site in the towns of Hempstead, North Hempstead and Oyster Bay in Nassau County, New York. Groundwater throughout these areas is contaminated with harmful volatile organic compounds (VOCs), which are often found in paint, solvents, aerosol sprays, cleaners, disinfectants, automotive products and dry cleaning fluids. The Magothy aquifer, Nassau County's primary source of drinking water, has been contaminated by the VOCs. This contaminated water is currently being treated before it is provided to area residents and the water supply is monitored regularly to ensure the water quality meets federal and state drinking water standards. Because of the nature and complexity of the contamination at the site, EPA is dividing the investigation and cleanup into phases. The April plan is the first EPA phase of the cleanup and addresses one portion of the site.

Groundwater testing in 2010 confirmed the presence of elevated levels of VOCs in groundwater feeding 11 public water supply wells, six in Hicksville, four in Hempstead and one in Westbury. Based on past water quality monitoring results, public water supply companies installed treatment systems that remove VOCs from the contaminated groundwater. The site was added to the NPL in 2011.

The proposed cleanup plan includes construction of a treatment plant to extract and treat groundwater contaminated with VOCs above a specific level. In some areas, a vapor stripper that forces air through polluted groundwater to remove harmful chemicals will be used on individual wells. The air causes the chemicals to change from a liquid to a gas, which is then collected and cleaned. In the most heavily contaminated areas, the groundwater will be treated using a treatment process such as chemical oxidation, which uses chemicals to destroy pollution in groundwater, breaking down the harmful chemicals into water and carbon dioxide. Samples of the groundwater will be collected and analyzed to ensure that the technology is fully effective. EPA will also require periodic collection and analysis of groundwater samples to verify that the levels and extent of contaminants are declining. The EPA will conduct a review every five years to ensure the effectiveness of the cleanup.[9]

At the end of September EPA issued final cleanup plans for these sites, however, due to the government shutdown, EPA's websites have not been updated to reflect the current status of the sites.

In March 2013, EPA finalized a plan to address contaminated groundwater at the Cayuga County Groundwater Contamination Superfund site in Cayuga County, New York. The final cleanup plan divides the approximately 4.8 square miles of groundwater beneath the site into three areas. For Area 1, which is the most contaminated area, the EPA will use bioremediation, a technique that involves adding chemicals and biological enhancements to the groundwater to promote the breakdown of the volatile organic compounds. For Area 2 of the groundwater, which contains lower levels of VOCs, EPA will use natural processes to reduce the level of contamination to meet groundwater standards. EPA is requiring periodic collection and analysis of groundwater samples to verify that the level and extent of contaminants are declining. EPA is deferring a decision on how to clean up the groundwater in Area 3 until further investigation. An important aspect of the long-term cleanup of groundwater at the site involves a cleanup by GE, overseen by the NYSDEC, at the former Powerex facility. New York and the EPA are coordinating closely in their cleanup efforts. On September 30, 2013, EPA signed an Administrative Settlement Agreement and Order on Consent with GE for the site. Under the Agreement, GE has agreed to: 1) perform the remedial design of the remedy selected in the March 2013 Record of Decision; 2) reimburse EPA for a portion of its past response costs; and 3) perform additional investigatory work in Area 3 of the site. For more information on the site, please visit: http://www.epa.gov/region02/superfund/npl/cayuga.[10]

B. RCRA—Hazardous Waste Electronic Manifest System

On October 5, 2012, President Obama signed into law the "Hazardous Waste Electronic Manifest Establishment Act" which authorizes EPA to implement a national electronic manifest system, commonly referred to as "e-Manifest." This national system is envisioned to be implemented by the EPA in partnership with industry and states. The legislation had broad bipartisan support and will significantly streamline the tracking of our nation's hazardous waste while saving EPA and the regulated industries several hundred million dollars per year.[11] As the Act calls for the system to be online three years from the

signing of the Act, the system should be online by October 2015. EPA is taking action now to meet the deadline and will post project schedule information on the e-Manifest web site. For more information, see: http://www.epa.gov/osw/hazard/transportation/manifest/e-man-faqs.htm#ga1.

C. TSCA—Expanded Access to Chemical Information and Possible Legislative Overhaul

In September, Administrator McCarthy called the Toxic Substances Control Act (TSCA), the 1976 law that guides EPA's regulation of chemicals, "broken and ineffective" and asked Congress to undertake a legislative fix. The "Chemical Security Improvement Act" (S. 1009) from Sens. David Vitter (R-La.) and the late Frank Lautenberg (D-N.J.) has 25 bipartisan co-sponsors and is viewed by many as the best chance for wholesale reform. The bill would grant EPA the authority to evaluate all chemicals in commerce and restrict or even ban ones identified as high-priority.[12]

In September, EPA also launched a web-based tool, ChemView, to significantly improve access to chemical specific regulatory information developed by EPA and data submitted under TSCA. This online tool will improve access to chemical health and safety information, increase public dialogue and awareness, and help viewers choose products that use safer ingredients. Just visit ChemView at http://www.epa.gov/chemview/.

III. Air and Climate Change

A. White House Issues President's Climate Action Plan

Citing a "moral obligation to future generations to leave them a planet that is not polluted and damaged," the White House issued the President's Climate Action Plan in June 2013. The Plan is designed to achieve three major goals: (1) cut carbon pollution in America; (2) prepare the country for the impacts of climate change; and (3) lead international efforts to combat global climate change and prepare for its impacts.[13] The Plan has a host of specific measures to achieve these goals including, among others, reduce greenhouse gas (GHG) emissions from power plants, double renewable energy generation by 2020, streamline the review process for energy transmission projects which will help promote the use of clean energy, curb emissions of hydrofluorocarbons and methane, and achieve a 20% share of energy consumption in the federal government through renewable energy sources. The Plan also includes detailed measures for adaptation and international action. Citing to the President's January 2013 inaugural address, the plan states that:

> We will respond to the threat of climate change, knowing that the failure to do so would betray our children and future generations. Some may still deny the overwhelming judgment of science, but none can avoid the devastating impact of raging fires and crippling drought and more powerful storms.[14]

B. EPA Progresses on Climate Change Adaptation Efforts

In February 2013, EPA released its draft Agency Adaptation Plan under Executive Order 13514, *Federal Leadership in Environmental, Energy, and Economic Performance*, in coordination with other federal agencies and departments.[15] Each EPA program office and Regional office, including Region 2, has prepared its own specific draft adaptation plan, which is still undergoing internal review prior to release.

C. Supreme Court Grants Certiorari in Climate Change Case

On October 15, 2013, the U.S. Supreme Court granted a petition for certiorari in *Utility Air Regulatory Group v. EPA*. The Court granted certiorari only with respect to one specific issue: "Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases." This narrow question, which left in place EPA's Endangerment Finding and Light Duty Vehicle Rules, will be briefed by petitioners and EPA over the next two months, with oral arguments likely in February.

D. D.C. Circuit Vacates EPA's Greenhouse Gas Biogenic Emissions Rule

On July 12, 2013, in *Center for Biological Diversity v. EPA*, the D.C. Circuit vacated EPA's Final Deferral for CO_2 Emissions from Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs ("Deferral Rule).[16] This rule deferred for a period of three (3) years the application of the Prevention of Significant Deterioration (PSD) and Title V permitting requirements to biogenic carbon dioxide (CO_2) emissions from bioenergy and other biogenic stationary sources. EPA established the three-year deferral to conduct science and technical reviews to determine what treatment biogenic emissions should receive. The D.C. Circuit held that the Deferral Rule could not be justified on any of the administrative law doctrines advanced by EPA but left for another day the question of whether EPA can permanently exempt biogenic sources from PSD and Title V.[17]

E. Supreme Court Denies Petition for Certiorari in Fuel Case

On June 24, 2013, the Supreme Court, in *Grocery Manufacturers Ass'n v. EPA*, No. 12-1055, denied several petitions for certiorari from industry groups challeng-

ing EPA's E-15 rule. The rule, which constitutes a waiver under the Clean Air Act's Title II provisions, allows the sale of gasoline containing up to 15 percent ethanol. The Court's decision follows an August 2012 decision by the D.C. Circuit holding that the industry groups lacked standing.

F. EPA Approves New Feedstocks for Renewable Fuels

On July 11, 2013, EPA issued a supplemental final rule under the Renewable Fuel Standard (RFS) program which approves two new fuel sources.[18] The rule contains a lifecycle GHG analysis for renewable fuels made from giant reed (Arundo donax) and napier grass (Pennisetum purpureum), and a regulatory determination that such fuels qualify as cellulosic renewable fuel under the RFS program. In response to comments regarding the potential for these feedstocks to behave as invasive species, EPA adopted a set of new registration, recordkeeping, and reporting requirements that apply only to fuels produced under these pathways. EPA also issued a Notice of Data Availability regarding the lifecycle analysis for barley as a new feedstock for conventional renewable fuel. The analysis demonstrates that barley, when used to make ethanol at facilities that use natural gas for all process energy, grid electricity, and drying 100% distillers grains, will meet the lifecycle greenhouse gas emissions reduction threshold of 20% required for conventional renewable fuel. When barley is used to make ethanol at facilities that use certain processing technologies, it will meet the lifecycle greenhouse gas emissions reduction threshold of 50% required by the Energy Independence and Security Act of 2007 (EISA) for advanced renewable fuel.[19]

IV. Water Quality

A. Science and Support

1. EPA and Partners Announce Green Infrastructure Initiative on Buffalo's West Side

On March 13, EPA Regional Administrator Judith A. Enck, along with representatives from PUSH Buffalo, Buffalo Niagara Riverkeeper, the Western New York Regional Economic Development Council, the New York State Environmental Facilities Corporation and other public officials announced an expansion of Green Infrastructure projects on Buffalo's West Side. The following day, EPA and the University at Buffalo co-sponsored a conference in Buffalo to discuss how Western New York communities can utilize green infrastructure projects, including:

- Acquiring Resources for Green Infrastructure
- Community Action in Green Infrastructure
- Innovations in Green Infrastructure
- Green Infrastructure Public Private Partnerships

Green infrastructure reduces run off of polluted stormwater by using vegetation, soils, and natural processes to manage rainwater and create healthier urban environments. At the scale of a city or county, green infrastructure refers to the patchwork of natural areas that provides habitat, flood protection, cleaner air, and cleaner water. At the scale of a neighborhood or city, green infrastructure refers to stormwater management systems that mimic nature by soaking up and storing water.[20]

2. EPA Survey Finds More Than Half of the Nation's River and Stream Miles in Poor Condition

On March 26, EPA released the results of the first comprehensive survey looking at the health of thousands of stream and river miles across the country, finding that more than half—55 percent—are in poor condition for aquatic life. The 2008-2009 National Rivers and Stream Assessment reflects the most recent data available, and is part of EPA's expanded effort to monitor waterways in the U.S. and gather scientific data on the condition of the nation's water resources. EPA partners, including states and tribes, collected data from approximately 2,000 sites across the country. EPA, state and university scientists analyzed the data to determine the extent to which rivers and streams support aquatic life, how major stressors may be affecting them and how conditions are changing over time.

Findings of the assessment include:

– Nitrogen and phosphorus are at excessive levels.

  Twenty-seven percent of the nation's rivers and streams have excessive levels of nitrogen, and 40 percent have high levels of phosphorus.

– Streams and rivers are at an increased risk due to decreased vegetation cover and increased human disturbance.

  Approximately 24 percent of the rivers and streams monitored were rated poor due to the loss of healthy vegetative cover.

– Increased bacteria levels.

  High bacteria levels were found in nine percent of stream and river miles making those waters potentially unsafe for swimming and other recreation.

– Increased mercury levels.

  More than 13,000 miles of rivers have fish with mercury levels that may be unsafe for human consumption.

  EPA will use this new data to inform decision making about addressing critical needs around the country for rivers, streams, and other waterbodies. This comprehensive survey will also help develop improvements to monitoring these rivers

and streams across jurisdictional boundaries and enhance the ability of states and tribes to assess and manage water quality to help protect our water, aquatic life, and human health.[21] Results are available for a dozen geographic and ecological regions of the country. For more information, visit: http://www.epa.gov/aquaticsurveys.

3. EPA to Award Over a Half Billion in Funding to Areas Impacted by Hurricane Sandy in New Jersey and New York: Funding Will Help Upgrade Wastewater and Drinking Water Facilities Damaged by the Storm

In May, EPA announced that it would provide grants of $340 million to the state of New York and $229 million to the state of New Jersey for improvements to wastewater and drinking water treatment facilities damaged by Hurricane Sandy that will make them more resilient to severe storms. The hurricane impacted more than 200 wastewater treatment plants and over 80 drinking water facilities in New Jersey and New York, causing damage and power failures that resulted in the release of over 10 billion gallons of raw sewage into local waters and the shutdown of drinking water plants in dozens of communities. The funds, which will be provided to the New York State Department of Environmental Conservation and the New Jersey Department of Environmental Protection, were authorized by the Disaster Relief Appropriations Act of 2013 and signed into law by President Obama on January 29, 2013. In addition to protecting drinking water systems and maintaining water quality, the funding will provide for 6,000 short-term construction jobs. For more information on the EPA's response to Sandy, visit: http://www.epa.gov/sandy.

B. Regulations and Guidance

1. EPA Finalizes Vessel General Permit for Large Commercial Vessels

On April 12, EPA issued a final vessel general permit that regulates the discharge of ballast water and 27 other categories of discharges from large commercial vessels and outlines best management practices to protect the nation's waters from ship-borne pollutants and reduce invasive species in U.S. waters. 78 Fed. Reg. 21938. The final vessel general permit covers commercial vessels greater than 79 feet in length, excluding military and recreational vessels, and will replace the 2008 vessel general permit, which will expire on December 19, 2013. The permit also improves the efficiency of the permit process by simplifying permitting and reporting requirements for vessel owners and operators. The permit will affect at least 60,000 U.S.-flagged and at least 12,000 foreign-flagged vessels. Commercial vessels shorter than 79 feet were exempted by Congress from permitting until December 2014 (Pub. L. No. 112-213). A permit for the smaller vessels, which will take effect sometime after the moratorium ends, is still in interagency review. The new discharge standards are supported by independent studies by EPA's science advisory board and the National Research Council, and are consistent with those contained in the International Maritime Organization's 2004 Ballast Water Convention. EPA issued the permit in advance of the current permit's expiration to provide the regulated community time and flexibility to come into compliance with the new requirements. For more information on the vessel general permit, visit: http://cfpub.epa.gov/npdes/vessels/vgpermit.cfm.

2. EPA Proposes Amended Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category

On June 7, pursuant to a consent decree with Defenders of Wildlife, Earthjustice, the Environmental Integrity Project, and the Sierra Club (*Defenders of Wildlife v. Jackson*, D.D.C., No. 1:10-cv-01915), EPA proposed the first amendment to the effluent limitations guidelines (ELGs) and standards for the Steam Electric Power Generating category (40 CFR Part 423) since 1982. 78 Fed. Reg. 34432. Steam electric power plants alone contribute 50-60 percent of all toxic pollutants discharged to surface waters by all industrial categories currently regulated in the United States under the Clean Water Act, including lead, mercury, arsenic, selenium, aluminum and 33 other pollutants, and power plant discharges to surface waters are expected to increase as pollutants are increasingly captured by air pollution controls and transferred to wastewater discharges. Discharges of these toxic pollutants are linked to cancer, neurological damage, and ecological damage, including contributing to over 160 water bodies not meeting state quality standards; 185 waters for which there are fish consumption advisories; and degradation of 399 water bodies across the country that are drinking water supplies.

The proposed rule would strengthen the existing controls on discharges from these plants by setting the first federal limits on the levels of toxic metals in wastewater that can be discharged from power plants, based on technology improvements in the industry over the last three decades. The proposed ELGs would apply to about 1,200 nuclear and fossil fueled power plants nationwide, of which approximately 500 are coal-fired generating units, but would not apply to power plants smaller than 50 megawatts. EPA is considering four preferred alternatives, and estimates that the preferred options would reduce pollutant discharges annually by 0.47 billion to 2.62 billion pounds, and reduce water use by 50 billion to 103 billion gallons. The public comment period closed on September 20, 2013. More information about the rule is available at http://water.epa.gov/scitech/wastetech/guide/steam-electric/index.cfm.

3. EPA Publishes Final National Recommended Ambient Water Quality Criteria for Ammonia in Freshwater

On August 22, pursuant to section 304(a) of the Clean Water Act, EPA published final national recommended ambient water quality criteria for the protection of aquatic life from effects of ammonia in freshwater. 78 Fed. Reg. 52,192. The final acute ambient water quality criteria (AWQC) for protecting freshwater organisms from potential effects of ammonia is 17 mg/L total ammonia nitrogen (TAN) and the final chronic AWQC for ammonia is 1.9 mg/L TAN at pH 7.0 and temperature 20 degrees Celsius, and were developed based on EPA's *Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses (1985), (EPA/R-85-100).*These criteria incorporate the latest scientific knowledge on the toxicity of ammonia to freshwater aquatic life, but are not legally binding, do not address human health toxicity data, and do not reflect consideration of economic impacts or the technological feasibility of meeting pollutant concentrations in ambient water. They provide guidance to states and authorized tribes in adopting water quality standards for protecting aquatic life and human health.

C. Compliance and Enforcement

1. District Court Upholds Limit on "Prior Converted Croplands" Exclusion to Federal Wetlands Jurisdiction

On May 24, the U.S. District Court for the Western District of New York issued a Decision and Order in *William L. Huntress, Acquest Development, LLC and Acquest Transit, LLC ("Acquest") v. DOJ, et al.* (W.D.N.Y., No. 1:12cv1146), resolving the status of a defense to CWA jurisdiction in favor of the government, and partially consolidating the case with an ongoing civil enforcement action (*U.S. v. Acquest Transit, LLC, et al.*, W.D.N.Y., No. 1:09cv55). On November 20, 2012, Acquest had simultaneously filed a complaint seeking a declaratory judgment and moved for a preliminary injunction, asking the court to enjoin the government from pursuing its related enforcement actions and declare them unlawful on the ground that EPA lacked jurisdiction over wetlands on the subject property in Amherst, New York. The U.S. opposed the motion and moved to dismiss the suit, or in the alternative, to consolidate it with the civil enforcement action. At Acquest's request, the court also ordered briefing on whether there were issues ripe for immediate determination, which it treated as a motion for summary judgment.

In its motion, Acquest argued, inter alia, that lands that qualify as prior-converted croplands ("PCC"), or wetlands converted to farming prior to December 23, 1985, are permanently excluded from the definition of "waters of the United States" and are therefore beyond the jurisdiction of the CWA because the Food Security Act of 1996 made application of the PCC exclusion permanent. EPA countered that, consistent with its longstanding interpretation of the applicable regulation (40 C.F.R. § 230.3(s)), as well as with the U.S.D.A.'s interpretation, as described in the preamble to regulations promulgated by EPA and the Army Corps of Engineers in 1993 (58 Fed. Reg. 45008), a PCC exclusion could be lost if an area is abandoned as a cropland for a period of five or more years and wetlands characteristics return, and that the Food Security Act of 1996 only made application of the PCC exclusion permanent for purposes of maintaining qualification for subsidies under the "Swampbusters" provisions of the Act. The Court ruled that EPA's and the Corps' statements in the preamble to regulations issued in 1993 were part of the regulations, and had not been affected by the 1996 amendment to the Food Security Act, finding, instead, that "a complete and enforceable rule is created when the Code of Federal Regulations, which excludes prior-converted croplands from the definition of 'waters of the United States,' is read in conjunction with the Federal Register, which defines 'prior-converted croplands' and subjects them to abandonment. *See Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 158, 102 S. Ct. 3014, 3025, 73 L. Ed. 2d 664 (1982) (looking to the preamble for the administrative construction of the regulation); *Chico v. Schweiker*, 710 F.2d 947, 954 (2d Cir. 1983) (relying, in part, on Federal Register preamble); *La. Environmental Action Network v. United States*, 172 F.3d 65, 69 (D.C. Cir. 1999) (reading EPA's language in Federal Register preamble together with EPA regulation)." This ruling is significant because it prevents developers, such as Acquest, from being able to use the cover of abandoned PCC status to surreptitiously drain wetlands until they lose their wetlands characteristics, and are thus no longer protected by the CWA.

2. Complaint Filed in Southern District of New York Against Westchester County for Safe Drinking Water Act Violations

On August 6, 2013, the U.S. Attorney for the Southern District of New York filed a civil lawsuit on behalf of EPA against Westchester County, New York, alleging that, since April 2012, Westchester Water District No. 1 has failed to comply with the Safe Drinking Water Act's Long Term 2 Enhanced Surface Water Treatment Rule (LT2) (40 CFR Part 141, January 2006) for a significant portion of the 175,000 people served by the district, leaving them at risk of consuming water contaminated with the microbial pathogen cryptosporidium (*United States v. Westchester County*, S.D.N.Y., No. 13-cv-5475). LT2 supplements existing microbial treatment and further protects public health from illness due to cryptosporidium and other microbial pathogens in drinking water through risk-targeted treatment requirements based on the results of source water monitoring. Public water suppliers serving 100,000 people or more that use unfiltered surface water were required to comply with the LT2 requirement by April 1, 2012.

3. EPA Files Administrative Complaint Against Housing Developer in Rochester, New York, Seeking $120,000 Penalty for Violations of Its Construction Stormwater Discharge Permit

On September 5, 2013, EPA Region 2 issued a Notice of Complaint and Proposed Assessment of a Civil Penalty to Alfred Spaziano and Atlantic Funding and Real Estate, LLC, alleging 2,317 violations of the Clean Water Act spanning 177 days. Respondent Spaziano is a long-standing home builder with several development sites and companies in New York. The site at issue is an approximately 8-acre subdivision in the Towns of Greece and Gates, in Monroe County, New York, upon which Spaziano and Atlantic Funding and Real Estate, LLC are constructing a multifamily residential development. Stormwater from the site discharges north into Lake Ontario and south into the Erie Canal. EPA conducted a Compliance Evaluation Inspection on September 19, 2012, and discovered numerous violations of Respondents' construction stormwater discharge permit, including failure to designate and utilize a concrete washout area, failure to install silt fencing, failure to maintain installed silt fencing, failure to properly install a check dam, failure to install and maintain sediment basins, failure to properly stabilize, and remove tracked dirt from, construction entrances, failure to stabilize a drainage swale, failure to maintain required documentation, failure to conduct required inspections, and failure to timely correct best management practice deficiencies. EPA issued an Administrative Compliance Order on January 15, 2013, directing the Respondent to correct its violations. Notwithstanding the order, a follow-up inspection by EPA on February 28, 2013 found that several of the violations continued and that, as a result, the site was discharging turbid water directly into the Erie Canal.

V. Environmental Crimes

A. Historic Verdict in Tonawanda Coke Case

In March 2013, a federal jury in Buffalo convicted the Tonawanda Coke Corporation (TCC) of 11 counts of violating the CAA and three counts of violating the RCRA. In addition, TCC's Environmental Control Manager was found guilty of 11 counts of violating the CAA, one count of obstruction of justice and three counts of violating RCRA. The charges carry a maximum combined penalty up to 75 years in prison and fines in excess of $200 million. The offenses related to the release of coke oven gas containing benzene into the air through an unreported pressure relief valve. In addition, a coke-quenching tower was operated without baffles, a pollution control device required by TCC's Title V CAA permit designed to reduce the particulate matter that is released into the air during coke quenches. In addition, the Environmental Control Manager told another TCC employee to conceal the fact that the unreported pressure relief valve, during normal operations, emitted coke oven gas directly into the air, in violation of the TCC's operating permit. The defendants also stored, treated and disposed of hazardous waste without a permit, in violation of RCRA. These offenses related to TCC's practice of mixing its coal tar sludge, a listed hazardous waste that is toxic for benzene, on the ground in violation of hazardous waste regulations.[22]

In the sentencing phase, over 100 impact statements from local residents were sent to federal prosecutors and Chief U.S. District Judge William M. Skretny. The statements recount residents' personal stories of sickness and loss and frequently note rare medical conditions. The letters may affect Judge Skretny's decision on how and where millions of dollars in fines are ultimately spent. Federal prosecutors recommended a fine of $57 million, with most, about $44 million, classified as a criminal fine.[23] Sentencing is now scheduled for March 2014. For more on EPA's criminal enforcement program, see: http://www2.epa.gov/enforcement/criminal-enforcement.

Endnotes

1. Any opinions expressed herein are the authors' own, and do not necessarily reflect the views of the U.S. Environmental Protection Agency.
2. EPA Press Release, EPA Adds Nine Hazardous Waste Sites to Superfund's National Priorities List/Agency also proposes to add an additional nine sites, May 21, 2013.
3. Superfund: Bills expanding state role in cleanups likely to see July House vote, Greenwire, July 9, 2013.
4. EPA Press Release, EPA Screens More Than 66,000 Contaminated Sites for Renewable Energy Potential, August 5, 2013.
5. EPA Press Release, EPA Finalizes Cleanup Plan for Gowanus Canal Superfund Site in Brooklyn, New York; $506 Million Cleanup Will Remove Contaminated Sediment and Create Jobs, September 30, 2013.
6. EPA Press Release, EPA Takes Public Comments on Proposal to Delete an Oneida County Site from the Superfund List after Cleanup, September 30, 2013.
7. EPA Press Release, Fourth Season of Dredging Begins in Upper Hudson; Project Expected to Reach Halfway Point during Fourth Season, April, 29, 2013.
8. EPA Press Release, EPA Encourages the Public to Comment on Plan for Cleanup at Eighteen Mile Creek Superfund Site in Lockport, New York, July 26, 2013.
9. EPA Press Release, EPA Encourages Public to Comment on Plan for Groundwater Cleanup Near New Cassel Industrial Area in Nassau County, N.Y., July 26, 2013.
10. EPA Press Release, EPA Finalizes Cleanup Plan for the Cayuga County Ground Water Contamination Superfund Site, April 8, 2013.
11. Hazardous Waste: Obama signs e-manifest bill, Greenwire, October 5, 2012.
12. CHEMICALS: McCarthy declares TSCA "broken and ineffective," urges Congress to act, Greenwire, September 23, 2013.
13. White House, President's Climate Change Action Plan (June 2013), available at http://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf.
14. *Id.*
15. EPA, Draft Climate Change Adaptation Plan (Feb. 2013), available at http://epa.gov/climatechange/impacts-adaptation/fed-programs.html.

16. 76 FR 43490 (July 20, 2011).

17. http://www.cadc.uscourts.gov/internet/opinions.nsf/F523FF1F29C06ECA85257BA6005397B5/$file/11-1101-1446222.pdfCenter.

18. EPA, Fact Sheet, EPA Issues Supplemental Final Rule for New Qualifying Renewable Fuels under the RFS Program, available at http://www.epa.gov/otaq/fuels/renewablefuels/documents/420f13040.pdf.

19. EPA, Fact Sheet, Notice of Data Availability Concerning Renewable Fuels Produced from Barley Under the Renewable Fuel Standard (RFS) Program, available at, http://www.epa.gov/otaq/fuels/renewablefuels/documents/420f13039.pdf.

20. EPA Press Release, EPA, PUSH Buffalo and Buffalo Niagara Riverkeeper Announce Green Infrastructure Initiative on Buffalo's West Side, March 11, 2013.

21. EPA Press Release, EPA Survey Finds More Than Half of the Nation's River and Stream Miles in Poor Condition, March 26, 2013.

22. DOJ Press Release, Historic Verdict in environmental crime case as Tonawanda Coke and manager found guilty of violating the clean air act and resource conservation and recovery act, March 28, 2013, http://www.justice.gov/usao/nyw/press/press_releases/2013/mar/Coke_Tona.html.

23. Graphic letters to judge pin residents' illnesses on Tonawanda Coke, The Buffalo News, September 23, 2013, http://www.buffalonews.com/city-region/environment/graphic-letters-to-judge-pin-residents-illnesses-on-tonawanda-coke-20130922.

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

DEC Update

By Randall C. Young

Flood Response

Repeated bands of torrential rain passed through the Mohawk Valley from June 28 through July 3, 2013, causing severe flooding and damage to homes and infrastructure. Governor Cuomo issued a disaster declaration on June 28, 2013, and Commissioner of Environmental Conservation Joseph Martens then issued an emergency declaration pursuant to ECL §§70-0111(d) and 70-1116. DEC Staff responded by issuing emergency authorizations and general permits to protect property and facilitate recovery efforts. Although the immediate crisis has passed, DEC Staff are continuing to work with local governments and land owners regarding efforts to stabilize affected areas of erosion and create effective and environmentally sound stream restoration projects.

Proposed Liquefied Natural Gas Regulations

On September 26, 2013, DEC issued draft regulations that would create a permitting program that would allow for the construction and operation of new liquefied natural gas (LNG) facilities in the State pursuant to Article 23, Title 17 of the Environmental Conservation Law. There is currently no system to allow for construction of such facilities in the state.

Under the proposed regulations, LNG transportation activities would not require a permit. However, intrastate transportation of LNG to supply a permitted facility would be prohibited unless the transportation route has been certified pursuant to the regulations. Storage or transportation of natural gas in the vapor state, under pressure or not, will not be subject to the proposed regulations. The draft regulations can be found at http://www.dec.ny.gov/regulations/93166.html.

A public meeting regarding the draft regulations was held in Syracuse on October 16, 2013, and a public meeting and hearing will be held in Albany on October 30, 2013. Written comments may be sent to Russ Brauksieck, NYSDEC Division of Environmental Remediation, 625 Broadway, Albany, NY 12233-7020. Comments were also accepted via e-mail to derweb@gw.dec.state.ny.us. The public comment period on the proposed regulation ran through November 4, 2013.

Revised CAFO Regulations

On May 8, 2013, DEC issued regulations pertaining to operations at Concentrated Animal Feeding Operations.[1] Among the changes, non-discharging Animal Feeding Operations (AFOs) with 200-299 are not required to obtain SPDES permit coverage unless: 1) the facility requests and is granted permit coverage as a Small CAFO or 2) the facility is designated as a Small CAFO by the Department. Other revisions clarified definitions used in the program and eliminated overlap between the SPDES and Materials Management programs.

On July 26, 2013, environmental groups including River Keeper, Inc., Water Keeper Alliance, Inc., and Sierra Club Atlantic Chapter filed an Article 78 petition challenging the revised regulations. Petitioners allege, among other things, that the regulations violate Article 17 of the Environmental Conservation Law by the creation of point sources—non-discharging medium CAFOs—without a permit.[2] Petitioners also allege that DEC failed to comply with the substantive and procedural requirements of SEQRA.

Regional Greenhouse Gas Initiative (RGGI)

The Regional Greenhouse Gas Initiative (RGGI) is a cooperative effort among the states of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont to cap and reduce CO2 emissions from certain stationary sources through a cap and trade system. A program review in 2012 resulted in determination that the emissions cap for the states should be adjusted. The RGGI states have committed to propose amendments to statutes and/or regulations that establish their CO_2 Budget Trading programs. To meet this commitment, DEC has proposed amendments to 6NYCRR Parts 200, 242, and 507.[3]

Operating Permit Program Fees

Revisions to the regulatory fees charged to major sources of oxides of nitrogen, volatile organic compounds, sulfur dioxide, particulates and hazardous air pollutants were adopted as proposed in the June 26, 2013, Environmental Notice Bulletin. The 2013 fee per ton, up to seven thousand tons of each regulated air contaminant emitted in 2012, are as follows:

$65 per ton for 5,000 total tons or more of annual emissions,

$55 per ton for 2,000 but less than 5,000 total tons of annual emissions,

$50 per ton for 1,000 but less than 2,000 total tons of annual emissions, and

$45 per ton for less than 1,000 total tons of annual emissions

New SEQR Forms

DEC promulgated new “Short” and “Full” Environmental Assessment Forms on January 25, 2012. As of October 7, 2013, applicants and project sponsors must use the new forms when applying to an agency for review, approval or funding of an action. DEC has made down-

loadable SEQRA forms available on its website: http://www.dec.ny.gov/permits/6191.html. To assist with proper utilization of the new forms, DEC had also developed a website containing workbooks with information instructions and guidance at: http://www.dec.ny.gov/permits/90125.html.

Environmental Audit Incentive Policy

The DEC's new Environmental Audit Incentive Policy, Commissioner Policy 59, will take effect on November 14, 2013. With some exceptions, the policy provides for waiver of the majority of penalties for violations discovered during an environmental audit or through a request for compliance assistance. Stakeholders including the business community, environmental advocates, environmental justice organizations, farmers, and governmental organization provided input during development of the policy. The policy is available at http://www.dec.ny.gov/regulations/93791.html or www.dec.ny.gov/enb/20131016_not0.html.

Endnotes

1. 6 NYCRR Part 750-1 and 6 NYCRR Parts 360-4 and 360-5.
2. See Verified Petition and Complaint, River Keeper Inc., et al v. Martens, www.earthjustice.org/sites/default/files/NYSCAFO-Petitition-Complaint.pdf.
3. http://www.dec.ny.gov/energy/rggi.html.

Randall C. Young is Regional Attorney for Region Six of the New York State Department of Environmental Conservation. This column is the work of the author and is not published by or on behalf of the New York State Department of Environmental Conservation.

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Member Profile

Long-Time Member: Marla Wieder

The New York State Bar Association is very proud to introduce Ms. Marla Wieder as one of our most outstanding members. Ms. Wieder has served as an Assistant Regional Counsel with the United States Environmental Protection Agency (EPA), Region 2, since 1995. In this role she is primarily responsible for negotiating the cleanup of major hazardous waste sites in New York and the Caribbean. She has received numerous awards for her accomplishments, including 3 gold and 2 bronze medals from EPA acknowledging her work on the Hudson River PCBs Superfund Site and the Motors Liquidation Company Bankruptcy. Never one to shy away form a challenge, Ms. Wieder has recently accepted the obligations of Office of Regional Counsel Intern Coordinator and Regional Criminal Enforcement Counsel.

Ms. Wieder is one of several esteemed Section members to serve a professor role at Pace University School of Law. Since 2000 she has been an adjunct professor teaching a course concerning the law of hazardous waste management and remediation. She has also contributed to the prestigious U.S./Brazil Comparative Environmental Law Course and the Brazil-American Institute for Law and Environment (BAILE) since 2002. Prior to these positions, she worked for the New York State Department of Environmental Conservation in Region 3.

Although Ms. Wieder lives and works in New York City, she is far from a perennial city-dweller. International travel is at the top of her list of interests, followed by genealogy research, photography, antique restoration, animal rights issues, landscaping, and organization of just about anything that can be organized. Clearly living by her beliefs, she has accumulated two rescue cats but dreams of owning a pet pig (a small one). For the time being that dream is on hold until her co-op board comes around to approving the pet.

When asked about the trends that she sees in environmental law, Ms. Wieder commented that the EPA is headed in the right direction regarding climate change, but new measures to foster effective dialogue between parties will ultimately lead to more effective legislation and less waste. Another trend that has enhanced the effectiveness of the EPA and lowered stakeholder compliance costs is electronic tracking of hazardous waste under the Resources Conservation and Recovery Act and the Toxic Substances Control Act. Ms. Wieder also notes that the past several years have shown increasing willingness of purchasers to buy Superfund sites, which speaks both to the effectiveness of EPA's programs, and the growing acceptance of brownfield remediation as a legitimate and profitable alternative to breaking new ground.

The Environmental Law Section thanks Ms. Wieder for all of her hard work and commitment to fostering environmental responsibility to diverse parties ranging from multi-national real estate investment firms, to first-year law students who are experiencing their first impression of environmental law.

Justin Birzon

Committee Reports

Global Climate Change Committee Report

The Global Climate Change Committee, led by co-chairs Mike Gerrard, Kevin Healy, Ginny Robbins, and Carl Howard, have been working on an initiative whereby heads of other sections of NYSBA have agreed to look at how statutes, regulations, and guidance documents should be modified or created to help New York cope with the effects of future climate change (such as extreme weather events, sea level rise, and intense and protracted heat waves). The Committee has hosted several conference calls exploring these issues and it plans to produce a white paper with its findings. In addition, members of the GCC have inquired into whether progress is being made to implement the recommendations of the 2100 Commission Report. While this Report reflects excellent thinking about preparing for future superstorms and other climate change-related incidents, the Committee is concerned that implementation of its recommendations could be sidetracked due to other state priorities. For this reason, the GCC is contemplating hosting a conference to shine a light on the recommendations of the Report and the pressing need for follow-up action.

* * *

Committee on Legislation Report

2013 Legislative Forum

Disaster Preparation and Response: How Disasters Such as Sandy Are Shaping Legislation and Environmental Policy—A Discussion of New York's Sustainability, Adaptability and Resiliency Efforts

By John Louis Parker, Co-Chair

Introduction

The Section's annual *Legislative Forum*, held in May 2013, in the Great Hall at the New York State Bar Center in Albany, was a well-attended success. Most importantly, it put the Environmental Law Section into the important role of hosting a thoughtful and interactive discussion on issues of sustainability, adaptability, and resilience—topics that will shape the New York metropolitan area for decades to come.

In October 2012, a historic Super Storm, Sandy, battered the New York City metropolitan area. Almost a year has passed since Sandy, and despite a number of rebuilding efforts, particularly in summer resort locations, much of the coastal area remains vulnerable to extreme storms and the ever increasing sea level. The *Legislative Forum* brought together New York legislative and executive branch leaders, academic leaders, and advocates to discuss how Sandy is shaping environmental policy.

Background

Disaster preparation and response are severely tested by storms like Sandy. The increased frequency of these extreme weather events has been predicted for some time. Sandy, the largest Atlantic hurricane on record, overwhelmed coastal areas, flooded homes, dislocated families, and compromised important infrastructure systems. In response, Governor Cuomo sought $60 billion from the Federal Government for disaster response and rebuilding efforts. In summer 2013, approximately $2 billion of the requested funds arrived to aid residential and small business property owners.

New York State and New York City government undertook a number of pre-and post-Sandy efforts aimed at assessing the challenge of extreme weather, a changing climate, and potential impacts of sea level rise.

Pre-Sandy Government Review and Recommendations

PlaNYC: A Greener, Greater New York (2007), New York City, available at http://nytelecom.vo.llnwd.net/o15/agencies/planyc2030/pdf/ full_report_2007.pdf.

Responding to Climate Change in New York State, New York State Energy Research and Development Authority, available at http://www.nyserda.ny.gov/climaid.

Sea Level Rise Task Force Report, December 2010, Sea Level Rise Task Force, available at http://www.dec.ny.gov/docs/administration_pdf/slrtffinalrep.pdf.

Climate Action Plan Interim Report (Nov. 2010), New York State Climate Action Council, available at http://www.dec.ny.gov/energy/80930.html.

PlaNYC: A Greener, Greater New York, Update April 2011, New York City, available at http://nytelecom.vo.llnwd.net/o15/agencies/planyc2030/pdf/planyc_2011_planyc_full_report.pdf.

Post-Sandy Government Review and Recommendations

Recommendations to Improve the Strength and Resilience of the Empire State's Infrastructure, the "NYS2100 Commission Report," available at http://www.governor.ny.gov/assets/documents/NYS2100.pdf.

*Moreland Commission on Utility Storm Preparation and Response—Interim Rep*ort, January 7, 2012, available at more-

land.ny.gov/sites/default/files/MAC-Interim-Report1-7-2013.pdf.

Moreland Commission on Utility Storm Preparation and Response—Final Report, June 22, 2013, available at http://www.newsday.com/long-island/moreland-commission-s-final-report-on-lipa-storm-response-1.5554665?p=316261.

A Stronger, More Resilient New York, June 2013, New York City, available at http://nytelecom.vo.llnwe.net/o15/agencies/sirr/SIRR_spreads_Hi_Res.pdf.

Panel Discussion

Stephen Liss, representing

Assemblyman Robert K. Sweeney, Assembly District 11—Amityville, Lindenhurst, Copiague and West Babylon

Chair, New York State Assembly Environmental Conservation Committee

Mr. Liss is well known to members of the Environmental Law Section. Prior to serving as Counsel to the Chair of the Environmental Conservation Committee, he was Counsel to Assemblyman Harrenberg. Mr. Liss was a Trustee at the Long Island Power Authority when it decommissioned the Shoreham Nuclear Power Plant on time and under budget.

Mr. Liss discussed the Sewage Right-to-Know-Act, which was passed and is awaiting the required regulations, an invasive species law and sea grass preservation law that were passed, proposed laws to ban flame retardants in furniture and certain chemicals that are environmental and health hazards to children, and a proposed bill to regulate, as water pollutants, non-point source pollution, such as pesticides and fertilizers. He also discussed the possibility of a new Environmental Bond Act, and the need to increase green purchases by the State.

Daniel Schlesinger, representing

Senator Mark Grisanti, 60th Senate District—Buffalo, Tonawanda, Niagara Falls and Grand Island

Chairman of the Senate Environmental Conservation Committee

Mr. Schlesinger has been Counsel to the NYS Senate Environmental Conservation Committee for the past two years. A graduate of Albany Law School, he was Managing Editor for Research and Writing of the *Albany Government Law Review* and wrote an article on the Lighthouse Pointe Property case for *The New York Environmental Lawyer*.

Mr. Schlesinger also discussed the recently passed Sewage Right-to-Know-Act, and discussed the Senate's Earth Day Legislative package of bills that extend the timeline for solar incentive, a ban on shark fin trade, and a collection effort for devices containing mercury. He also discussed brownfields reform, a proposed bill to ban specified chemicals added to many children's products, a proposed bill to address flushing unused or dated drugs into waterways, and a proposed bill to consider sea level change in building permits.

Eric Goldstein

New York City Environmental Director

Natural Resources Defense Council

Mr. Goldstein has worked for more than three decades on urban environmental issues, including solid waste, air pollution, drinking water, and environmental justice. He co-teaches the Environmental Law Clinic at New York University School of Law.

Mr. Goldstein discussed the need for expanding voluntary property buyouts in flood zones, increasing NYSDEC jurisdiction to freshwater wetlands smaller than the current 12.4 acre threshold, providing Bond Act funding to green infrastructure, authorizing local municipalities to form and fund storm water authorities to control run off, amending the State Environmental Quality Review Act to include extreme weather planning, and advancing a system for emergency air quality monitoring for debris and demolition resulting from storm events.

Eleanor Stein

Administrative Law Judge

Public Service Commission

Ms. Stein has presided over or mediated many energy and environmental proceedings. She teaches the Law of Climate Change: Domestic & Transnational at Albany Law School and the State University of New York at Albany.

Ms. Stein discussed the work of the New York State 2100 Commission and its focus on the need for resilient systems and infrastructure, how current state efforts are building upon the comprehensive efforts of earlier State work such as the Climate Action Council, and how there is a need for a regulatory effort to require investment in damage prevention and risk assessments, and that these expenses be built into the rate base. She also discussed that the current extreme weather and climate change is unpredictable, and that this reality is the new normal.

Charlie Gottlieb

Staff Attorney

Government Law Center of Albany Law School

Mr. Gottlieb conducts legal research and produces scholarship on a broad range of governmental law and policy issues including environmental, energy, land use, and municipal law at the Government Law Center. He is an Adjunct Professor at Albany Law School and Siena College.

Mr. Gottlieb's land use planning discussion for storms and weather events addressed the need for comprehensive planning, stricter standards for non-conforming uses, and consideration of moratoriums on building in vulnerable areas. He also discussed local municipal regulation of freshwater wetlands and the need for active consideration of rolling easements to address changing high water mark boundaries.

Robin Adair

Special Counsel

Moreland Commission on Utility Storm Preparation and Response

Ms. Adair was a Senior Attorney at the Department of Environmental Conservation before leaving to become Special Counsel for the Moreland Commission on Utility Storm Preparation and Response. She led a statewide dam safety enforcement initiative, managed New York City compliance involving combined sewer overflows, and worked with staff to regulate concentrated animal feeding operations.

Ms. Adair discussed the mission of the Moreland Commission, which is to investigate the responses to Hurricane Irene, Tropical Storm Lee, and Super Storm Sandy by the New York State Energy, Research, and Development Authority, the Public Service Commission, and the Long Island Power Authority. She explained how Executive Law Section 86 authorizes investigations and provides unique powers including issuing subpoenas and calling witnesses. On a historical note, there have been 59 Moreland Commission investigations called since 1907.

Edward McTiernan

Assistant Commissioner and General Counsel

Mr. McTiernan became General Counsel for NYSDEC in spring 2013. He formerly was a partner at Gibbons, P.C., where he focused on natural resource damage claims, the Comprehensive Environmental Response, Compensation, and Liability Act, cost recovery actions, environmental remediation, administrative actions, and New Jersey environmental law.

Mr. McTiernan discussed ongoing State Environmental Quality Review Act reform efforts, praised NYSDEC accomplishments on the Regional Greenhouse Gas Initiative, discussed increased funding for the Environmental Protection Fund, and mentioned the Consent Order with NYC Department of Environmental Protection addressing storm sewers, runoff and requiring implementation of green infrastructure projects. He also noted that the Super Storm Sandy emergency permit expiration date was October 21, 2013.

Submitted on behalf of Jeffrey Brown, John Parker, Andrew Wilson, Co-Chairs, Committee on Legislation.

District Court Decisions Provide Further Guidance on Scope of "Arranger" Liability Under Superfund

By David J. Freeman and Harry H. Clayton IV

The Supreme Court's decision on "arranger liability" under Superfund in *Burlington Northern & Santa Fe Railway Company v. United States*[1] continues to reverberate. The most recent manifestations are a trio of decisions by the U.S. District Court for the Eastern District of North Carolina in *Carolina Power & Light Co. v. Alcan Aluminum Corp.* and *Duke Energy Progress, Inc. v. Alcan Aluminum Corp.*[2]

In a January 31, 2013 decision,[3] the Court granted summary judgment to defendant Georgia Power Co. ("Georgia Power") on the basis that its sale of used transformers to the operator of the Ward Transformer Superfund Site (the "Site") did not amount to an "arrangement for disposal." In examining the "fact-specific circumstances," the Court determined that the evidence established that these transactions were sales of a "useful product" rather than attempts to dispose of hazardous substances.

Then, on February 18, 2013, the Court denied summary judgment to defendant Broad River Electric Cooperative, Inc. ("Broad River") on the basis that a genuine issue of material fact existed as to whether the transformers that Broad River sent to the Site for repair contained a hazardous substance.[4] Notably, the Broad River decision lacked a detailed analysis of whether Broad River intended to dispose of a hazardous substance as part of its contract for repair of its transformers.

In response to Broad River's motion for reconsideration of the February 18 decision, the Court issued a third opinion on May 6, 2013[5] that provided clarification of its thinking on the issue of "intent to dispose" in a repair transaction setting.

These three decisions help further define the contours of arranger liability under Superfund in the wake of *Burlington Northern*.

Site Background

The Site is an extensively contaminated facility in Wade County, North Carolina that for many years was the location of a transformer repair and recycling facility.[6] Extensive cleanup has already taken place, and additional remediation is under way and planned. Total costs of the cleanup are expected to exceed $100 million.

Two potentially responsible parties, Carolina Power & Light and Consolidation Coal, entered into an administrative settlement with EPA to perform an initial removal action. They then sued more than 100 companies for cost recovery and contribution under Sections 107 and 113(f) of CERCLA.[7] The Section 107 claims were dismissed at an earlier stage of the litigation on the basis that Section 113 provides the exclusive avenue for cost recoupment by parties that have settled with the government.[8]

For the purpose of expediting discovery, the Court requested test case volunteers from three general categories of defendants: (1) those who allegedly sent transformers to the Site for repair; (2) those who sent transformers to the Site on consignment; and (3) those who sold transformers to the owner / operator of the Site, Ward Transformer Company ("Ward").[9] The specific proofs for each category of defendants vary slightly, as Plaintiffs maintain that the repair and consignment defendants are liable as both facility owners and arrangers under CERCLA, while the sale defendants are liable only as arrangers.[10]

Georgia Power's Summary Judgment Motion

Following the Court's decision to utilize discovery test cases, Georgia Power volunteered to be the "sales" test case defendant. Over the years, Georgia Power sold Ward numerous transformers that allegedly contained dielectric fluids with polychlorinated biphenyls ("PCBs"). These sales were arms-length transactions, generally through auctions at which there was more than one bidder. Prior to their sale, Georgia Power cleaned most of these transformers by a "double-pumping" method, which removed free-flowing oil but left a sheen or residue of oil on the metal surfaces of the transformers. However, some of the transformers sold by Georgia Power were not drained prior to the sale and allegedly contained dielectric fluids with PCBs.[11]

In order to establish a prima facie case for arranger liability under CERCLA, a plaintiff must show: (1) that a defendant owned or possessed hazardous substances; (2) that, by contract, agreement or otherwise, it arranged for disposal or treatment, or arranged for transport for disposal or treatment of those substances at a facility; (3) that there was a release or threatened release of a hazardous substance at the site; and (4) that the release or threatened release caused the incurrence of response costs.[12] Following the conclusion of discovery, Georgia Power moved for summary judgment contesting its arranger liability under CERCLA. Specifically, citing the Supreme Court's decision in *Burlington Northern*, Georgia Power claimed it could not be held liable as an arranger because it lacked the intent to dispose of any hazardous substance at the Site.

In its decision, the Court acknowledged that the *Burlington Northern* analysis requires a showing that a defendant has taken "intentional steps to dispose of a hazardous substance" and outlined several factors used to determine such intent, including (1) knowledge of disposal, (2) the value of the materials sold, (3) the usefulness of the materials in the condition in which they were sold, and (4) the state of the product at the time of transfer.[13]

In evaluating these four criteria, the Court began by looking at the value of the transformers at the time of the

sale, focusing on the method of the sale (via public auction), the price paid (between $150 and $3,200 per transformer) and the fact that Ward was able to refurbish and resell the transformers for a profit.[14]

The Court then turned to an analysis of the usefulness of the product at the time of sale and reviewed prior case law which found used transformers to be useful products, even as scrap metal. Based on these prior determinations, the Court found that the transformers in the instant case were useful products, as most if not all of them had not reached the end of their useful lives and continued to be used as transformers after their sale to Ward.[15]

The Court then looked to the state of the product at the time of the transfer, focusing on where the hazardous materials at issue (PCBs) were contained or leaking. The Court noted the fact that Georgia Power either capped the transformers to prevent leaking or drained and disposed of PCB-laden oil in the transformers before selling them. In the Court's view, the possibility that the transformers which had been drained may have contained a sheen of oil that had the potential to be released into the environment did not rise to the level of leaking as considered in *Burlington Northern*, and was overcome by the steps taken by Georgia Power to prevent spills by either draining or capping the transformers before shipping them to the Site. For the Court, these precautionary steps further showed that it was not Georgia Power's intent to dispose of hazardous materials in sending the transformers to Ward.[16]

Only after completing its analysis of the value, usefulness and condition of the transformers at the time of the sale did the Court consider Georgia Power's knowledge of the disposal at the Site—i.e., whether Georgia Power knew or assumed that hazardous waste would be "leaked, spilled, dumped or otherwise discarded" as a result of its transactions with Ward. The Court distinguished between knowledge of the potential for the release based on experience in or knowledge of the industry and products, and actual knowledge that spills were occurring at the Site (as was the case in *Burlington Northern*). In the instant case, Georgia Power's knowledge of spills was limited to the *potential* for release, and it was not shown to have specific knowledge of contamination problems at the Ward site. Notably, the Court found that where all other factors counseled toward a finding that Georgia Power lacked the requisite intent for arranger liability, the Court would not rely on such "knowledge alone" to hold Georgia Power liable.[17]

Broad River's Summary Judgment Motion

Broad River had volunteered to be the "repairs" test case defendant. During the 1980s, Broad River sent Ward three transformers for repair. Broad River did not produce documentation to confirm or refute the presence of PCBs in the transformers that it sent to Ward, but instead relied on its internal PCB policies and EPA regulations regarding monitoring PCBs as evidence that the transformers did not contain PCB-contaminated fluids. By contrast, plaintiffs produced documents and testimony that purported to show that upon receipt, Ward measured and tested the fluids in each of the Broad River transformers and found measurable concentrations of PCBs in them.[18] In two instances, Ward refilled the transformers before returning them to Broad River. In the third instance, after an initial inspection by Ward, Broad River decided not to repair the transformer and left it with Ward to offset the inspection cost.[19]

Following discovery, Broad River moved for summary judgment, contesting both its ownership and arranger liability under CERCLA. Specifically, Broad River claimed it could not be held liable as an arranger because, inter alia, (1) there was no evidence of disposal of a hazardous substance, and (2) it lacked the intent to dispose of any hazardous substance at the Site.

After setting forth the elements of ownership and arranger CERCLA liability, the Court began its analysis by reviewing the facts relevant to the common elements of both ownership and arranger liability. As part of this analysis, the Court determined that whether Broad River's transformers contained a hazardous substance was a genuine issue of material fact. The Court correctly reasoned that if the transformers did not contain any PCBs, Broad River could not be liable as an arranger; but if the transformers did contain PCBs, Broad River could be held liable, provided that the other elements of arranger liability could be shown. Ultimately, based on the conflicting evidence produced during discovery, the Court found that the presence or absence of PCBs was an unresolved issue and denied summary judgment.[20]

One would have expected the Court then to examine the issue of Broad River's intent in sending the transformers to Ward. But such a discussion was nowhere to be found. The Court's analysis lacked a discussion of evidence both negating an intent to dispose (e.g., sealing the transformers prior to shipment to prevent spills), and that which would tend to prove such an intent. Rather, the Court seemed to view the draining, disposal and replacement of the transformer oil as an understood and necessary element of the repair transaction. It appeared that the nature of the transaction itself was sufficient to preclude a grant of summary judgment to Broad River on the issue of intent.

Broad River's Motion for Reconsideration

Following issuance of the Court's February 18, 2013 decision, Broad River filed a motion for reconsideration, arguing that the Court failed to consider case-specific information that negated Broad River's intent to dispose of hazardous materials at the Ward Site. Specifically, Broad River cited (i) its spill prevention and control policy, which, like Georgia Power's, required the removal of the transformer bushings and sealing of ports to prevent spills or leaks prior to the shipping of the transformers for repair, and (ii) the testimony of Broad River's CEO, who visited the Ward Site and found it to be a professional, clean and well-run operation.[21] Broad River also noted that, like those of Georgia Pacific, its transformers were useful products in that they "continued to be used as transformers after their repair / resale."[22]

In support of Broad River's motion for consideration, defendant Carr & Duff filed a brief which took specific aim at the apparently disparate approach taken by the Court in its two earlier decisions. Why, it asked, should the question of "intent to dispose" be analyzed any differently for "repair" defendants, especially those who can prove that they took steps to drain transformer oils prior to delivering the transformers to Ward for repair?[23]

The Court denied the motion for reconsideration because no new law or facts had been presented. It nevertheless felt the need to address the alleged disparity between its rulings on the summary judgment motions brought by Georgia Power and Broad River, and to "aid the parties' understandings as litigation moves forward."[24] The Court again noted that arranger liability required an intent to dispose, and that the determination of intent is "fact intensive and case specific." But it reiterated, even more emphatically than in its initial decision, that "the difference between a sale and a repair for the purposes of CERCLA liability is critical to the liability determination in these cases."[25] The Court buttressed its analysis by referencing a consideration not mentioned in its earlier decision: the fact that Broad River continued to own the transformers and their contents and retained—and exercised—the authority to instruct Ward "as to the specific handling of its transformers while under repair."[26] It concluded that "[t]hese facts tend to show that defendant Broad River took 'intentional steps' to dispose of the transformer oil."[27]

Insights into CERCLA Arranger Liability

These recent decisions are particularly instructive because, despite the defendants having proffered similar case-specific evidence, the Court engaged in a significantly different legal analysis of their respective liability based on its view of the underlying nature of the transactions.

Both defendants dealt with useful products—transformers that were capable of reuse after being repaired. Both adduced evidence of policies (e.g., draining of transformers before shipment, inspections of the disposal site) whose goal was to prevent the disposal of hazardous wastes. But, in the Court's view, the characterization of one defendant's transactions as sales, and the other's as repairs, was sufficient (at least on the facts presented) to trump any transaction-specific evidence of intent to the contrary.

There are those who thought that *Burlington Northern*'s admonitions that intent to dispose must be proven, and that proof is "fact intensive and case specific," would usher in a new era of Superfund litigation, in which broad assumptions and inferences would give way to a more nuanced look at parties' actual intent in entering into specific transactions. There are others who believed that *Burlington Northern* did not move the needle all that much, and that generalized inferences and assumptions would continue to play a significant role in courts' decision-making. For better or worse, this trio of decisions lends support to the latter view of Superfund jurisprudence in this important and still-developing area.

Endnotes

1. *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599 (2009).
2. On May, 2, 2013 Carolina Power & Light Company filed a motion to amend the case caption due to a change in its corporate name to Duke Energy Progress, Inc. The motion was granted by the Court by Order dated May 2, 2013.
3. *Carolina Power & Light Co. v. Alcan Aluminum Corp.*, 2013 BL 28835 (E.D.N.C. Feb. 1, 2013) (hereinafter "*CP&L II*").
4. *Carolina Power & Light Co. v. Alcan Aluminum Corp.*, 2013 BL 44440 (E.D.N.C. Feb. 19, 2013) (hereinafter "*CP&L III*").
5. *Duke Energy Progress, Inc. v. Alcan Aluminum Corp.*, 2013 BL 121456 (E.D.N.C. May 6, 2013) (hereinafter "*CP&L IV*").
6. *See CP&L II* at *2.
7. *Id.* at *1.
8. *See Carolina Power & Light Co. v. 3M Company*, No. 5:08-CV-460 (E.D.N.C. filed March 24, 2010) (hereinafter "*CP&L I*"), slip op. at 20-23.
9. *See CP&L II* at *1-2.
10. *Id.* at *2. In a prior opinion, the court held that individual transformers could be "facilit[ies] at which…hazardous substances were disposed of" for purposes of CERCLA Section 107(a)(2). *CP&L I*, slip op. at 12-15.
11. *CP&L II* at *3-5.
12. *See* 42 U.S.C. § 9607(a)(3).
13. *CP&L II* at *6-7 (citing *Burlington Northern*, 556 U.S. at 610 and *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769, 775 (4th Cir. 1998)).
14. *Id.* at *7-8.
15. *Id.* at *8 (citing *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1319 (9th Cir. 1990) and *Schiavone v. Northeast Utilities Service Co.*, 73 ERC 1626 (D. Conn. Mar. 22, 2011)).
16. *Id.*
17. *Id.* at *9.
18. *CP&L III* at *3-4. The meaning and significance of that evidence was contested by Broad River. Memorandum in Support of Motion for Summary Judgment of Defendant Broad River Electric Cooperative at 11-13, *Carolina Power & Light Co. v. Alcan Aluminum Corp.* No. 5:08-CV-460 (E.D.N.C. filed February 17, 2012).
19. *CP&L III* at *3-4.
20. *Id.* at *3-4.
21. Memorandum in Support of Motion for Reconsideration of Defendant Broad River Electric Cooperative at 5-6, *Carolina Power & Light Co. v. Alcan Aluminum Corp.* No. 5:08-CV-460 (E.D.N.C. filed March 5, 2013).
22. *Id.* at 5.
23. Memorandum in Support of Motion for Reconsideration of Defendant Carr & Duff, Inc. at 4-5, *Carolina Power & Light Co. v. Alcan Aluminum Corp.* No. 5:08-CV-460 (E.D.N.C. filed March 5, 2013).
24. *CP&L IV* at *1.
25. *Id.* at *2.
26. *Id.* at *3.
27. *Id.*

David J. Freeman is a Director, and Harry H. Clayton IV is an associate, in the Real Property and Environmental Law Department of Gibbons P.C. Mr. Freeman served as counsel to Kobe Copper Products, Inc. in the Ward cases before that party was voluntarily dismissed at an earlier stage of the litigation.

Green Alert: The Need to Rescue New York's Renewable Energy Portfolio Standard

By Edward Hyde Clarke

New York law requires that a State Energy Planning Board (Board) convene and discuss clean and renewable energy in the state and make policy recommendations on the state's energy plan moving forward.[1] One component of the state energy plan is the Renewable Energy Portfolio Standard (RPS). Originally established in 2004, the initial goal of the RPS was to increase "the amount of renewable electricity used by consumers to 25% by 2013."[2] Since the initial regulations have been adopted, the goal has been increased to 30% by 2015.[3]

In order to make recommendations moving forward, the Board must conduct "[a]n assessment of current energy policies and programs."[4] Governor Andrew M. Cuomo, the first term Governor of New York, has shown a great commitment from his administration to increase renewable energy in New York State and to encourage in-state generation to reach the RPS goal. The Governor signed the Power Act of 2011 into law, which has led to three promising initiatives in the state: the reauthorization and change to Article X of the Public Service Law, the NY-Sun initiative and the New York Energy Highway.

Although the initiatives will ultimately increase renewable energy consumption in the state, it is clear from several studies that the administration will come up short of reaching the 2015 goal. The latest report issued by the New York State Energy Research and Development Authority (NYSERDA) in 2012 projects that New York is on target to meet its goal for small-scale generation projects.[5] Small-scale projects are often relatively low in overall production and are installed by the individual consumer.[6] However, the report makes no such assurance for the Main Tier component of the program, which accounts for the major utility-scale resources, or the projects that generate the most power.[7] As of 2012, the Main Tier component had 1,456 megawatts (MW)[8] in operation and another 384 MW being developed or under construction.[9] The Main Tier had reached 48% of its goal, meaning that the state must add close to 1,577 MW by 2015 in order to reach 30%.[10]

In spite of the fact that New York will not reach the goal by 2015, success and the continuance of this program are crucial to both energy security and economic recovery in New York. Governor Cuomo himself has publicly recognized the jobs and tax relief that can be generated by increasing clean energy on the grid. The Board must consider policy recommendations that will help New York realize its clean energy goals, including out-of-state generation.

NYSERDA recently submitted a petition for modification of the RPS Main Tier program to the Board, lobbying that eligibility of Main Tier projects should be limited to in-state projects only.[11] It is NYSERDA's position that limiting eligibility to New York projects will lead to "(1) environmental improvement; (2) energy security; and (3) economic benefits to New York."[12] However, limiting projects to in-state generation will be detrimental to New York's overall clean energy goals.[13] New York should be welcoming out-of-state projects like the Champlain Hudson Power Express (CHPE).[14] New York is having the most difficulty in obtaining the Main Tier component of the RPS program. The CHPE is a 1,000 MW project, of which 94% of the generated power comes from hydro and wind. This energy production represents over 66% of what is needed to reach the RPS goal.

The State Energy Planning Board should adopt a state energy plan that expands the scope of projects that qualify for the RPS goal and extend the 2015 deadline to 2017. The CHPE project has the ability to meet all of the goals identified by NYSERDA and, because capacity is so close, will ensure the state's clean energy goal is met upon completion. Extension will retain NYSERDA's ability to fund incentives to companies for delivering clean energy to consumers and, as a result, not overly delay obtaining a major policy goal.[15] New York's green energy infrastructure is at a crossroads. At a time when the RPS goal is not being met, the state should not be limiting resources but rather expanding program criteria and extending deadlines to ensure the program's success.

Where Is New York Now? Background and Initiatives Taken by Governor Cuomo

New York first publicly recognized the problems associated with dependence on foreign fuel and the impacts that it can have on the environment in its 2002 State Energy Plan.[16] In 2004, the Public Service Commission implemented regulations to create the RPS.[17] In order for an energy source to qualify for the RPS, it must have an attribute, which "include[s] any and all reductions in harmful pollutants and emissions, such as carbon dioxide and oxides of sulfur and nitrogen."[18] The main goal is to not only increase renewable energy in New York State, but to avoid negatively impacting the state's ability to be competitive in the marketplace.[19] By limiting Main Tier projects to in-state production only, New York would be significantly impacting its ability to compete in the marketplace.

The executive agency charged with being responsible for both tracking the progress and supporting the RPS is

NYSERDA. Through the end of 2011, NYSERDA reported that 47% of the goal for 2015 had been met. It is projected that if the 30% goal is met by 2015 that New York will gain approximately $6 billion in economic benefits.[20] Although these benefits are just estimates, this is a significant incentive at a time when state government faces a number of deficits and is forced to cut spending from a number of programs.

Governor Andrew M. Cuomo has taken a number of steps to increase renewable energy in New York State and presumptively ensure that New York meets its RPS standards by 2015. The Governor recognized that the "[k]ey to powering our economic growth is expanding our energy infrastructure."[21] Most notably, the Governor has signed the Power New York Act of 2011.

The Power New York Act of 2011 (A08510 same as S 5844), sponsored by Kevin Cahill in the Assembly and George Maziarz in the Senate, was signed in to law by Governor Cuomo on August 4, 2011. The purpose of the bill was to:

> Establish an on-bill recovery mechanism for the "Green Jobs / Green New York" program which was added by chapter 487 of the laws of 2009, reauthorize and modernize Article X of the Public Service Law, regarding siting of major electric generating facilities in a manner that enhances public participation and augments environmental justice, and require a study with respect to increasing generation from photovoltaic devices in New York.[22]

There are three main direct and indirect results from signing this bill: the reauthorization and change to Article X, the NY-Sun initiative and the New York Energy Highway. All three of these initiatives have been major steps towards helping New York increase renewable energy in the state and are undoubtedly part of the policy assessment performed by the Board in crafting New York's Energy Plan.

Article X

The original provision of Article X expired in 2003, which provided for a multi-agency planning board for siting power generators sized 80 megawatts (MW) or larger.[23] Facilities that were not covered by the law were forced to deal with the numerous levels of local and state government.[24] As explained in the Power New York Act, the new Article X encompasses facilities that generate 25 megawatts, which encompass more than power plants in its regulatory reach.[25] In addition, the new Article X gives power to the Department of Environmental Conservation to focus on reducing carbon dioxide produced by the facility.

"Like its predecessor, the law grants to a State Siting Board exclusive authority to certify power plants and it preempts local laws that would otherwise prevent or delay new power plant construction, including zoning."[26] As a general principle, a "municipal zoning ordinance is presumed to be valid, and will not be held unconstitutional if its wisdom is at least fairly debatable and it bears a rational relationship to a permissible state objective."[27] Local governments have the ability to set conditional use permits that implement noise restrictions, setback requirements, minimum lot size requirements, signage requirements, limitations on zoning districts, decommissioning plans, and requirements that the project comply with building and electric codes.[28]

The big change is that Article X now includes wind projects. Many wind projects that may have been held up by local laws can now be streamlined into the "one stop shopping" process that was once only available for power plants. Wind is a major component of the Main Tier part of the RPS standard. Wind developers will still have to conduct a site evaluation and ensure that there is a certain amount of wind power generated, before they will invest their money and capital in the project.[29] The benefit of Article X is now the company will have the ability to go to just one planning board, simplifying the process and hopefully encouraging more companies to go through the necessary administrative process.

In assessing the impact this will have on the overall goals of renewable energy development in the state, the board must understand that New York is not close to reaching its potential of 5,000 MW of land-based wind generation. Further, it is not clear to what extent any new wind projects would be developed in time to benefit the state in reaching the RPS goal.[30] The main issue is the amount of power that the projects are able to produce. NYSERDA claims that its programs have been instrumental in securing wind farms totaling an amount of 41.5 MW of power.[31] This is a relatively low fraction considering the state's actual capacity. New York lags behind when it comes to wind generation when compared to other states.[32] The American Wind Energy Association just released numbers on the amount of wind power that was added over the course of 2012.[33] The United States wind industry added 13,000 MW in 2012, which is the most that has ever been added in a single year.[34] The concern for New York is that it is not even in the top ten of wind producers in the country.[35] Colorado ranks tenth in the country at 496 MW of wind generation capability.[36] It is clear that New York has not harnessed the amount of new wind generation that is being utilized in other parts of the country.

The other issue that wind projects are facing is that one of the major federal tax breaks for projects expired on January 1, 2013.[37] There are many who feel the expiration will impact installations all over the country and that

overall projects will likely fall close to 90%.[38] It is thought that the expiration of the credit and the uncertainty that surrounds whether or not it will be extended and for how long it will be extended will bring the nation's wind farm projects to a "virtual standstill."[39] Unfortunately, the expiration of the tax credit is nothing new for the industry. The uncertainty of the financial support limits developers who have to plan and submit a number of documents for the lengthy environmental assessment process.[40]

Therefore, although Article X and streamlining the permitting of wind projects was a positive step taken by the Administration, it will not be significant enough to lead New York to achieving the RPS goal.

The NY-Sun Initiative

> We will continue to establish New York's technology leadership in this important emerging market while balancing investments in other renewable resources and protecting the taxpayer. This approach will create jobs, expand solar power and protect ratepayers—a win, win, win.[41]

The New York Sun Initiative involves contributions from at least three different bodies: NYSERDA, Long Island Power Authority (LIPA), and the New York Power Authority (NYPA).

NYSERDA conducted a Solar Study to analyze the benefits and cost of increasing PV devices in New York.[42] The study estimated the cost of achieving a 5,000 MW goal at $1.4 to $4.3 million per MW produced, depending on the status of the federal tax credit program and whether or not the program is able to continue at the current rate.[43] According to the base case scenario, the cost exceeds the benefits in reaching a goal of 5,000 MW.[44] The study did find that there will be benefits in the job market and for the environment.[45] Through 2025, an estimated 2,300 jobs would be created as a direct result from PV installation and maintenance.[46] It is estimated that there will be a 4% reduction in fossil fuel consumption, a drop in carbon dioxide by 3% and a notable reduction in nitrogen oxides, acid rain, and smog.[47] Despite the challenges, NYSERDA advises, "New York State should support continued investment in the steady and measured growth and deployment of PV as part of a sound and balanced renewable energy policy." It is unclear whether or not this advice will lead to the state reaching the goal of 5,000 MW or if the state will take a more cautious approach due to the significant costs.

NYSERDA is the executive chamber's most active arm in guiding the state's RPS program. NYSERDA has a program called the Solar PV Program Financial Incentives.[48] Applications are accepted from 2010 through 2015, and will actually provide cash incentives to "Eligible Installers of new grid-connected Solar Electric or Photovoltaic (PV) systems that are 7kW or less for residential, and 50 kW or less for commercial sites." This funding is provided through the money that is allotted to reach the RPS. The incentives are only available to those electricity distribution customers of the companies that contribute to the financial support of RPS goal.[49] The residential customers are expected to go through a home audit, which will analyze their daily energy habits and an inspection to identify where improvements can be made in terms of energy efficiency.[50] The incentives are paid directly to the company, which is then responsible for passing on the benefits to the consumer.[51]

NYSERDA also funds another program called the New York Sun Competitive PV Program, which has over $106 million available.[52] This program is actually an expansion RPS Customer-Sited Tier program, which now can include projects in upstate New York.[53] In order to qualify for this incentive program the system that is installed must produce more than 50 kW and must be installed within 8 months of the award.[54] NYSERDA has also identified specific strategic locations that can receive an additional 15% above the project reward.[55] There is a cap on funds that can be received, which is set at $3 million.[56] There are two technologies that are available for funding under this program: Photovoltaics (PV) and Renewable Biogas-fueled projects.[57]

In addition to the efforts that are being made by NYSERDA, NYPA and LIPA have their own initiatives geared towards increasing the amount of solar power in New York. NYPA is in the process of creating a Solar Market Acceleration Program (Solar MAP).[58] Solar MAP will work in conjunction with NYSERDA to reduce the cost of implementing solar technology in New York State.[59] The program is geared towards technology research, demonstration projects, and soft-cost reduction strategies.[60] Specific to Long Island, LIPA has what is called the Solar Pioneer Program for Homeowners.[61] Through the program, LIPA offers rebates to help with the initial cost of implementation.[62] In the event that the new system produces more electricity than the residential home requires, LIPA will give a credit back to the homeowner, which can be "banked" for a later date.[63] Overall, the goal is to encourage homeowners to install the PV panels, and thus gain credits towards the RPS goal.

The New York Sun Initiative and other solar programs are encouraging in relation to increasing the use of solar technology. However, it is not clear if solar is the solution to reaching notable generation goals. Solar technology is still considered to be in the early stages of development and progress, not necessarily the solution to achieve clean energy goals in the near future.[64] "[A] typical commercial photovoltaic solar cell has an efficiency of 15%, where about one-sixth of the sunlight striking the cell generates electricity, the cost of energy generated by the typical solar cell is an unaffordable $.38 per kilowatt

hour without government subsidies."[65] The investment that Governor Cuomo has outlined will be critical to increasing solar panels in New York, but it may not be the most economical or beneficial energy source to rely on in achieving the RPS goal.

New York Energy Highway

> The Energy Highway Task Force presents…immediate actions and policy recommendations to modernize the power generation and transmission systems to achieve vital safety, reliability, affordability, and sustainability goals on behalf of all New Yorkers.[66]

Governor Cuomo held a summit in April of 2012, in which numerous parties submitted proposals on how to improve the state's energy grid.[67] While the Energy Highway Task Force has a number of goals, most notably the initiative aims to increase renewable energy in-state.[68] Increasing renewable energy is just one way of modernizing the grid. Specifically the plan identifies Upstate New York for the potential siting of projects. "Modernizing our generation assets promotes environmental and efficiency goals and preparing well in advance for the potential closure of power plants is critical to safeguarding system reliability and protecting consumers."[69]

The "blueprint" proposal was finalized in October of 2012. The blueprint includes calls to "execute new contracts for up to $250 million within the next year with renewable energy developers under the Renewable Portfolio Standard (RPS) to leverage an additional $425 million in private-sector investment to build up to 270 MW; continue to invest annually with future contract solicitations in new large-scale renewable energy projects."[70] The RPS goal will surely benefit from any continued investment in energy sources that qualify for the program. While there is no indication that NYSERDA is close to running out of funds to support the project, a commitment from the state to invest will certainly help ensure its success.

The blueprint also calls for the permitting process to be expedited. This involves collaboration between energy, environmental and economic development agencies. This part of the initiative, coupled with Article X, is an effort to streamline the process and ensure that the projects are in fact implemented. New York must encourage companies and investors that development is possible in New York and that it will not take years to start production.

Finally, the blueprint identifies offshore wind as a great opportunity and calls for an extensive study to be conducted.[71] Offshore wind projects have been the center of controversy in a number of coastal communities and bring a range of similar challenges with siting.[72] It is unclear whether or not offshore wind will ever be successful, given the challenges that current wind projects such as the Long Island New York City Wind Collaborative currently face,[73] a project that has been met by fierce opposition from landowners who argue that their view and aesthetics will be ruined. "When considering wind power in the abstract, the public generally supports generating power from wind energy. However, individual proposals for generating power using offshore wind may face aesthetic and environmental objections."[74]

The blueprint calls for New York to provide certainty for development in renewable energy beyond 2015.[75] This type of commitment looks beyond just the RPS goal, but the continued building of New York's renewable energy efforts in the future. The blueprint has tasked this assignment to NYSERDA and the Department of Public Service (DPS). This initiative aims to encourage renewable energy generation, while at the same time building on projects already in place, such as the NY-Sun initiative.[76]

The New York Energy Highway discusses the potential of increasing investments in renewable technology to insure that New York meets its target deadline for the RPS.[77] However, the report discusses adding only 270 MW of renewable energy.[78] The state is still over 1,500 MW away from reaching its RPS goal, so while this investment is important, it will not be sufficient in meeting the 2015 deadline.

Cuomo Administration Moving Forward

In Governor Cuomo's first term in office he has taken a number of steps to ensure that New York State is a leader in green technology. The Governor understands that by increasing the use of green technology, the state will not only promote a cleaner environment, but the state can increase the number of job opportunities and build a more reliable power grid. "Wind turbines and solar panels together require thousands of components that can be designed, manufactured, distributed, sold, deployed, installed, and serviced by a workforce trained and educated" in the field.[79]

One of the main challenges that renewable technology faces in New York is the fact that investments are not maximizing on their return. "Currently, various New York State entities collect and spend $1.4 billion per year on renewables and energy efficiency. Approximately 80 percent of this funding—or $1.15 billion—comes in the form of one-time subsidies. In spite of this level of spending, the State is far from realizing its clean energy goals."[80] In order to address the current projection that the state will not meet its clean energy goals, the Governor laid out potential solutions in his 2013 State of the State address this January.

The first proposal by the Governor was the creation of the Energy Czar post in his administration. The Governor appointed Richard Kauffman to be the Chairman for Energy Policy and Finance for New York State.[81] In

accepting the position, Kauffman is leaving his current post as a senior advisor to Steven Chu, the Secretary of Energy.[82] "Mr. Kauffman was Chief Executive Officer of Good Energies, Inc., a leading investor in renewable energy and energy efficiency technologies."[83] It has yet to be seen the extent of Kauffman's power in the new position or how the energy subcabinet will work with the other state agencies charged with the implementation of renewable energy projects. However, Kauffman is known for being "one of the country's leading experts in private sector investment in clean energy."[84] Due to the high cost of developing a renewable energy grid, it is critical to spur private investment and persuade companies to expand in New York.

One of Kauffman's first jobs in his new position will be implementing the NY Green Bank, which was also proposed in the Governor's address.[85] "Governor Cuomo proposes to create a $1 billion NY Green Bank to leverage public dollars with a private-sector match to spur the clean economy."[86] "To fund the bank, a portion of Energy Efficiency Portfolio Standards, Renewable Portfolio Standards, and/or System Benefit Charge funds will be leveraged to attract private investment, and the State will support new borrowing by the Green Bank to support loans for energy efficiency improvements."[87]

A green bank would allow "the government [to] provide financial support for energy projects in an attempt to increase the flow of private capital into the sector."[88] A green bank has the ability "to fill a gap necessary for the commercial deployment of cost-competitive renewable energy technologies."[89] The federal government has had similar proposals before Congress in an attempt to create a national green bank.[90] While a green bank has the potential to leverage spending and spur development, it does require taxpayer assistance to fund the program. Therefore, the establishment of a Green Bank would have to be reconciled with the original goal of the RPS when it was established in 2004, which was for the "creation of renewable industries that are self-supportive based on market demand and market forces instead of relying primarily upon ratepayer and taxpayer assistance to survive."[91]

While the Governor has made significant progress towards increasing renewable energy in New York, most of the solutions proposed have been in-state driven. The key point about the RPS goal is that it is renewable energy that is "consumed" in New York. As opposed to what is being proposed by NYSERDA, the state should not limit its solutions and consider only projects that are generated on state land. In order to be serious about increasing renewable energy that is consumed in the state, New York must support projects that produce clean energy out of state, as well as in-state, because competition leads to a more cost-effective RPS program.[92]

NYSERDA'S 3 Goals

In the petition submitted to the State Energy Planning Board, NYSERDA identified three main goals that it believes will be achieved by limiting Main Tier facilities to in-state production.[93] Not only can all three of these goals be met by projects that are generated out of state,[94] but more importantly New York will fail to reach the RPS goal for a number of years if this policy is adopted. New York can support and incentivize and leverage in-state projects,[95] but to place an all out ban on out of state projects for the RPS standard would be detrimental to the overall goal of increasing clean energy consumption in New York.[96] "Barring out-of-state resources from participation in the RPS Program will affect a number of factors…includ[ing]: the cost of resources, the availability of renewable energy resources, and the amount of time required to develop sufficient" projects.[97]

The Champlain Hudson Power Express is one project that utilizes available renewable energy sources and can be completed in time to have a positive impact on New York's RPS goal.[98] Not only is this project well on its way to being approved for the necessary regulatory permits, but it is also supported by a number of groups and agencies in New York.[99] Banning out-of-state generated projects from qualifying for the RPS when New York is on the verge of acquiring such a project would be noxious to the state's clean energy policy goals.

Champlain Hudson Power Express

> Designed to deliver hydroelectricity and wind power from Canada into New York City, the $2.2 billion line would originate underwater at the border between the US and Canada near Champlain, New York, and continue south under Lake Champlain for 101 miles before traversing predominantly rights of way along land before continuing under the Hudson River into Astoria.[100]

The Champlain Hudson Power Express (CHPE) involves "a 1,000-megawatt (MW) high-voltage direct current (HVDC) Voltage Source Converter (VSC) controllable transmission system from the Canadian Province of Quebec to New York City."[101] While there is a full route that has been laid out and detailed, ultimately the plan will be subject to final approvals and an agreement from all the stakeholders that are involved.[102] The CHPE was first proposed in an application to the Public Service Commission in March of 2010.[103] While the first end point was in Yonkers, the project destination was changed to Astoria, Queens.[104]

The CHPE has faced a number challenges and regulatory steps in order to be in compliance and gain the approval of the commission. In particular, the commission

identified alternative routes that had to be considered.[105] As with other large projects, there were procedural meetings with administrative law judges and a number of public statement hearings and informational hearings.[106] As of February 2012 the signatory parties were confident "their various positions can be addressed through settlement and agree that settlement is now feasible."[107]

As of April 2013, the state "Public Service Commission unanimously approved" the CHPE project, leaving only permits from the federal government and local opposition to surmount.[108]

Support for the Project

One of the main reasons that the out-of-state limit should not be adopted is that it would have an immediate impact on a project that already has a lot of support. A number of environmental advocate groups and government agencies have signed on board with the CHPE.[109] Support came after an agreement to modify the route of the line, in addition to the developer creating an environmental fund of $117 million.[110] "The government agencies included the cities of New York and Yonkers and the New York State Department of Environmental Conservation."[111]

Consolidated Edison (Con Edison) decided to support the project after reaching an agreement with TDI to ensure that Con Edison ratepayers would not have to pay for any new developments in the equipment or facilities that will be required for the project. In addition, TDI also agreed to change the line to avoid a Con Edison LNG plant.[112] These efforts demonstrate the willingness of the developer to work with the groups in-state to come up with a solution that is beneficial for everyone. By creating an environmental fund, TDI is ensuring that one of NYSERDAs goals of an in-state limit will not be violated; any environmental improvement required is well supported by the $117 million reserved for this project.

In February of 2012 the CHPEI (Champlain Hudson Power Express, Inc.) submitted a joint proposal for the project, along with a number of agencies representing the public interest in the project.[113] The joint proposal was made under the procedural provisions of the Public Service Commission and represents the terms that have been agreed upon by the signatory parties.[114] The proposal identifies the need for the project, citing that it will lower the wholesale price for electric power and lower carbon dioxide and other harmful emissions,[115] thus achieving both environmental improvements and economic benefits.[116] Furthermore, the increase of 1,000 MW of new energy being delivered to the city would lead to an "enhancement in system reliability."[117] This highlights that the project will not only be an improvement to the environment, but system reliability is another example of energy security and ensuring delivery.

The joint proposal also has an extensive section that is devoted to analyzing the environmental impact of the project.[118] Since environmental impact is a main concern for NYSERDA, the impact must be a major determining factor in the approval process. In burying the line, it was found that there would be "[n]o permanent or significant impacts related to geology or soils."[119] It was determined that any disturbance of sentiments and overall water quality would be minimal and well within the agreed parameters.[120] The project also took in to account any possible impacts on fish, vegetation and other aquatic life, and it was decided that any impact would be minimal and that if any rare species were identified during construction that steps would be taken to minimize or avoid any potential impact.[121] The proposal reassures that any land use will be "with minimal potential impact to the general public or private property, open space, or any existing or planned land uses."[122]

In addition to wildlife and vegetation concerns, the report outlines that there will be no disruption in any of the transportation structure during construction and once the line is in place,[123] ensuring that there will be no negative impact on the economic activity of the state. Noise, which is often a concern for parties interested in a development project, is estimated to be insignificant and is likely to occur only during the installation process.[124] The joint proposal also sets out to establish a trust that will be dedicated to mitigating efforts and water studies to ensure that the project does not lead to significant deterioration, and will be overseen by a number of the signatories.[125] Overall, this project is estimated to have very little negative environmental impact, which lends itself to be supported by the signatories.

Opposition

One of the loudest voices of opposition is from Entergy, which is the company that oversees Indian Point.[126] Indian Point will be impacted if this project does in fact get installed, as Indian Point and the CHPE will be in competition to provide power to New York City.[127] The facility is currently going through a review process over whether or not its expiring reactor permits will be renewed. One license is expiring this year and the second license is expiring in 2015.[128] Supporters of Indian Point rely on the fact that it is relatively cheap for the facility to generate power, generally estimated at "$44 to $53 per megawatt-hour."[129] Whether or not Indian Point is in operation, this project will certainly not be enough to replace the nuclear power facility on its own.[130]

There is also opposition from energy generators, who are making the argument that the project is too expensive and relies too heavily on subsidies.[131] Not only do opponents highlight their financial concerns about the project, but also opponents note that this project does not solve the current problems of congestion and updating

the power grid. As stated above, the project is a point-to-point line, and there will be no break or station to allow upstate New York to receive any of the energy passing through the area.

The fact that the project relies heavily on subsidies should not discount the benefits that this project will have on the market and the environment. "Oil, gas, and coal industries are heavily subsidized today…[and] include both direct subsidies in the form of tax abatements and investment incentives, but also indirect subsidies that include environmental impairments, health effects, and climate consequences."[132] It is time that clean energy projects, such as the CHPE, are placed on a level playing field in terms of the amount of subsidies that the industry receives and the security of knowing that the subsidies will continue in the future.[133]

Achieving New York's Renewable Energy Goals with the CHPE

> Due to the highly controllable nature of the HVDC Transmission System…a number of benefits [] can be expected to increase overall system reliability. These benefits include fast voltage control, and the ability to energize at a lower voltage level when required. In addition, the output of the HVDC Transmission System is controllable so that system operators can match load and generation, at morning pick up, during system emergencies, normal operation, etc.[134]

As stated above, the CHPE will not only be secure, but there will be a high level of control to match demand. One concern about energy security is the level of reliability that can be placed on renewable energy. The main criticism of wind power is its inconsistency.[135] Since wind is not generated at a consistent rate throughout the day, the concern is that it is unable to keep up with peak energy demands during periods of calmness.[136] These concerns can be addressed with other renewable energy power generation by "developing a multi-source energy matching up wind generation capacity to equal the existing hydroelectric capacity."[137] The idea is that the dams fill up while wind is most powerful and then the dams are released when wind is no longer able to meet peak energy needs.[138] The CHPE is a unique project because it involves both wind and hydro, as suggested as a solution for encouraging renewable energy projects.

As of 2012, New York was still over 1,500 MW of renewable energy generation away from meeting its goal by 2015.[139] Not only did NYSERDA shy away from claiming that it would make the goal by the current terminal date,[140] but if growth is similar to what the reports outline from 2010 to 2012, this component of the project will not even be close to reaching its current goal.[141]

In 2009, the Public Service commission changed the RPS goal from 25% by 2013, to 30% by 2015.[142] In order to continue to strive to increase renewable energy in New York, the Public Service Commission should consider once again revising the terminal date and the goal of the project. The current rate of new generation for Main Tier projects in New York is just not sufficient to make the deadline of 2015. However, the RPS goal should not be abandoned just because the projection is that it will miss the deadline. It would not be the first time that the date was changed and it would also allow for more time for Governor Cuomo's energy policies to take effect. It is important to allow for this Governor's energy policies to develop because this is the fourth administration since the goal was first established. Changing the terminal date would also be in line with the Governor's overall goal of looking beyond 2015 in updating the grid and increasing renewables in New York. Increasing green and renewable energy is not just a one-time goal, but rather a commitment to change the way we do energy business in New York.

As long as out-of-state projects still qualify, by changing the terminal date of the project to 2017 the state will have the opportunity to take advantage of and solicit other major projects that would qualify as Main Tier, such as the CHPE. Governor Cuomo has announced very favorable projects and investments that will take place in New York, but it is critical that CHPE also get the political support and media attention that it needs in order to be a major part of the solution. The CHPE is a 1,000 MW project and it is projected that 94% of its power generation will come from either hydro or wind, thus meeting the standards for New York's Energy Portfolio.[143] A 1,000 MW project represents 66% of what New York still needs to achieve and 33% of the total generation goal. If the project is not delayed in any more of the review processes, it could be completed by 2017, just in time for a revised termination date for the RPS goal. The amount of support that this project received in its joint proposal, and the fact that it will largely fall within New York's RPS, lends itself to changing the termination to incorporate this project.

It is crucial that the state succeed in this policy goal because it will add much-needed public support. It will be difficult to justify the state continuing to invest in clean energy projects if the state never reaches any goal that it sets, while at the same time having to cut funding to important public programs. The CHPE must do its part to take the project to the public and promote the benefits of clean and renewable energy. There must be a total effort to bring together the community, the political leaders and the clean energy companies.[144] "By redefining policy and political agendas, the clean energy industry can optimize its opportunities in the emerging twenty-first century clean energy economy."[145] Just as education and communication is important, political leaders must be lobbied to ensure the necessary financial support.[146]

> Because the facilities for producing and then transporting renewable energy to the power grid are very capital intensive, it is essential that state governments implement economic incentives which will help to level the playing fields with traditional energies until renewable energies technologies and infrastructures become profitable enough to independently attract investors.[147]

Some may view increasing renewable energy as an expensive operation; however it must be viewed as an investment. An investment in jobs, an investment in energy security, an investment in energy efficiency, and an investment in not only the State of New York, but an investment in the nation as a whole.

Conclusion

It is very important that the state look at not only in-state policies and projects, but also look for ways to secure outside renewable energy. While it is disappointing that New York will likely not meet the 2015 RPS deadline, changing the goal to 2017 is another policy decision that could ensure a bright future for renewable energy and green technology in New York. Coupled with Governor Cuomo's proposal of a Green Bank, the CHPE will be an important step in ensuring energy independence from oil and coal. We should be talking about energy security from foreign oil companies, not energy security from a direct line of wind and hydro generated power, from a country that is considered a close friend and ally.[148]

Endnotes

1. N.Y. Energy Law § 6-102 (McKinney 2013). The board consists of New York Department of State, New York Empire State Development Corporation, New York State Energy Research and Development Authority, New York State Department of Public Service, New York State Department of Environmental Conservation, New York State Department of Health, New York State Department of Labor, New York State Department of Transportation, New York State Division of Homeland Security and Emergency Services, Department of Agriculture and Markets, Appointments by the Governor, Assembly, and Senate, New York Independent System Operator (non-voting). 2013 Energy Planning Board, N.Y. State Energy Plan, http://www.nysenergyplan.com/board.html.
2. N.Y. State Energy Research and Dev. Auth., The New York State Renewable Portfolio Standard Performance Report 3 (2012).
3. *Id.*
4. N.Y. Energy Law § 6-104(2)(d) (McKinney 2013).
5. *Id.* at 4. The small scale generation projects are known as the Customer-Sited Tier (CST) projects. These projects include photovoltaic (PV), fuel cell, and anaerobic digesters. *See* New York Renewable Portfolio Standard, NYSERDA, http://www.nyserda.ny.gov/Program-Planning/Renewable-Portfolio-Standard.aspx#customer.
6. New York Renewable Portfolio Standard, *supra* note 2.
7. *Id.*
8. Robin J. Lunt, *Recharging U.S. Energy Policy: Advocating for a National Renewable Portfolio Standard*, 25 UCLA J. Envtl. L. & Pol'y 371, 387 n. 60 (2006-2007) (explaining that "MW stands for megawatt, or one million watts. (One kilowatt= 1000 watts). Watts are the measurement used to describe how much electricity could be produced at any given time, whereas the amount consumed over a period of time is described as a watt-hour.").
9. *Id.*
10. *Id.* at 3.
11. Case 03-E-0188, *Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard,* NYSERDA Petition ("Petition"), Dec. 14, 2012, at 1.
12. *Id.*
13. *See* Case 03-E-0188, *Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard,* Consolidated Edison and Orange and Rockland Utilities Comments ("Comments"), Feb. 19, 2013, at 2.
14. *See infra* page 27-30 (analyzing the Champlain Hudson Power Express).
15. Currently "funded through quarterly payments made to NYSERDA by Central Hudson, Con Edison, NYS Electric and Gas, National Grid, Orange and Rockland, and Rochester Gas and Electric."
16. *Id.* at 4.
17. N.Y. State Energy Research and Dev. Auth., The New York State Renewable Portfolio Standard Performance Report (2012).
18. *Id.* at 5.
19. *Id.*
20. *Id.* at 20.
21. N.Y. Energy Highway Task Force, New York Energy Highway Blueprint 3 (2012), *available at* http://www.nyenergyhighway.com/Content/pdf/Blueprint_FINAL.pdf.
22. Bill summary.
23. Bill memo.
24. *Id.*
25. *Id.*
26. 2 N.Y. Zoning Law & Prac. § 11:23.10.
27. *Id.* (citing to Greene v. Town of Blooming Grove, 879 F.2d 1061, 1063 (2d Cir. 1989).
28. 4 Am. Law. Zoing section 37:9 (5th ed).
29. Large Wind Farm Developments, NYSERDA, http://www.nyserda.ny.gov/Renewables/Large-Wind.aspx?sc_database=web.
30. *Large Wind Farm Developments*, N.Y. State Energy and Dev. Auth. (2013), http://www.nyserda.ny.gov/Renewables/Large-Wind.aspx (NYSERDA is currently working with developers which would account for 425 MW of power, from four different projects). *Id.*
31. *Id.* (large wind farm developments).
32. Press Release, American Wind Energy Association, Wind energy top source for new generation in 2012; American wind power installed new record of 13,124 MW (Jan. 20, 2013), *available at* http://www.awea.org/newsroom/pressreleases/officialyearendnumbersreleased.cfm.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. Matthew L. Wald, *Developers of Wind Farms Run a Race Against the Calendar*, NY Times, Dec. 28, 2012, B1.

38. *Id.*

39. *Id.*

40. *Id.*

41. Andrew M. Cuomo, Governor, State of New York, State of the State Address (Jan. 4, 2012).

42. N.Y. State Energy Research and Dev. Auth., New York Solar Study (2012), *available at* http://www.nyserda.ny.gov/Publications/Program-Planning-Status-and-Evaluation-Reports/~/media/Files/Publications/Energy-Analysis/solar-study-full-report.ashx.

43. *Id.* (discussed in the summary).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. N.Y. State Energy Research and Dev. Auth., Solar PV Program Financial Incentives Program Opportunity Notice 1 (2012), *available at* http://www.nyserda.ny.gov/Funding-Opportunities/Current-Funding-Opportunities/~/media/Files/FO/Current%20Funding%20Opportunities/PON%202112/2112summary.ashx.

49. Central Hudson, Con Edison, NYS Electric and Gas, National Grid, Orange and Rockland, and Rochester Gas and Electric.

50. *Id.* at 2.

51. *Id.* at 3.

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57. *Id.* at 4.

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60. *Id.*

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63. *Id.*

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71. *Id.* at 24.

72. *Report of the Renewable Energy Committee*, 32 Energy L.J. 405 (2011).

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91. *New York Incentives/Policies for Renewables and Efficiency*, Database of State Incentives for Renewables and Efficiency (May 11, 2012), http://www.dsireusa.org/incentives/incentive.cfm?Incentive_Code=NY03R.

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93. *See supra* notes 11-12.

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95. *Id.* at 9.

96. *Id.* at 8.

97. *Id.*

98. *See* discussion on Champlain Hudson Power Express.

99. *See infra* Support for the Project.

100. *Planned Quebec-New York Merchant Line Taking More Heat*, Electric Power Daily, Jan. 22, 2013.

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102. *Id.* (the proposal is for the route to go a total of 336 miles. This includes being buried in Lake Champlain, using the right of way along route 22, railroad owned by the Canadian Pacific Railway, down the Hudson River, and a combination of other right of ways).

103. Champlain Hudson Power Express, Inc., Joint Proposal 2 (2012), *available at* http://chpexpresseis.org/docs/CHPE_Article_VII_Joint_Proposal.pdf.

104. *Id.*

105. *Id.* at 3 (working with the various agencies involved in order to fall within the requirements).

106. *Id.* at 4 (the meetings were held in Yonkers, Kingston, Schenectady, Whitehall, and Plattsburgh).

107. *Id.* at 5.

108. Kristopher Settle, *Clean Energy for NYC? $2.2 Billion Electric Pipeline Gets State Approval*, THE ENERGY COLLECTIVE, *available at* http://theenergycollective.com/ecskris/214976/22-billion-electric-pipeline-gets-new-york-state-approval ("Regulators said a big factor in their approval stemmed from how the project will be entirely funded privately…[with] no charges added for customers to complete the project.").

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. JOINT PROPOSAL, *supra* note 103, at 1 (The other New York State agencies included in the joint proposal was the Department of Public Service, Department of Environmental Conservation, Department of State, Department of Transportation, Adirondack Park Agency, Department of Agriculture and Markets, Riverkeeper, Scenic Hudson, City of Yonkers, Trout Unlimited, City of New York, Office of Parks, Recreation and Historic Preservation, Palisades Interstate Commission).

114. *Id.* at 6.

115. *Id.* at 13.

116. See discussion on NYSERDA's 3 goals.

117. *Id.* at 14.

118. *Id.* at 15.

119. *Id.* at 16.

120. *Id.* at 20-21.

121. *Id* at 23-30.

122. *Id.* at 31.

123. *Id.* at 37-39.

124. *Id.* at 39.

125. *Id.* at 61-62.

126. Indian Point is a nuclear facility located in Westchester County. Victor Gilinsky, *Indian Point: The Next Fukushima?*, N.Y. TIMES, Dec. 17, 2011, at A25.

127. http://www.bizjournals.com/newyork/news/2013/02/04/indian-point-closure-cost-could-near.html.

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130. The CHPE "represents a sizeable 10% increase in electric capacity for the New York City Region." Settle, *supra* note 108.

131. *Planned Quebec-New York merchant line taking more heat*, *Electric Power Daily*, January 22, 2013 Tuesday.

132. Pruss, *supra* note 79, at 362.

133. *Id.*

134. JOINT PROPOSAL, *supra* note 103, at 63.

135. Rustin P. Diehl, *Transitioning to a Clean Renewable Energy Network in the West*, 27 J. LAND RESOURCES & ENVTL. L. 345, 351 (2007).

136. *Id.*

137. *Id.* at 351.

138. *Id.*

139. *See supra* page 24.

140. *Id.*

141. Compare report from 2010 to the report in 2012 (From 2010 to 2012, the percentage of the goal that had been reached in 2010 was 43.7% and was only up to 47% in 2012).

142. New York State Renewable Portfolio Standard Performance Report, NYSERDA, 2010, at page 4-5.

143. JOINT PROPOSAL, *supra* note 103, at 54.

144. Pruss, *supra* note 79, at 363.

145. *Id.* at 365.

146. Diehl, *supra* note 135, at 363.

147. *Id.* at 365.

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Pre-Emptive Measures to Reduce Environmental Exposure

By Urs Broderick Furrer

The last decade has brought dramatic changes to the domestic downstream petroleum industry. One of the most significant changes has been the divestment of retail service station sites by major oil companies. These divestments have resulted in the rapid growth of distributors and independent retailers nationwide. However, unlike the major oil companies, few, if any, of the distributors or independent retailers have the necessary environmental background and experience in-house. Furthermore, the distributors and independent retailers often do not have in-house counsel with the experience defending environmental claims that the major oil companies have. Because of the differences in technical and legal experience these distributors and retailers are likely to rely on outside consultants to evaluate and remediate the environmental conditions at their sites, and outside counsel to defend claims for environmental contamination. This article will discuss how distributors and independent retailers can proactively mitigate litigation exposure associated with petroleum spills.

First, and most importantly, environmental exposure can be limited by planning for environmental litigation. Understanding that environmental litigation is likely and preparing for it will result in a far more effective defense. Whether distributors and retailers and their insurers can minimize that liability depends on whether they are prepared.

Whether your client owns several stations, hundreds of stations, or whether you insure your client's service stations, there are certain steps that can be taken to prepare for future litigation.

The first critical line of defense is for your client to locate, interview, and retain environmental counsel experienced in the petroleum industry. Your client's environmental counsel need not be local as he can always interface with you, his in-house or local counsel. By selecting the appropriate attorneys and working with them to chart a proactive defense, successful litigation can be optimized.

The next step is working with that environmental attorney and your client's consultant to design a program that ensures compliance with all applicable laws and regulations (See 6 NYCRR Parts 612, 613, & 614). This, however, is not enough.

With the environmental attorney and the necessary experts such as forensic geochemists and hydrogeologists, you and your client should develop a proactive monitoring approach. This program is more than simple compliance. Information is key. It is imperative that you and your client be immediately aware of any product loss from any tanks or lines owned or managed by your client. This proactive monitoring approach should include upgradient wells where there are other nearby potential sources (i.e., other gasoline stations) and wells downgradient of the tanks and dispensers. Of course, the specific approach depends on the nature of the site. With the right proactive monitoring plan in place, awareness of product losses can occur long before any contamination migrates off-site, giving you, your client, or your insured time to respond.

With the right monitoring plan in place, you, your client, or your insured will also learn of off-site sources impacting your client's property before such contamination migrates into your client's tank field or beneath your client's dispensers. The right monitoring plan may enable the successful shifting of responsibility to the off-site discharger in the eyes of both the regulator and potential plaintiffs.

Understand that environmental consultants are rarely, if ever, tasked with anything more than ensuring compliance with the applicable regulations. Indeed, while many consultants are good at collecting soil and groundwater data and preparing the reports required by the responsible regulatory agencies, many consultants do not evaluate data evidencing other potential sources nor do they develop accurate site conceptual hydrologic and transport models. This should not be a surprise as cost cutting imposed upon them in recent years by their clients has forced many consultants to rely on less experienced associates, resulting in site analysis and reports sufficient for reporting purposes but insufficient for the defense of potential claims. As a result, while the work performed by the environmental consultants may comply with all applicable regulations and meet the requirements of the regulating agencies, the work required to protect against claims or assess the potential for third-party responsibility may be beyond the usual scope of work and should be addressed with specificity when setting the consultant's scope of work.

This cost-cutting in recent years has resulted in many consultants approaching new projects with a limited mindset. While they are charged with collecting, compiling, and reporting data to regulators, they are usually not charged with, and all too often fail to focus on, mitigating litigation exposure and defending against existing or future claims. Indeed, remediation consultants may assume that contamination found in the monitoring wells they installed is from their client's property. Such assumptions frequently result in unwarranted remediation expenses,

both on and off-site and the preparation of reports and containment plume maps that inaccurately identify their client's site as the source of off-site impacts.

In sum, countless lawsuits have been lost and untold millions unnecessarily incurred by the failure to make sure that the focus during investigation and remediation is on recognizing key technical elements in preparation for potential litigation. In my experience, the short-term savings obtained by cost cutting have been offset by significant litigation exposure.

While the retention of experts ahead of time may seem to some as unnecessary and unwarranted, great benefits derive from such retention. Working beforehand with your environmental counsel and technical experts can help you, your client, or your insured make the right decisions as to data collection and analysis in order to better prepare for potential litigation.

The above is only a brief outline for mitigating potential environmental exposure, and it is clear that a proactive defense prepared in conjunction with environmental counsel and appropriate experts can positively impact the bottom line.

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Insuring Island States: The Role of Insurance for Small Island States in Responding to the Adverse Effects of Sea Level Rise

By Maria Antonia Tigre

> "We, the people, still believe that our obligations as Americans are not just to ourselves, but to all posterity. We will respond to the threat of climate change, knowing that the failure to do so would betray our children and future generations. Some may still deny the overwhelming judgment of science, **but none can avoid the devastating impact of raging fires, and crippling drought, and more powerful storms**."
>
> **President Obama, Inauguration Speech 2013**[1]

Introduction

Climate change[2] is an acknowledged scientific phenomena, even though there are still those trying to deny its serious impact.[3] The last United Nations Framework Convention on Climate Change (UNFCCC) in Doha (Conference of the Parties 18—COP18) met with limited success in finding consensus. However, the attendees from all 190 participating countries, including the United States, managed to get an important declaration.[4] Those countries acknowledged that the world will experience global average temperature rise of at least 2º C (3.6º F) in the near future, which, as agreed by them, is the limit for purposely managing global warming as a practical matter.[5] Climate change will—and already has—generated several changes in global weather and atmospheric patterns, and these are unlikely to be reversed. The world will continue to get warmer. Wet areas will continue to get wetter. Dry areas will continue to get drier. More extreme temperatures will continue to occur, along with other severe weather events such as tsunamis, cyclones, hurricanes, flooding and high winds.[6]

In addition to these effects, the sea level will continue to rise.[7] The entire world will be impacted by these developments, some geographical regions and economies more than others. A few countries, though, are likely to suffer the greatest impact. The most affected will be, almost undoubtedly, the Small Island Developing States (SIDS).[8] SIDS will experience disproportionate impacts along with other low-lying coastal countries such as Bangladesh and the Netherlands. SIDS in particular are threatened with the risk of completely disappearing.

Only a few meters above static sea level at their highest points, these islands and countries are already largely dependent on their coastal resources. First, they have dense concentrations of infrastructure and settlements on their coasts. In addition, most of their economic activities, such as fishing, agriculture, and tourism, take place near the ocean. Moreover, these states tend to be geographically isolated and have limited economic and financial resources.

Small island states are also generally low emitters of greenhouse gas emissions (GHGs), meaning they have contributed little to the problem of human-induced climate change. For an array of reasons, including their reduced economic and political power relative to the international power of other states, these smaller islands and states have come together, forming the Alliance of Small Island States (AOSIS).[9] Jointly, they have been battling to gain the attention of the international community in their search for solutions. However, they are still left with many unanswered questions and no clear path on how to deal with their issues.

Will there be a future for them? Is anyone responsible for the damages and losses they will suffer? What will happen to their population and their resources? Do other countries have responsibility in light of their possible contributions to these circumstances? This article will discuss risks, present trends and theories, as well as possible ways to start answering some of these questions. It will then address how insurance companies play a part, considering the uncertainties of the consequences of climate change and the insurability of the risks associated with it.

Climate Change and Sea Level Rise—Some Technical Aspects[10]

Rising sea level is one of the most pressing consequences of climate change, especially for nations with low elevation above mean sea level. It is also one of the most important risks to consider in this context. As John Coomber, former CEO of Swiss Reinsurance Co. (Swiss Re),[11] said, climate change "is the number one risk in the world ahead of terrorism, demographic change and other global risk scenarios…."[12]

Changes in sea level occur due to a variation in the mass and volume of water in the ocean. In other words, when water is added or removed, a change in the level of the sea is takes place. These changes frequently happen due to an imbalance between evaporation and precipitation or when water flows from land to sea, via rivers or due to melting ice. The same mass of water may also alter

in volume when seawater warms or freshens. Likewise, vertical land motion contributes to these changes, due to redistribution of the mass of ice and water, glacial melt water or water moving through the ocean basins. Finally, groundwater extraction or tectonic activity may contribute to sea level changes as well.

All of these processes have been taking place ever since early on in the Earth's formation, and small changes were likely to occur, although always maintaining some pattern of variation. Human activities, however, have accelerated those changes, thus significantly altering the patterns. The industrial revolution that started about 100 years ago has played an important role in this regard. Carbon dioxide (CO_2) emissions, along with other greenhouse gases (GHGs), raise the average global temperature, affecting the mass and volume of seawater through increased melting of land ice and higher ocean temperatures. The melting of polar ice sheets, mountain glaciers, snow and permafrost also contribute to this phenomenon.

Sea level rise will affect the world. As a result of global climate change, the world has undoubtedly changed. In the last 30 years, the incidence of natural catastrophes, either geophysical, meteorological, hydrological or climatological events, has risen exponentially, to the rate of 400%.[13] Although the sea level rose at about 2mm per year during the 20th century, it is expected to rise 5mm per year during the 21st century. A four-meter rise in sea level is unlikely, but a two-meter rise is possible, and one-meter seems unavoidable.[14] Several island nations, such as the Maldives, Kiribati, the Cook Islands, the Marshall Islands and Tuvalu, are only a few meters above present-day sea level, and will be highly compromised even with a one-meter sea level rise.

Climate Change, Sea Level Rise, Risk and Regulation

Even though some skeptics still challenge the effects—or even the existence—of climate change, the science cannot be ignored. Countries and companies have invested significant sums to understand their vulnerabilities and strengths, to better prepare for what comes ahead. Insurance companies are an important part of that group. The risks may be varied and wide, including different sectors such as agriculture, forests, human health, marine productivity, and energy supply and demand.

Rising tides also pose additional risks. Historically, people have preferred settlements near water for logistical reasons. As a consequence, over 40%[15] of the world's population lives within 100 kilometers of the coast.[16] Low-lying countries, especially island nations, are even more vulnerable and may entirely disappear. Sea level rise will threaten human settlements, forcing migration from densely populated areas, impacting freshwater resources, and generating losses of land, property and crops. These economic impacts will have long-term effects, but because they are global, no one country can respond effectively.

Though the exact consequences of climate change and sea level rise are still uncertain, its potential effects have been known for years. GHGs have been causing global warming and generating, as a consequence, adverse effects on the world's environment for some time now. An obvious policy solution would be to force risk-generating activities to internalize some of the social costs, offsetting marginal benefits by taking into account the full costs of certain activities.[17] In other words, polluting industries should internalize some of the costs of climate change, because they share most of the benefits of polluting the world.

But, on the contrary, policy makers have been slow to provide a beneficial response and the international community has so far failed to reach a consensus on the subject.

One of the difficulties of regulation rises in yet another tricky aspect of climate change: global warming might also provide some benefits from the emissions themselves. To name a few examples, increased precipitation might turn dry areas into arable land; a warmer world might extend areas prone to forestry, thus increasing carbon sinks. But the fact remains that advantages are much smaller, and the disadvantages are borne disproportionally by the world's regions and population.

Despite the absence of clear answers, uncertainty cannot be an excuse. For ages, nations have regulated risks from uncertainty and ignorance due to the lack of sufficient scientific evidence. Although experts are better prepared to assess risk according to the best available science, there is often uncertainty in their assessment. However, the precautionary principle clearly states that the lack of scientific certainty cannot be used as an excuse, and action must be taken sooner rather than later. In view of the omission of stakeholders to deal with climate change, however, someone will have to pay the price.

The Cost of Climate Change

After considerable discussion of possible solutions, scholars and policy makers generally come back to three categories of results: mitigation, adaptation and compensation.[18] There are many uncertainties with respect to climate change, but there is one sure thing about it: minimizing it, or adapting to it, costs money. So does doing nothing. All of the solutions are expensive, and while the first two options have more immediate costs the last one, even if it proves to be too little, too late, reflects a cost similar to the actual damage caused.

The equation seems to have therefore an easy answer. It is better to wait and pay the price later rather than sooner. But is it indeed better?

The price of inaction will probably account for other intangible factors that mitigation and adaptation by themselves would not: loss of cultures, traditional knowledge,[19] and human rights violations,[20] to name a few. It will also be comparably higher for those who have not contributed much to the problem, thus creating an additional environmental justice issue that will probably give rise to claims for further compensation.

For insurance companies, environmental hazards can give rise to three broad categories of covered losses: (a) duty do defend in lawsuits—which are quite expensive—of alleged property damage and bodily or personal injury; (b) business interruption; (c) property coverage. In addition, shareholders might try to hold Directors and Officers (D&O) liable due to managerial decisions during a disaster, which might also incur in losses for the companies and insurance companies.[21]

Economies have already been highly vulnerable to rising disasters due to climate change, with risks being partly covered by insurance companies. As assessed in 2007, environmental catastrophes had a higher impact on insurers in the previous fifteen years than in their entire history.[22] While between 1970 and 1990 the insured losses due to weather-related events averaged $3 billion annually, between 1990 and 2004 the value increased to $16 billion annually. Superstorm Sandy alone cost the insurance companies about $25 billion, a number that might have increased since the total losses were not completely assessed.[23] It is also important to note that the National Flood Insurance Program incurred in the remainder of the $70 billion in losses, evaluated for New York and New Jersey alone.[24]

It is clear, given this example, that disasters are not cheap to handle, and that, at least for the U.S., insurance covers for a large portion of the damage. The problem for small island states is that there usually is no insurance to pay for the damage. First, local businesses usually do not have insurance, except for big resorts and hotels. Second, there is generally no national insurance program to cover for the rest of the expanses—although, as it will be further discussed, this scenario might be changing. While programs are being developed, governments have to incur in debts to help their citizens in coping with the damage. It remains unknown who will pay for those losses, but certainly the impacted will seek someone responsible.

A study ordered by Swiss Re[25] concluded that, on the whole, economic losses from man-made and natural catastrophes throughout the world amounted $186 billion in 2012.[26] Considering insurance losses, 2012 was the third most expensive year on record, with $77 billion in insured claims. Out of the $119 billion in total economic losses in America during the year, more than half, $65 billion, was insured, which amounted to about 0.68 percent of U.S. gross domestic product (GDP) for the year.

The predictions for the future are debatable, and numbers vary depending on the report ranging from some hundred millions to a few billions. According to DARA,[27] one of the most catastrophic studies,[28] extreme weather and climate change already account for 1.6 percent of the world's GDP, totaling $1.2 trillion per year. By 2030, the percentage will rise to 3.2 due to carbon-related pollution and escalating temperatures. For lower-income countries, a lot of them small island states, losses are already rising at the rate of 11%. Major economies will also be highly affected: climate change will cost China $1.2 trillion in 20 years. The United States will probably pay around 2 percent of its GDP and India over 5 percent.

A study led by the Oxford University Centre for the Environment[29] estimates that a meter sea level rise will cost Caribbean Community and Common Market (CARICOM)[30] nations $1.2 billion per year in GDP (not including hurricane and storm impact), permanent land value loss of $70 billion (over 2,700 km^2 of area), and $4.6 billion in relocation and reconstruction costs.[31] These figures do not include losses in agricultural production (1% of agricultural land will be lost), costs of changing energy needs, increased storm or hurricane damage and related insurance costs, necessary water supply construction, increased health care costs, or any non-market value impacts. On the long run, climate risks could cost countries up to 19 percent of the annual GDP, if no investments in adaptation are made.[32]

The problem with using insured loss costs, however, is that they tend to be unevenly accounted for in the world. The ratio of economic losses[33] to insured losses is higher when there is a limited insurance market, such as in most developing countries, or in industrialized countries in which there are no minimum insurance requirements. On the other hand, in a market like America, the ratio is much lower given that banks and other financial institutions often require insurance for mortgages. Insurers often require the use of effective mitigation measures for reducing losses from natural disasters as well, thus inducing behavior. The ratio is therefore unevenly distributed, and does not reflect the actual impact of the disaster itself.

Another problem of using insured losses is that fatalities are generally not accounted for. Developing countries often have more deadly disasters,[34] but have, on the other hand, lower economic losses.[35]

Whatever the uncertainties, it is clear that insurance companies have already been paying part of the price of climate change due to property losses, personal injuries, and business interruption in disasters and extreme weather events. Regardless, the capacity of the insurance industry to handle large-scale disasters without the assistance from the public sector can be discussed. Will they also pay the price for ongoing changes in the environment due to climate change when the affected people start searching for the ones responsible?

Who Is Responsible?

There is little doubt that global warming and its effects were caused by man-made GHGs emissions. The Intergovernmental Panel on Climate Change (IPCC), on the Fifth Assessment report, appraised that there is a 99% probability[36] that human activities are responsible for the increase global average surface temperature since the 1950s.[37]

Although the world has known about the catastrophic potential effects of climate change, little effort has been put into effectively slowing it down. It can be argued that countries that continue to be inoperative in setting emissions reduction targets, or companies that continue to avoid more efficient technologies although that technology has long existed, are responsible for climate change and its effects on other countries that contributed a lot less to it.

Due to the lack of consensus on the best way to tackle climate change, a possible answer may result from the potential for liability. Several theories on which to rest a climate change suit, thus holding emitters accountable, have been academically discussed.[38] The United States, considering its international policy—or lack thereof—on the subject, and corporations therein, are the most viable targets for climate change liability suits.

The population affected by rising tides is, on the other hand, one of the most viable and ideal plaintiffs, since it is a group of individuals who have contributed the least but are harmed the most. They are an identifiable group who can demonstrate significant and specialized harms readily linked to GHGs emissions.[39] These potential plaintiffs may thus more easily establish a causal link between global warming and the harms suffered due to sea level rise.

Depending on the legal theory chosen to file a claim there might be several potential defendants, especially if you consider the overwhelming number of GHG emitters. Theoretically, every single person can be held accountable for global warming. Nonetheless, the electricity generation industry is one of the most obvious choices.[40] On top of being one of the world's highest emitting industries, it could be argued that the industry has intentionally failed to prevent or reduce its global warming impact.[41] Since the technology for cleaner and more efficient energy generation has long existed—and been viable—the industry is particularly vulnerable.

Although there might be other potential defendants like high-emitting states,[42] and also plaintiffs, this section will focus on citizens of drowned small island states versus American electricity generating companies. The potential solution of filing a climate change suit in a domestic federal or state court will be briefly discussed.[43] Given these premises, there are several challenges to successfully establish a climate change suit in the U.S.

First, considering that in some way or another every person contributes to climate change, causation has to be clearly established. It is already widely recognized that there is a causal link between anthropogenic emissions and global warming, with a U.S. Supreme Court holding that there is firm scientific consensus regarding climate change.[44] Nonetheless, it is nearly impossible to prove that a specific damage was suffered due to a single source of emissions. It can be argued that a combination of the emissions caused the damage, thus making it harder to prove a case. Then again, any carbon dioxide emissions, being similar in nature (the process for fuel combustion is similar in makeup and apportionment) form an equitable way of allocating the harms associated with climate change. The better strategy, in this sense, is to bring a large number of defendants jointly, who are all significant GHG contributors.[45]

In any case, the U.S. Supreme Court already held that climate change science is sufficiently direct and tangible to form a basis for standing in public nuisance cases.[46] In fact, Judge Tatel specifically stated that the plaintiffs had standing because a rise in sea level would hurt Massachusetts, adding that sea level rises were caused by human emissions.[47] The small island nations' citizens claiming that climate change has submerged their homes could therefore use the same rationale.

To gain standing in a U.S. federal court, the plaintiff must show that (a) he suffered a concrete and actual or imminent injury, rather than hypothetical; (b) the injury is fairly traceable to the challenged action of the defendant; and that (c) the injury alleged is capable of redressability by the judiciary.[48] It must also be noted that "standing is not to be denied simply because many people suffer the same injury."[49]

Given the difficulties of bringing a climate change suit under the federal common law of nuisance by non-citizens, an option would be to file a suit under the Alien Tort Statute (ATS).[50] The statute allows non-citizens to bring claims in the U.S. courts based on torts violating treaties and customary international human rights law, arguing that the emission of GHGs is a human rights violation.

To successfully prove a case, it is necessary to determine the "law of nations," thus proving that (a) a plaintiff identify a specific, universal, and obligatory norm of international law; (b) that a norm is recognized by the U.S.; and (c) that it adequately alleges its violation.[51]

There are, conversely, a few challenges to face, given that U.S. courts do not recognize a right to a healthy environment in customary international human rights law (the Stockholm Declaration of 1972[52] and Rio Declaration of 1992[53] have recognized principles of a right to the environment, but there is no link with a human rights violation). Another discussion is whether it is desirable to have

U.S. courts award damages for climate change injury, thus acting as a climate change policy maker for the world.

Despite the advantages of this option, and the fact that it might be one of a few to hold American companies accountable for their actions overseas, the Supreme Court recently ruled that the ATS only applies to actions within the U.S. or on the high seas. The case was *Kiobel v. Royal Dutch Petroleum Co.*,[54] which arose from the torture and killing of Nigerians who protested against the exploitation of oil by a corrupt regime and international oil companies.

The ruling follows a decision by the Second Circuit[55] that the ATS is inapplicable to corporations, given that corporate liability is not a discernible norm of customary international law.[56]

The rationale of the finding, which was unanimous, relied on the argument that it was not the 1789 Congress' intent to apply its statutes extraterritorially, unless with a clear indication otherwise. The decision also follows the rationale of the prospective foreign policy issue of having American courts rule on events that occurred in another country possibly leading to an unlimited influx of international cases and possible diplomatic friction.[57] Justice Breyer, however, noted that the doctrines of *forum non conveniens*, comity, and exhaustion of remedies serve as limiters to address those problems.[58]

It is still unknown whether the case will apply to prospective claims of sea level rise plaintiffs. The majority opinion recognized that ATS cases in which a portion of the conduct occurred overseas might still be sustainable, as long as a portion of the relevant conduct occurred within the U.S. Justice Kennedy, in a concurring opinion, highlighted that: "Other cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the [Torture Victim Protection Act] nor by the reasoning and holding of today's case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation."[59]

Justice Breyer concluded that the ATS provides jurisdiction where (i) the alleged tort occurs on U.S. soil; (ii) the defendant is an American national; and (iii) the defendant's conduct substantially and adversely affects an important American national interest, such as keeping the U.S. from becoming a safe harbor for a "common enemy of mankind."[60]

Considering these specific arguments raised by the judges, sea level rise plaintiffs might still be able to prove a case under the ATS. Since the conduct of emitting GHGs happens within the U.S., and only the effects are overseas, the presumption of extraterritoriality might not be applied. The tort would thus have occurred on U.S. soil, falling under one of the categories of the ATS jurisdiction.

If, however, the ATS cannot be applied for sea level rise plaintiffs, the ruling will thus raise yet another issue. Since a lot of the environmental damage is caused by companies with no assets in the islands affected by sea level rise, a decision from a local court would not be locally enforced. Even if a favorable verdict is reached, prospective plaintiffs will have to enforce the decision elsewhere, probably facing more difficulties in trying to reach the companies' assets.

Another option would be to file a claim under the nuisance doctrine. There was already a precedent of a climate change suit brought under the federal common law public nuisance claims. The Village of Kivalina, in Alaska,[61] filed a suit against 24 major oil companies seeking relocation costs and damages regarding fisheries. Besides the monetary damages, the village asked for a declaratory judgment for past and future damage caused by global warming. The federal nuisance was dismissed based on the attenuated nature of the causal link between the claimed damage and a particular conduct by any of the defendants, and on the basis that the regulation of GHGs was an issue to be dealt with by the political branches of government. There was an appeal to the 9th Circuit,[62] which held that the Clean Air Act (CAA) and agency action authorized thereunder displaced federal common law, precluding a claim for public nuisance.

It is still uncertain whether insurance companies will pay for the losses in those potential suits. In the U.S., specific insurance companies offer climate change coverage within environmental insurance (Chartis US is one example). One of the challenges for insurance is how new risks are incorporated into old coverage, and new causal bases for filing claims for losses. The problem is that the cause—emission of GHGs—is often old and continuous.

Climate Change Insurance

Regardless of how the accountability for climate change loss and damage will play out, given the risks and uncertainties, insurance is part of the answer. The intersection between climate change, insurance and finance is a rapidly growing area of inquiry. For a few years the insurance industry has been warning of its escalating exposure to climate change-related claims in extreme weather events as well as the effects of sea level rise.

Insurance in its commercial sense has been advocated by small island states for more than 20 years.[63] Given the uneven distribution of losses, the prospects of property loss, and the need of moving people to safer areas, an insurance pooling system for the small island states would be advisable. There are a few major ways in which insurance can be a part of the solution: (a) global insurance scheme paid with donations from developed countries; (b) partnership between insurance and local / regional governments; and (c) private insurance for homeowners and business developers. In either case, insurers and rein-

surers can contribute with their risk management expertise, by modeling risks, reinforcing risk prevention, supporting climate adaptation infrastructure, and developing new and innovative risk transfer solutions.[64]

Small Island States' Climate Insurance Fund

For more than 20 years the island nations have been advocating for a specific "loss and damage" mechanism that would function as an insurance policy. A proposed protocol[65] to the UNFCCC established a Multilateral Fund on Climate Change, and, within this context, an international mechanism addressing risk management and risk reduction strategies and insurance-related risk sharing and risk transfer mechanisms. It was not clearly defined, though, how this insurance mechanism would function, with just a brief explanation that developed countries should fund it.

The global insurance fund is set up according to the principle of common but differentiated responsibilities:[66] small island states, as well as other poor nations that are at risk of sea level rise, will pay an annual premium; rich developed nations, on the other hand, will provide the larger amount as aid. The funds shall be privately invested in order to extend the amount available in the event of a crisis.

The payouts would be according to the damage, when assessed that the weather variations were directly caused by climate change. There is also an additional requirement that nations that benefit from the payouts have taken preventive measures to avoid further damage, so that the amounts are only used for extreme events.

The insurance payouts can be used to repair the damaged infrastructure such as roads and airports. On an extreme level, insurance payouts could be used for drowned nations to buy a new homeland if the sea level rise threatens their maintenance in their own homes.

Although the idea is interesting, it has not gained many advocates from developed countries, since many of them, especially the U.S. and the European Union, are still wary of the proposal due to potential legal liabilities and open-ended financial obligations.[67]

Partnership of Insurance Companies With Local Governments

In least developed countries (LDCs), which require a strong public intervention, insurers tend to work alongside governments. While governments regulate risk through mandatory safety measures, insurers use a broad menu of safety choices and corresponding prices, thus inducing the insured to self-select safety. Given the opposite ways in which to achieve the same objective, a partnership between governments and insurers might provide a halfway solution.

In areas more prone to disasters, governments may require mandatory insurance, hence creating an additional incentive for insurers to develop a specific local program where they otherwise would not. The mandatory facet of the insurance creates a set amount of clients. Through government's incentives premiums may become more affordable for homeowners and local businesses.

This solution provides a win-win situation, with cost-effective approaches to the insurer, government and insured. Some programs even have a fourth party, a financing partner that provides aid in paying for the premium. Safety standards are an incentive as discounts are given for additional precautions taken. This is a clear example of how private insurance markets can be profitably used to supplement or even replace legal controls.

The Caribbean Catastrophe Risk Insurance Facility

Considering the possible savings countries could have by pooling their risks together, 18 Caribbean countries, together with the World Bank, established the Caribbean Catastrophe Risk Insurance Facility (CCRIF),[68] the first multi-country catastrophe insurance pool. The initiative came from the Caribbean Community (CARICOM), who requested the World Bank's help in establishing an insurance system. The Caribbean Hazard Mitigation Capacity Building Programme of CARICOM is helping Caribbean countries create national hazard vulnerability reduction policies; and CCRIF is a piloting a scheme for small island states to buy parametric insurance coverage against natural disaster risk.

The CCRIF enables governments to purchase catastrophe coverage akin to business interruption insurance. If a country is hit by a natural disaster, the CCRIF will provide the participating governments with immediate liquidity, without the need of a prior damage assessment.

Even though being an interesting development and pattern shifting, the CCRIF only provides response to immediate disasters, and not to the slow effects of climate change such as sea level rise. In this regard, the Alliance of the Small Island States (AOSIS) has been lobbying for insurance as a funding option to support mitigation and adaptation.

The Pacific Catastrophe Risk Insurance

Swiss Re has recently announced[69] the Pacific Catastrophe Risk Insurance Pilot arranged by the World Bank, Government of Japan and the Secretariat of the Pacific Community (SPC). The program is part of the Pacific Catastrophe Risk Assessment and Financing Initiative (PCRAFI), a joint initiative of the World Bank, SPC, and the Asian Development Bank, and depends on financial support of the Global Facility for Disaster Reduction and Recovery (GFDRR) and the European Union, as well as from Japan. The Marshall Islands, Samoa, Solomon Islands, Tonga and Vanuatu will receive protection against

earthquake, tsunami and tropical cyclone risks from Swiss Re and other insurers. After its pilot phase, which will test whether a risk transfer arrangement modeled on an insurance plan can help Pacific island nations deal with the immediate financial effects of natural disasters, more countries will be included in the program.

Private Insurance Market for Small Island States

It is interesting to observe that most of the current insurance options or even additional prospective ideas are focused on government-based solutions. While risk transfer is a widely used policy tool in the developed world, it is still emerging in developing countries. Given the assessed losses from the latest disasters, insurers and reinsurers are asking whether severe weather related events are insurable, and, if so, at what price.

Considering that most of the island states are also LDCs, the private insurance market is harder to develop. In addition, depending on aggressive intervention by the local government or on international aid for funding the payouts in case of damage may expand the funding available to address the risk even further.

Through insurance and reinsurance a substantial portion of the losses from natural catastrophes can be borne by others rather than the victims and governments from those countries. Currently, most of the costs of infrastructure damage and other losses have to be relocated from domestic budgets, approved loans, aid or new loans, as well as voluntary donations.

There is a big underdeveloped market for private insurance, but it is highly dependable on a combination of an affordable premium and an expanded coverage of good quality. First, an insurer shall identify, quantify, and estimate the chances of the event occurring and the extent of losses likely to be incurred. Secondly, the insurer must be able to set premiums for each potential customer or class of customers. If both issues are presented, the risk is insurable, and the insurer must finally ask the question of whether it is also profitable.[70]

For homeowners or business developers at the coast with a high risk of disappearing due to rising sea, insurance could be the answer to secure a house or business elsewhere instead of facing the property losses and depending on governmental or foreign aid.

Risk transfer could occur through micro-insurance, catastrophe bonds and reduced insurance premiums as an incentive to take preventative measures. Insurance is often cited as an option with high potential. However, the small risk pool and lack of financial mechanisms act as an obstacle to insurance initiatives.

If an insurer decides the risk of sea level rise is insurable and profitable, then comes the challenge of offering an affordable product in a highly vulnerable area. In order to reduce premium prices and thus increase their market share in small island states, there is an incentive to induce efficient risk-reducing behavior. Since risk reduction measures often occur after the policy has been issued and the premium paid, insurers have the incentive to induce measures and hence minimize their potential loss.[71]

However, insurers have a significant concern about uncertainty in estimating the premium, given that disasters involve potentially high losses with extreme uncertainty of occurring: the medium loss is low, and the maximum loss is very high.[72] A decision to cover the risk must therefore address the issue of maximizing the expected insurer's profits.

In this context, a partnership with local governments is usually a viable answer. After the 1994 Northridge earthquake that devastated California, insurers refused to renew homeowners' policies, and the California Earthquake Authority was formed by the state with funds from insurers and reinsurers.[73]

On a broader level, high-emitting companies that may be targeted by the affected to pay for their losses may also have an incentive to invest in efficiency and greener solutions in order to increase their coverage and reduce their premiums. As an example, insurers often refine their premiums through the practice of "feature rating," by adjusting the premium according to the insured's individual risk characteristics. Additionally, previous insured's loss experience also may impact the premium price through "experience rating" to either retroactively or prospectively adjust it.[74]

Insurance companies therefore have an important role as regulators while performing the functions of risk reduction and risk management, additionally focusing only in *ex post* indemnification. Since insurers have the expertise to quantify the effect of the precaution on risk reduction, as well as to ascertain that a cost of precaution is justified, insurance can be used to efficiently choose precaution measures.

The educational function of insurance with risk management practices has the potential to greatly help SIDS in preparing for climate change impacts, especially in the form of increased extreme events. For example, the United Insurance Company of Barbados[75] gives financial incentives for homeowners to put preventative measures in place.

Nonetheless, it can be argued that insurers face challenges that are too hard to overcome. For example, insurance companies cannot cover losses for which the affected parties cannot afford to purchase coverage, and likewise do not cover "known unknowns," contingencies that are known to exist, but to which neither the probability nor the magnitude can be actuarially allocated.[76] As Ben-Sharar and Logue[77] explained, climate change can put insurers in a poor regulatory position, with far into the future costs and a large set of diffuse victims that will

probably not be covered by present insurers. Although they assess that the insurance industry will likely bear a large portion of the costs of climate change, "it may be ill positioned to overcome the coordination-across-time problem," thus leaving the regulation exclusively to governments.

Conclusion

Although there has been some development, there is still a long way to go in order to provide small island states with some financial assistance in coping with the adverse effects of climate change. There are a few potential paths to follow, all of them with several advantages and disadvantages.

An option for the small island nations is to achieve compensation through climate change litigation. In order to successfully do so, academics have presented a few incremental steps: a small number of plaintiffs, a group of defendants, modest damage requests. This option, however, seems to be their last resort, when all other paths have failed, and the international community and local governments have not taken significant steps in finding other viable options.

In light of the difficulties of the options presented, insurance can be used to enhance small island nations' options, while providing solutions and safeties before the actual damage happens. While acting as regulators and enhancing mitigation and adaptation, insurers can also be valuable stakeholders as the world manages its new climate. Although a private market might have challenges that are too big to overcome, a partnership between governments and insurers can be a good resort. As per the examples in the Pacific and Caribbean mentioned in this article, it seems that investments have been made in this regard.

It will be interesting to follow how the insurance market develops in small island states in the Pacific and Caribbean, for surely there will be much progress in the future.

Endnotes

1. Office of the Press Secretary, *Inaugural Address by President Barack Obama*, The White House (Jan. 21, 2013), http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama.
2. It is important to clarify that every time this article uses "climate change," we are talking about human-induced climate change. This will be better explained in the next section, while discussing the technical aspects of climate change and sea level rise.
3. *See* Billy McKibben, *Hot Mess*, New Republic (Oct. 6, 2010), http://www.newrepublic.com/article/environment-energy/magazine/78208/gop-global-warming-denial-insanity#.
4. United Nations, *Doha Climate Conference Opens Gateway to Greater Ambition and Action on Climate Change*, United Nations (Dec. 8, 2012), http://www.un.org/wcm/content/site/climatechange/pages/gateway/the-negotiations/template/news_item.jsp?cid=37700.
5. United Nations Framework Convention on Climate Change, *Background on the UNFCCC: The international response to climate change* (last visited Oct. 10, 2013), http://unfccc.int/essential_background/items/6031.php.
6. U.S. Climate Change Science Program, *Weather and Climate Extremes in a Changing Climate*, 81 (June 2008), available at http://www.climatescience.gov/Library/sap/sap3-3/final-report/sap3-3-final-all.pdf.
7. IPCC Fourth Assessment Report: Climate Change 2007, *Projections of Future Changes in Climate* (last visited Oct. 10, 2013), http://www.ipcc.ch/publications_and_data/ar4/wg1/en/spmsspm-projections-of.html.
8. The Small Island Developing States are low-lying coastal countries, mainly from the Pacific and Caribbean, which were first recognized as a developing countries group at the United Nations in 1992.
9. The AOSIS is a coalition of 44 small islands and low-lying coastal countries that share specific concerns due to their vulnerability to the adverse effects of global climate change, thus functioning as an *ad hoc* lobby and negotiating voice for SIDS within the United Nations system. *See* AOSIS, http://aosis.org (last visited Apr. 3, 2013).
10. For more information on the science of sea level rise see Mary-Elena Carr et al., *Sea Level Rise in a Changing Climate: What Do We Know?*, *in* Threatened Island Nations: legal implications of rising seas and a changing climate, 15-54 (Michael B. Gerrard & Gregory E. Wannier, *eds.*, 2013).
11. Swiss Reinsurance Company or Schweizerische Rückversicherungs-Gesellschaft AG, better known as Swiss Re, is the biggest insurance and reinsurance company in the world, operating in more than 30 countries.
12. John Coomber, *Interviews*, The Climate Grp. (2006), *available at* http://www.theclimategroup.org/what-we-do/interviews/John-Coomber/.
13. Peter Hoeppe, Water and Disasters, 3 (2013) (Munich RE presentation at the United Nations Special Thematic Session on Water and Disasters).
14. Gregory E. Wannier & Michael B. Gerrard, *Overview*, *in* Threatened Island Nations: Legal Implications of Rising Seas and A Changing Climate, *supra* note 10, at 4.
15. Center for International Earth Science Information Network at Columbia University–CIESIN, Percentage of Total Population Living in Coastal Areas, NASA Socioeconomic Data and Applications Center (SEDAC), 1, http://sedac.ciesin.columbia.edu/es/papers/Coastal_Zone_Pop_Method.pdf (last visited Apr. 4, 2013, 10:04AM).
16. The Millennium Ecosystem Assessment establishes a 100 kilometer buffer zone: a coastal zone is defined either by 100 kilometers from the coast as a distance threshold, and 50 meters as an elevation threshold, whichever is closer to the sea.
17. Christopher D. Stone, *Beyond Rio: "Insuring" Against Global Warming*, 86 Am. J. Int'l L. 445, 4-6 (1992).
18. Adaptation is a solution more focused on the present, providing means to act immediately, although in the face of uncertainty. Mitigation is a post-catastrophe action, whilst compensation only provides some recovery for what has already been lost. *See* United Nations Framework Convention on Climate Change, art. 3, par. 2, May 9, 1992. *See* Sally Kane and Jason F. Shogren, *Linking Adaptation and Mitigation in Climate Change Policy*, 45 Climate Change, 75 (2000).
19. For example, loss of indigenous languages and knowledge through the disappearing of native land and dispersed population. *See* UNESCO, *Weathering Uncertainty: Traditional knowledge for climate change assessment and adaptation* (2012), available at http://unesdoc.unesco.org/images/0021/002166/216613e.pdf.

20. Through the lack of efficient warning systems for catastrophes and response mechanisms. See International Council on Human Rights, Climate Change and Human Rights Policy: A Rough Guide (2008), *available at* http://www.ichrp.org/files/reports/45/136_report.pdf.

21. An important risk analysis that has been made by insurance companies is related to liability issues associated with climate change due to the potential risk of shareholders accusing companies of failing to properly analyze climate-related financial exposure. If those cases are taken to court, insurers have to defend those companies who have purchased Directors' and Officers' (D&O) liability coverage. Insurance companies providing D&O policies could, however, resist covering claims in which the environmental liability—and in this specific case, the potential carbon exposure—on financial statements has not been adequately disclosed. *See* Howard C. Kunreuther & Erwann O. Michel-Kerjan, *Insurability of Large-Scale Disasters, and the Emerging Liability Challenge*, 155 U. PA. L. REV. 1795, 19-24 (2007).

22. Howard C. Kunreuther & Erwann O. Michel-Kerjan, *id.*, at 3.

23. LUCIA BEVERE *ET AL.*, SIGMA: NATURAL CATASTROPHES AND MAN-MADE DISASTERS IN 2012: A YEAR OF EXTREME WEATHER EVENTS IN THE US, 13 (Kurt Karl ed., no. 2/2013, 2013), *available at* http://media.swissre.com/documents/sigma2_2013_en.pdf (Swiss Re).

24. World Economic Forum, *Global Risks 2013: An Initiative of the Risk Response Network*, 18, (April 1st, 2013, 4:05PM), http://media.swissre.com/documents/WEF_GlobalRisks_Report_2013.pdf.

25. LUCIA BEVERE *ET AL.*, *supra* note 23.

26. 2011 was the costliest year, with $126 billion in insured losses, especially due to earthquakes and flooding in the Asia Pacific region. LUCIA BEVERE *ET AL.*, *supra* note 23, at 1.

27. DARA is a non-profit organization from Spain that provides support in the field of humanitarian aid as well as climate change, disaster and risk reduction. *See* DARA, http://daraint.org/about-us/ (last visited Apr. 26, 2013).

28. CLIMATE VULNERABLE FORUM & DARA, CLIMATE VULNERABILITY MONITOR: A GUIDE TO THE COLD CALCULUS OF A HOT PLANET, 2 (2nd ed., 2012), *available at* http://www.daraint.org/wp-content/uploads/2012/10/CVM2-Low.pdf.

29. Murray Simpson *et al.*, An overview of modeling climate change : Impacts in the Caribbean Region with contribution from the Pacific Islands (2009), http://www.caribsave.org/assets/files/7dec09/Summary%20Document%20Final%20Caribbean%20CC%20UNDP%20Report.pdf (CARICOM, Caribbean Cmty.–Climate Change Ctr., Dep't for Int'l Dev., Caribsave and UNDP).

30. *See* CARICOM, http://www.caricom.org (last visited Apr. 27, 2013).

31. MURRAY SIMPSON *ET AL.*, *supra* note 29, at 26.

32. PATRICK REICHENMILLER ET AL., WEATHERING CLIMATE CHANGE: INSURANCE SOLUTIONS FOR MORE RESILIENT COMMUNITIES, 3 (Esther Baur ed., 2010), *available at* http://media.swissre.com/documents/pub_climate_adaption_en.pdf (Swiss Re).

33. Howard C. Kunreuther & Erwann O. Michel-Kerjan, *supra* note 21, at 4-5.

34. The 2004 Asian tsunami cost the insurance industry about $5 billion, but the disaster killed over 280,000 people.

35. The 2011 Thailand floods had an estimated cost of $15 to 20 billion; Hurricane Katrina $125 billion; Superstorm Sandy $70 billion.

36. IPCC, Climate Change 2013, The Physical Science Basis, *available at* http://www.ipcc.ch/report/ar5/wg1/ (last revised October 24, 2013).

37. Leo Hickman, *Landmark Climate Change Report Leaked Online*, THE GUARDIAN ONLINE (Dec. 14, 2012, 09.07 EST), http://www.guardian.co.uk/environment/2012/dec/14/ipcc-climate-change-report-leaked-online.

38. *See* THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE, PART IV: ESTABLISHING ACCOUNTABILITY, *supra* note 10.

39. Jennifer Kilinski, Symposium: Arctic Law in an Era of Climate Change, Comments, *International Climate Change Liability: A Myth or a Reality?*, 18 J. TRANSNAT'L L. & POL'Y 377, 3 (2009).

40. According to data gathered by Ms. Kilinski, the U.S. power plants account for 63% of all U.S. sulfur dioxide emissions and 39% of carbon dioxide emissions. The top fifty U.S. greenhouse gas emitters collectively account for more than 25% of U.S., and nearly 5.5% of worldwide, emissions. *See* Jennifer Kilinski, *id.*, at 5.

41. Jennifer Kilinski, *id.*, at 5.

42. Some theories have risen to recover damages based on violation of international law. An option would be to argue a breach of treaty claims under the UNFCCC. *See* THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE, Chapter 13, *supra* note 10. A second option would be to base a claim on ocean acidification, which could have worked as natural barriers to sea level rise, and thus litigate under the LOSC, which offers a compulsory dispute-settlement mechanism. *See* THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE, Chapter 15, *supra* note 10. A third option is establishing liability under the World Heritage Convention. *See* THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE, Chapter 13, *supra* note 10. A last option would be to challenge environmental impact assessments for failure to consider climate impacts internationally. This option was carried out by the Federal States of Micronesia, through a submission to the Czech Ministry of Environment rather than a lawsuit. *See* THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE, Chapter 17, *supra* note 10. An advisory opinion from the ICJ on damages from climate has been sought by Palau, in order to discuss the potential responsibility of states. *See* Kysar, Douglas A., *Climate Change and the International Court of Justice* (August 14, 2013), available at http://ssrn.com/abstract=2309943 or http://dx.doi.org/10.2139/ssrn.2309943.

43. Other options have been academically discussed: claims under the UNFCCC and the Kyoto Protocol; the International Court of Justice (ICC); the Inter-American Commission on Human Rights; and the United Nations Conference on the Law of the Seas (UNCLOS) and the United Nations Fish Stocks Agreement. For more information on the pros and cons of each of those options, as well as the challenges, see Jennifer Kilinski, *supra* note 39, at 6-11.

44. Mass. v. EPA, 549 U.S. at 521-27.

45. Jennifer Kilinski , *supra* note 39, at 6-11.

46. Mass. v. EPA, 549 U.S. at n.24.

47. Mass. v. EPA, 415 F.3d 50, 64-74 (D.C. Cir. 2005).

48. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

49. Nw. Envtl. Def. Ctr. v. Owens Corning Corp., 434 F. Supp. 2d 957 (D.Or. 2006); Friends of Earth, Inc. v. Watson, 2005 WL 2035596 (N.D. Cal); Korsinsky v. Envtl. Prot. Agency, 2005 WL 2414744 (S.D.N.Y.).

50. 28 U.S.C. § 1350 (2000).

51. Kiobel v. Royal Dutch Petroleum, No. 10-1491, 2013 U.S., WL 1628935 (U.S., Apr. 17, 2013).

52. Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), principle 1 (1972).

> Principle 1: Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and

foreign domination stand condemned and must be eliminated.

53. Rio Declaration on Environment and Development (Rio Declaration), pr. 1, Aug. 12, 1992, A / CONF.151 / 26 (Vol. I). "Principle 1: Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."
54. *Kiobel v. Royal Dutch Petroleum (U.S.), supra* note 51.
55. *Kiobel v. Royal Dutch Petroleum*, 642 F.3d 268 (2nd Circuit, 2011).
56. "All the cases of the class affected by this case involve transnational corporations, many of them foreign. Such foreign companies are creatures of other states. They are subject to corporate governance and government regulation at home. (…) I cannot think that there is some consensus among nations that American courts and lawyers have the power to bring to court transnational corporations of other countries, to inquire into their operations in third countries, to regulate them—and to beggar them by rendering their assets into compensatory damages, punitive damages, and (American) legal fees. Such proceedings have the natural tendency to provoke international rivalry, divisive interests, competition, and grievance—the very opposite of the universal consensus that sustains customary international law."
57. *Kiobel v. Royal Dutch Petroleum (U.S.), supra* note 51, at 2.
58. *Kiobel v. Royal Dutch Petroleum (U.S.), supra* note 51, at *16 (Justice Breyer, concurring).
59. *Kiobel v. Royal Dutch Petroleum (U.S.), supra* note 51, at *11 (Justice Kennedy, concurring).
60. *Kiobel v. Royal Dutch Petroleum (U.S.), supra* note 51, at *12 (Justice Breyer, concurring).
61. *Native Village of Kivalina v. Exxon Mobil Corp.*, 663 F. Supp. 2d 863 (2009).
62. *Native Village of Kivalina v. Exxon Mobil Corp.*, 696 F. 3d 849 (9th Circuit, 2012).
63. *See Small Island Nations to Seek Accord on Creating Insurance Pool to Cover Risk*, 14 Int'l Envtl. Rep. (BNA) 561-62 (Oct, 23, 1991).
64. Patrick Reichenmiller et al., *supra* note 32, at 5.
65. AOSIS, *Proposal by the Alliance of Small Island States (AOSIS) for the Survival of the Kyoto Protocol and a Copenhagen Protocol to Enhance the Implementation of the United Nations Framework Convention on Climate Change*, WASH. POST, http: / / www.washingtonpost.com / wp-srv / photo / homepage / AOSIS1.pdf.
66. Principle 7 of the Rio Declaration: "In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command."
67. Louise Gray, *Cancun climate change summit: small island states in danger of "extinction,"* THE TELEGRAPH (2010), http: / / www.telegraph.co.uk / earth / environment / climatechange / 8170075 / Cancun-climate-change-summit-small-island-states-in-danger-of-extinction.html.
68. *See* THE CARIBBEAN CATASTROPHE RISK INSURANCE FACILITY'S, http: / / www.ccrif.org (Mar. 25, 9:45AM).
69. The program was launched on January 18, 2013, according to the Swiss Re website. See Swiss Re, *Swiss Re supports first sovereign catastrophe risk insurance in Asia Pacific*, SWISS RE (Jan. 18, 2013), available at http: / / www.swissre.com / about_us / global_partnerships / Swiss_Re_supports_first_sovereign_catastrophe_risk_insurance_in_Asia_Pacific.html and The World Bank, News Release, *5 Pacific Island Nations to be Insured Against Natural Disasters: Pilot Program to Help Governments Respond to Natural Disasters*, SWISS RE (Jan. 18, 2013), http: / / media.swissre.com / documents / WB_press_release_five_pacific_island_nations_to_be_insured.pdf.
70. Howard C. Kunreuther & Erwann O. Michel-Kerjan, *supra* note 21, at 9.
71. Omri Ben-Shahar and Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 5 (2012).
72. Howard C. Kunreuther & Erwann O. Michel-Kerjan, *supra* note 21, at 12.
73. *Id.* at 13.
74. Ben-Shahar and Logue, *supra* note 71, at 7.
75. *See* UNITED, http: / / www.unitedinsure.com / united.cfm?LID=inside%20united (last visited Apr. 6, 2013).
76. *See* Ben-Shahar and Logue, *supra* note 71, at 18.
77. Ben-Shahar and Logue, *supra* note 71, at 19.

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Administrative Decisions Update

Prepared by Robert A. Stout Jr.

In the Matter of the Alleged Violations of Article 15 of the Environmental Conservation Law ("ECL") of the State of New York by Robert Berger, Karen Berger, David Cook and Jody Cook, Respondents.

Decision and Order of the DEC Commissioner June 17, 2013

Summary of the Decision

The Honk Falls Dam (the "Dam"), built in 1898 and formerly used for hydroelectric power generation, is located on Rondout Creek and impounds the water in Honk Lake in the Town of Wawarsing, County of Ulster. The Dam is approximately 300 feet long and 42 feet high at its tallest point. In 1981 a New York District Corps of Engineers (the "Corps") Phase I Inspection Report indicated that the Dam's spillway capacity was "seriously inadequate" and noted deterioration in the Dam surface, cracks in the downstream face of the auxiliary spillway, erosion at the junction of the concrete and rock at the tow of the Dam and growth of brush and trees at various locations on the Dam. The Dam was classified in the "high hazard" category. In 1998, the Corps rated the Dam as a Class C, High Hazard. During the period from 1983 to 2010, DEC inspected the Dam at least 14 times and identified deficiencies, each time noting that the Dam was classified as a Hazard Class C.

The Berger and Cook respondents own property on each side of the Dam on the east and west sides of Rondout Creek respectively. The Commissioner found that Respondents were "owners" of the Dam within the meaning of ECL §15-0507(1) and were jointly and severally liable for compliance with the statute.[1] As a result, Respondents were ordered to perform certain remedial activities, post $500,000 in financial assurance and pay a $116,500 penalty, $86,500 of which is suspended pending compliance with the Decision and Order.

Background

By letter dated September 6, 2006, DEC notified Respondents of potential ECL § 15-0507 violations, informed Respondents of the classification of the Dam and that no Emergency Action Plan ("EAP") was in place and requested further engineering analysis. Follow-up letters were sent in November 2006 and February 2007, but no action was taken to address the deficiencies. A notice of hearing and complaint, dated April 27, 2007, was served on Respondents.[2] The amended complaint cites violations dating from July 27, 1999, the month in which amendments to the dam safety statute were adopted. Following extensive motion practice and discovery, hearings occurred from November 2011 to January 2012.

Much of the proceedings focused on the question of whether Respondents were "owners" within the meaning of the statute.[3] In the Decision and Order, the Commissioner noted that liability does not implicate the issue of use of the Dam. The Commissioner found that because none of the relevant deeds contained an exclusion or reservation of the Dam from conveyance of the property, the owner or owners of the land underneath the Dam own the Dam. The Commissioner also concurred with the ALJ's finding that the conveyance of land along a stream or lake is presumed to convey land under the water to the centerline of the stream or lake, unless the deed expressly excludes the underwater land.[4] Accordingly, the boundary line between the Berger property and the Cook property was found to be the centerline of Rondout Creek. The Commissioner found joint and several liability, citing the broad remedial purposes of the dam statute and "clear intent in the 1999 legislation to strengthen the powers of (DEC) and shift to all owners of dams the primary responsibility for ensuring that their Dams are safe." Further, the Commissioner found that the harm resulting from failure to act would be "incapable of any reasonable or practicable division or allocation among multiple tortfeasors, irrespective of whether defendants acted in concert or concurrently."

Decision and Order of the Commissioner

Respondents were found jointly and severally liable for failing to operate and maintain the Dam in a safe condition in accordance with ECL 15-0507(1). A maximum civil penalty of $1,416,000 was possible for the violations which occurred from July 1999 to April 27, 2007, the date of the complaint, pursuant to ECL §71-1109, which provides for a penalty of $500 per offense, with each day the violation continues being a separate and discrete offense. Recognizing that the repairs to the Dam were of prime importance, that Respondents were individuals, and that the cost of remedial work and $500,000 financial assurance was significant, DEC proposed lesser penalties. One alternative calculation advanced by DEC proposed using the period from the notice of violation to the date of the complaint, resulting in a penalty of $116,500. Consequently, the Commissioner assessed a penalty of $116,500, $30,000 of which was immediately payable and $86,500 of which was suspended, contingent upon respondents' compliance with the terms of the Decision and Order. In addition to the penalty and financial assurance, Respondents were directed to perform remedial activities, including:

1) conducting an engineering and safety inspection within 30 days and a full engineering assessment within one year;
2) submission of a proposal within 45 days for lowering the water level of Honk Lake and a schedule for implementing the proposal;

3) preparation of a basic or interim emergency action plan ("EAP") within 90 days and a full EAP within one year;

4) performance of quarterly safety inspections;

5) preparation of an inspection and maintenance plan;

6) submission of a permit application within 60 days of the completion of the engineering assessment specifying the selected alternative and remedial work to be performed;

7) commencement of remedial work within 30 days of permit issuance;

8) completion of the remedial work within 150 days of permit issuance.

Conclusion

Owners of land adjacent to water bodies impounded by dams must take close note of this decision. As reflected in the decision and related case law, deeds which fail to explicitly carve out underwater rights will be deemed to convey title to the center of the body of water. If even a portion of a dam rests on this land, joint and several liability for the dam may follow. According to the 2013 US Army Corps of Engineers National Inventory of Dams, there are 1,968 dams in the state, 409 of which are rated High Hazard potential. Given the advancing age of our dams (hundreds are in excess of 100 years old) and our recent experience with extreme weather, this issue will only become more important.

Endnotes

1. ECL §15-0507(1) requires, among other things, that any owner of a dam or other structure which impounds waters shall at all times operate and maintain said structure and all appurtenant structures in a safe condition. See also, Dam Safety Regulations at 6 NYCRR Part 673.
2. The complaint sought a $941,00 penalty, $500,000 in financial assurance and on a short-term basis: the lowering of lake surface waters as soon as possible, a basic or interim Emergency Action Plan (pursuant to 6 NYCRR 673.7), quarterly inspections and an Inspection and Maintenance Plan. DEC also sought an Engineering Assessment with repair alternatives and cost estimates that would allow the dam to meet safety criteria and a full Emergency Action Plan, to be completed within one year.
3. ECL §15-0507 defines an "owner" to "any person or local public corporation who owns, erects, reconstructs, repairs, maintains or uses a dam or other structure which impounds waters."
4. The ALJ cited cases including *Stewart v. Turney*, 237 NY 117, 121-122 (1923). The Commissioner found that the Court of Appeals Decision in *Knapp v. Hughes* 19 N.Y. 3d 67 (2012) is a reaffirmation and clarification of existing law. The Commissioner cited specific language in the *Knapp* decision, which states: "The effect of a grant should not turn on such fine distinctions as that between "side" and "edge." To make a plain and express reservation of rights to underwater land, a grantor must do more than use the word "edge" or "shore" in a deed. He or she must say that land under water is not conveyed, in those words or in words equally clear in meaning. In the absence of an explicit reservation, a grant of land on the shore of a pond or stream will be held to include the adjoining underwater land, except in unusual cases where the nature of the grant itself shows a contrary intention." *Id.* at 677.

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Recent Decisions and Legislation in Environmental Law

Recent Decisions

In re Norse Energy Corp. USA v. Town of Dryden, 964 N.Y.S.2d 714 (N.Y. App. Div. 3d Dep't 2013)

Facts

In response to local opposition against hydraulic fracturing, in August 2011 the Town of Dryden ("Town") amended its zoning ordinance "to ban all activities related to the exploration for, and the production or storage of, natural gas and petroleum."[1] Prior to the enactment of the zoning amendment, Norse Energy Corp. USA's ("Norse") predecessor acquired 22,000 acres of leases for drilling and development of natural gas within the Town.[2] Norse commenced this suit against the Town pursuant to CPLR Article 78, arguing that the zoning amendment was preempted by the Oil, Gas and Solution Mining Law (OGSML).[3] Both the Town and Norse moved for summary judgment and Dryden Resource Awareness Coalition (DRAC) sought to intervene to defend the zoning amendment.[4]

Procedural History

On February 22, 2012, the Supreme Court in Tompkins County entered summary judgment in the Town's favor, holding that certain amendments to the Town's zoning ordinance are not preempted by OGSML, with the exception of a provision allowing for invalidation of permits granted by other local or state agencies.[5] The Supreme Court denied DRAC's motion to intervene and DRAC and Norse now appeal.[6]

Issues

Whether (1) the Supreme Court's decision to deny DRAC's motion to intervene was an abuse of discretion, and (2) OGSML preempts the amendment to the Town's zoning ordinance which essentially bans hydraulic fracturing within the Town?

Rationale

In addressing DRAC's appeal, the court explained that "[w]hile the only requirement for obtaining an order permitting intervention via [CPLR 1013] is the existence of a common question of law or fact, the resolution of such a motion is nevertheless a matter of discretion."[7] The court reasoned that because DRAC failed to differentiate its interest in the outcome as compared to other residents of the Town and based on the fact that the Town was the more appropriate party to defend the amendments, there was no abuse of discretion in denying DRAC's motion to intervene.

The court then discussed whether OGSML preempts the Town's amendments to the zoning ordinance. Norse argued that OGSML both expressly and impliedly preempts the Town's amendment. The NY Constitution grants local government the power to enact local laws "relating to its property, affairs or government," as long as they are consistent with general State laws and the Constitution.[8] However, the Legislature may preempt local laws by expressly stating "its intent to preempt, or it may do so by implication."[9]

The court began by examining the supersession clause in the OGSML which states that it "shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries[.]"[10] Because the OGSML does not define "regulation," the court had to determine whether a zoning ordinance is a regulation. Giving the word "regulation" its ordinary meaning, the court used the definition, "'an authoritative rule dealing with details or procedure.'"[11] The court explained that the Town's zoning ordinance does not deal with details or procedure, rather it "establishes permissible and prohibited uses of land within the Town for the purpose of regulating land generally."[12] Additionally, the legislative history and OGSML itself do not support the inclusion of zoning within the term "regulation."[13] The court found that the Legislature intended the supersession clause in the OGSML "to ensure uniform statewide standards and procedures with respect to the technical operational activities of the oil, gas and mining industries in an effort to increase efficiency while minimizing waste[.]"[14] Because the Town's zoning ordinance does not seek to regulate "the actual operation, process, and details of the oil, gas and solution mining," the court refused to preempt the zoning ordinance on the basis of express preemption.[15]

Norse argued in the alternative that even if the zoning ordinance is not expressly preempted, "it is nevertheless invalid under the principles of implied preemption."[16] A local law is impliedly preempted when it is inconsistent with constitutional or general laws.[17] Norse pointed to provisions of the OGSML which address well-spacing, arguing that since it regulates where drilling may occur, that zoning amendments which restrict the location of drilling are impliedly preempted.[18] The court explained that the Town's zoning ordinance and OGSML are not inconsistent with one another because the zoning law seeks to restrict where drilling may occur, whereas the OGSML instructs proper spacing between wells.[19] Therefore, the court ruled that the Town's zoning law is not impliedly preempted by the OGSML.[20]

Conclusion

The OGSML does not expressly or impliedly preempt the Town's zoning amendment banning hydraulic fracturing within the Town. This decision is consistent with the Home Rule provision of the State Constitution, and reassures that local governments are not powerless in the face of natural gas exploration.

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Endnotes

1. *In re* Norse Energy Corp. USA v. Town of Dryden, 964 N.Y.S.2d 714, 716 (App. Div. 2013).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at 716–17.
6. *Id.* at 717.
7. *Id.* at 717–18.
8. *Id.* at 718.
9. *Id.* at 719.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 721.
15. *Id.*
16. *Id.* at 723.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 724.

* * *

Center for Biological Diversity v. Environmental Protection Agency, 2013 WL 3484511 (D.C. Cir. 2013)

In *Center for Biological Diversity v. Environmental Protection Agency,* the D.C. Circuit of the Court of Appeals reviewed the Environmental Protection Agency's (EPA) rule to defer regulation of "biogenic" carbon dioxide ("Deferral Rule") for three years.[1] The Court vacated the Deferral Rule, holding that EPA lacked justification under any administrative law doctrine to impose such a rule.[2]

Facts

This case arose from a challenge to a portion of EPA's regulation of air pollutants under the Clean Air Act.[3] The Clean Air Act states that if the EPA determines an "'air pollutant…may reasonably be anticipated to endanger public health or welfare,' it must regulate that air pollutant under the Prevention of Significant Deterioration of Air Quality (PSD) and Title V permitting programs."[4] The PSD program requires that any major emitting facility that has the potential to emit over 100 tons per year (tpy) of "any air pollutant" obtain state-issued construction permits before starting a construction or significant modification project.[5] To obtain a PSD permit, the facility must install the best available control technology (BACT) to control the emission of every regulated pollutant, even those that do not reach the 100 tpy threshold.[6] The Title V program requires that any stationary source that has the potential to emit 100 tpy of any regulated air pollutant obtain an *operational* permit.[7]

Issue

This case questions the validity of EPA's Deferral Rule which is a temporary, three year regulation that "exempts from regulation biogenic carbon dioxide sources that trigger the PSD and Title V permitting programs."[8] Biogenic carbon dioxide is carbon dioxide "directly resulting from the combustion or decomposition of biologically-based materials other than fossil fuels and mineral sources of carbon."[9] Although the Deferral Rule is temporary, its effect would provide a permanent exemption from PSD permitting for biogenic carbon dioxide sources constructed within the three-year period unless such facility undertakes significant modification after the deferral period.[10]

Procedural History

In addressing the threshold ripeness requirements, the Court determined the Deferral Rule was fit for review because it functions as a permanent exemption from PSD permitting for the sources constructed during the deferral period.[11] Withholding a decision would cause hardship because there is an uncertain number of sources that may be constructed without a PSD permit that, but for the Deferral Rule, would be required to limit their pollution.[12] Judge Henderson dissented, arguing that this is not fit for review because the temporary nature of the Deferral Rule would resolve the issue without judicial involvement within three years and there is a trivial hardship because there has been only one facility constructed so far that is exempted from PSD permits due to the Deferral Rule.[13]

Rationale

Petitioners argued that the EPA violated the plain language of the Clean Air Act, which requires the regulation of "any air pollutant."[14] EPA did not provide explanation of its statutory analysis of how it could treat biogenic carbon differently from any other air pollutant. Instead, the Court denied each of the three principles of administrative law EPA provided as justification for the Deferral Rule: the *de minimis*, one-step-at-a-time, and administrative necessities doctrines.[15] First, the *de minimis* doctrine "allows agencies to grant regulatory 'exemption[s] when the burdens of regulation yield a gain of trivial or no value.'"[16] The Court denied this justification because the *de minimis* doctrine allows agencies to establish *permanent*

regulation exemptions, whereas the EPA concedes the Deferral Rule is a temporary, three-year regulation.[17]

Second, the one-step-at-a-time doctrine allows agency regulations to be promulgated in a piecemeal fashion. This doctrine requires that the agency must "articulate (1) what it believes the statute requires and (2) how it intends to achieve that goal."[18] The Court held that EPA's reliance on the one-step-at-a-time doctrine was arbitrary and capricious because EPA failed to describe what it believes full compliance with the Clean Air Act is.[19] Without this conception of what full compliance would be, the Court had no basis to determine what direction the Deferral Rule was taking "one step" toward.

Third, the administrative necessity doctrine allows an agency to adopt the narrowest feasible exemption to regulations in order to avoid implementing a statute if attainment of such statutory objectives is shown to be impossible.[20] The EPA exempted all biogenic carbon sources because it argued that limiting the use of biogenic fuel sources would be contrary to the goal of the Clean Air Act to reduce overall carbon output.[21] However, there was a proposed alternative to the complete exemption of biogenic carbon sources: to require sources to obtain permits for biogenic carbon output only if they fail to make an effort to account for net carbon cycle impacts.[22] EPA's explanation that this middle-ground option would have only a trivial impact on biogenic carbon sources does not sufficiently explain why permanent exemptions in the Deferral Rule are the narrowest feasible exemption when this middle ground approach would also lessen carbon output, though possibly not as much. Since EPA failed to sufficiently explain its reasoning for rejecting this middle-ground option, the Court rejected its administrative necessity argument.[23]

In its brief, EPA also relies on the absurd results doctrine, which states "'that a statute should not be construed to produce an absurd result.'"[24] EPA claims that, since the use of biomass fuels may actually reduce net emissions of carbon dioxide, then it would be contrary to the Clean Air Act's goal to regulate such fuels.[25] Since this argument occurs nowhere in the text of the Deferral Rule, the Court held that the absurd results doctrine was a post hoc argument and not a valid justification for the Deferral Rule.

Conclusion

The Court vacated the administrative action creating the Deferral Rule since EPA cannot justify its actions under any of the administrative law doctrines it relied on.[26] This decision did not, however, address the issue of whether EPA has the authority to permanently exempt biogenic carbon dioxide sources from PSD permitting under the Clean Air Act, which the Court said could later be decided if it ever becomes an issue.

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Endnotes

1. Ctr. for Biological Diversity v. E.P.A., 2013 WL 3481511, at *1, (D.C. Cir 2013).
2. *Id.*
3. *Biological Diversity*, 2013 WL 3481511 at *1.
4. 42 U.S.C § 7521(a)(1) (internal citations omitted).
5. *Id.* at §§ 7475, 7479(1).
6. *Id.* at § 7475(a)(4).
7. *Id.* at §§ 7661-7661(f).
8. *Biological Diversity*, 2013 WL 3481511 at *4.
9. *Id.* at *2.
10. *Id.* at *4.
11. *Id.* at *5.
12. *Id.*
13. *Id.* at *12.
14. *Id.* at *5.
15. *Id.*
16. *Id.* at *6 (quoting Alabama Power Co. v. Costel, 636 F.2d 323, 360-61 (D.C. Cir. 1979)).
17. *Id.* at *6.
18. *Id.*
19. *Id.* at *6–*7.
20. Sierra Club v. E.P.A., 719 F.2d 436, 463 (D.C. Cir. 1983).
21. *Biological Diversity*, 2013 WL 3481511 at *7.
22. *Id.*
23. *Id.* at *7–*8.
24. *Id.* at *8 (quoting Mova Pharmaceutical Corp. v. Shalala, 140 F.3d 1060, 1068 (D.C. Cir. 1998)).
25. *Id.* at *8.
26. *Id.* at *9.

* * *

Koontz v. St. Johns River Water Management Dist., 133 S. Ct. 2586 (U.S. 2013)

Facts

This case involves a tract of land in the State of Florida that was first acquired in 1972.[1] The 14.9-acre property is a point of contention because of its location and wetland characteristics.[2] After the parcel was purchased, the State of Florida adopted the Water Resources Act, which established a Management and Storage of Surface Water ("MSSW") permit, and the Warren S. Henderson Wetlands Protection Act, which established a Wetlands Resource Management ("WRM") permit.[3]

Petitioner, Koontz, desired to develop 3.7 acres of the parcel and applied for both of the required permits.[4] The development would have required raising the elevation and grading part of the land.[5] The proposal offered an environmental easement on 11 acres to the St. Johns River Water Management District (the "District") in order to mitigate any environmental impacts from the development.[6]

The District found the environmental easement to be inadequate, and directed Petitioner that the permits would not be approved unless the District's proposed alternatives were followed.[7] The District proposed the following: decrease the size of the development to a smaller project, install retaining walls, and / or financially support improvements on other pieces of property.[8] The Petitioner found the demands to be excessive and commenced this lawsuit.[9]

Procedural History

The Florida District Court found the District's actions to be unlawful, but the Florida State Supreme Court found that the case was distinguishable from *Nollan* and *Dolan* and reversed the District Court's decision.[10] The Supreme Court granted certiorari.[11]

Issue

The main issue addressed by the court is whether *Nollan* and *Dolan* must be satisfied "when the government denies [a land-use] permit[,] even when its demand is for money."[12]

Rationale

The court's decisions in *Nollan* and *Dolan* deal with the Fifth Amendment and "just compensation for the property the government takes when owners apply for land-use permits."[13] The Court sympathized that applicants are vulnerable and may be subject to extortionate demands, and will do anything to ensure that they receive the necessary permit that is required.[14]

> *Nollan* and *Dolan* accommodate both realities by allowing the government to condition approval of a permit on the dedication of property to the public so long as there is a "nexus" and "rough proportionality" between the property that the government demands and the social costs of the applicant's proposal.[15]

In this case, the court established that the legal precedent applies to both setting the condition for approving the permit and denying the permit for the failure to do so.[16] The lower courts struggled with the proposition that denial of a permit could be considered a takings issue, since no property was actually exchanged.[17] The majority focused on the burden that the condition places on landowners.[18]

The second issue is the requirement that money be paid in order to make improvements at other property sites.[19] The Court found that this is still an unconstitutional condition, and compared it to similar rulings on issues such as tax benefits, public employment, health care, and crop payments.[20]

Conclusion

The Court reversed the decision of the Florida Supreme Court, and remanded it for further proceedings, finding that the District must comply with *Nollan* and *Dolan*.[21]

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Endnotes

1. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2591 (U.S. 2013).
2. *Id.* at 2591–92.
3. *Id.* at 2592.
4. *Id.*
5. *Id.*
6. *Id.* at 2592–93.
7. *Id.* at 2593.
8. *Id.*
9. *Id.*
10. *Id.* at 2593–94.
11. *Id.* at 2594.
12. *Id.* at 2603.
13. *Id.* at 2594.
14. *Id.*
15. *Id.* at 2595.
16. *Id.*
17. *Id.* at 2596.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 2603.

* * *

Kellner v. City of N.Y. Dep't of Sanitation, 107 A.D.3d 529 (N.Y. App. Div. 1st Dep't 2013)

Facts

On November 29, 2012 the Supreme of New York County dismissed a Civil Practice Laws and Rules (CPLR) article 78 proceeding brought by the Petitioner, Assembly Member Micah Z. Kellner.[1] Petitioner sought a declaration that the NYS Department of Environmental Conservation (DEC) and City Department of Sanitation (DSNY) did not comply with the State Environment Quality Review Act (SEQRA), DEC rules, and the City's Solid Waste Management Plan.[2] Petitioner argued the agencies failed to comply because the DEC did not require, and the DSNY did not create, a Supplemental Environmental Impact Statement (SEIS) when preparing for the construction of 91st Street Marine Transfer Station.[3] Petitioner also sought to enjoin the city from continuing the project until the agencies complied.[4] The DSNY was designated as the lead agency for the project.[5]

Procedural History

The Supreme Court denied the petition, and the petitioners appealed to the Supreme Court, Appellate Division, First Department, New York.[6]

Issue

Whether the DEC's and DSNY's failure to require and prepare a SEIS was an "error of law, arbitrary and capricious, or an abuse of discretion"?[7]

Rationale

The court held that DSNY "took the requisite 'hard look' at the potential impacts of the delay in implementation and made a reasoned determination that an SEIS was not required."[8] The court also stated, "Petitioner's scenarios suggesting potential consequences of the delay are no more than speculation."[9]

The court, however, does not expand on what the DEC and DSNY did that qualifies as a "hard look" and does not discuss further what Petitioner's potential scenarios include.

Conclusion

The court affirmed the lower court's decision that DSNY's and DEC's decision was "not affected by an error of law, arbitrary and capricious, or an abuse of discretion"[10]

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Endnotes

1. *Kellner v. City of NY Dept of Sanitation*, 107 A.D.3d 529 (N.Y. App. Div. 1st Dep't 2013).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 529-30.
9. *Id.* at 530.
10. *Id.* at 529.

* * *

Mingo Logan Coal Co. v. U.S. EPA, 714 F.3d 608 (D.C. Cir 2013)

Facts

In June of 1999 the predecessor of Mingo Logan Coal Company, Hobet Mining Inc., applied for a permit under § 404 of the Clean Water Act (CWA) for the Spruce No. 1 site to discharge mining material into four West Virginia streams and their tributaries.[1] The U.S. Army Corps of Engineers (Corps) has the authority under CWA § 404(a) to issue permits.[2] The Corps, in 2002, prepared a draft Environmental Impact Statement.[3] In a letter to the Corps, the Environmental Protection Agency (EPA) commented that it was concerned that "significant and unavoidable environmental impacts" had not been adequately addressed; however, EPA did not make a § 404(c) objection.[4] In January 2007, Mingo Logan was issued a permit (Spruce Mine Permit) that was valid until December 31, 2031.[5] The permit expressly stated that the Corps could "reevaluate its decision on the permit at any time the circumstances warrant."[6] However, EPA's post-permit authority was not mentioned in the permit.[7]

In 2009, EPA wrote a letter to the Corps requesting revocation of the permit, stating that there was "new information and circumstances…which justif[ied] reconsideration of the permit."[8] When the Corps refused EPA stated that it would use its own administrative procedures to do so, and in January 2011 EPA issued a Final Determination that revoked the permit.[9]

Procedural History

Mingo Logan challenged EPA's Final Determination in an action filed in the district court.[10] Mingo Logan challenged EPA's ability to revoke a permit that was three years old.[11] In 2011, Mingo Logan amended its complaint alleging that EPA's Final Determination was ultra vires and arbitrary and capricious.[12]

The district court granted summary judgment in favor of Mingo Logan stating that EPA "exceeded its authority under section 404(c) of the Clean Water Act when it attempted to invalidate an existing permit by withdrawing the specification of certain areas as disposal sites after a permit had been issued by Corps under section 404(a)."[13] On behalf of EPA the United States filed an appeal and the Corps joined EPA on the brief.[14]

Issue

Whether EPA had the authority under CWA § 404 (c) to revoke the Spruce Mine Permit after it had already been issued?

Rationale

The court in this case reviewed the district court's grant of summary judgment de novo.[15] The court reviewed EPA's interpretation of CWA § 404 using the *Chevron* standard.[16]

The court examined and determined that both CWA § 404(c) itself and the legislative intent of the CWA clearly indicate that Congress intended to grant EPA the power to withdraw permits issued by the Corps.[17] The court explained that while the Secretary of the Corps has the authority to issue the permits, EPA has been granted by Congress "a broad environmental 'backstop' authority

over the Secretary's discharge site selection in subsection 404(c)."[18] The court explained that the Administrator's authority has no time limit; he can act "whenever" an "unacceptable adverse effect" will occur.[19] The court defined the term "whenever" to mean "'[a]t whatever time, no matter when.'"[20] The court further explained that the language "withdrawal of specification" supports the interpretation that EPA can withdraw a permit that has already been issued.[21]

The court rejected Mingo Logan's argument that EPA cannot withdraw the permit once issued by the Corps.[22] Mingo Logan argued that the specification of the disposal sites must happen before the permit is issued and if EPA wants to withdraw the permit it must happen then.[23] The court disagreed and stated that Mingo Logan's interpretation would render the term "withdrawal" of CWA § 404(c) unnecessary.[24] The court stated that final specifications must be made in the permit itself but that they do not necessarily have to be made prior to the issuance of the permit.[25]

Mingo Logan also argued that EPA's interpretation was in conflict with CWA § 404 because permitting authority was given to the Corps and not EPA.[26] The court again rejected the argument stating that the statute is clear and, as explained above, the Administrator of EPA has the authority to make "the *final* say on the specified disposal sites 'whenever' he makes the statutorily required 'unacceptable adverse effect' determination."[27]

Mingo Logan also argued that EPA's interpretation "tramples" on CWA § 404(p) and § 404(q).[28] CWA § 404(p) provides that compliance with the permit is compliance with the CWA for enforcement actions brought under CWA § 1319 and 1365.[29] CWA § 404(q) directs the Secretary of the Corps to make agreements with other agencies to prevent delays with issuing permits.[30] EPA argued that CWA § 404(c) unambiguously gave EPA authority to act post permit and when CWA § 404(p) was enacted it did not limit CWA § 404(c).[31] The court agreed with EPA.[32] The court stated that, with regard to CWA § 404(q), that obligation is only required prior to the issuance of a permit and is not affected by EPA's actions once a permit has been issued.[33]

Mingo Logan's final argument was that legislative history shows that EPA must act prior to issuance of a permit.[34] Mingo Logan used the statement of then-Senator Edmund Muskie as evidence of such intent.[35] Senator Muskie stated that "'*prior* to the issuance of any permit to dispose of spoil, the Administrator must determine that the material to be disposed of will not adversely affect municipal water supplies, shellfish beds, and fishery areas…wildlife or recreational areas in the specified site.'"[36] The court again rejected Mingo Logan's argument and stated that while EPA should consider these adverse effects pre-permit, EPA was not barred from reviewing these post-permit also.[37]

Conclusion

The court reversed the district court's holding and held that EPA had the authority under CWA § 404(c) to revoke the Spruce Mine permit after it had been issued.[38]

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Endnotes

1. *Mingo Logan Coal Co. v. United States EPA*, 714 F.3d 608, 610 (D.C. Cir 2013).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 610-611.
9. *Id.* at 611.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 612.
16. *Id.*, *see Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984).
17. *Mingo Logan*, 714 F.3d at 612-614.
18. *Id.* at 612.
19. *Id.* at 613.
20. *Id. quoting* 20 Oxford English Dictionary 210 (2d ed. 1989).
21. *Mingo Logan*, 714 F.3d at 613.
22. *Id.* at 614.
23. *Id.*
24. *Id.*, *see Corley v. United States*, 556 U.S. 303, 314 (2009) ("a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant").
25. *Mingo Logan*, 714 F.3d at 614.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 615.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 616.
38. *Id.*

* * *

Cooperstown Holstein Corporation v. Town of Middlefield, 106 A.D.3d 1170, 964 N.Y.S.2d 431 (3d Dep't 2013)

Facts

In June, 2011, the Town of Middlefield in Ostego County, New York ("the Town") enacted a zoning law that would become effective on June 28, 2011.[1] Article V of the law prohibits "[h]eavy industry and all oil, gas or solution mining and drilling[,]" effectively banning oil and gas drilling within the Town.[2] The plaintiff argues that New York State Environmental Conservation Law (ECL) preempts any local ordinances as they relate to such drilling, and that the ban on oil and gas drilling should no longer be enforced.[3] The plaintiff is a party to two oil and gas leases with Elexco Land Services, Inc. and the enforcement of the drilling ban has interfered with these leases.[4]

Issue

Did the State of New York prohibit local governments from enacting and enforcing legislation which may impact upon the oil, gas and solution drilling or mining industries other than that pertaining to local roads and the municipalities' rights under the real property law?[5]

Holding

The Supreme Court of Ostego County, New York found in favor of the Town, holding that the zoning law was not preempted by the state ECL.[6]

Rationale

The Court evaluated the legislative intent and history of ECL 23-0303(2) and how it relates to local authority, finding no indication that the state had intended to preempt or impact local municipal land use laws when the state law was originally enacted in 1963, subsequently amended in 1978, and again 1981.[7] Specifically, the Court analyzed the text "this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries."[8] The Court found that the "natural and most obvious sense of the word 'regulation,'" when considered with the legislative history, is relative only in a procedural context in order to maintain statewide standards for drilling methods. In addition, the Court found that the state's interest in these statewide standards complements home rule law of local governments in that the state controls the "how" of such drilling, while municipalities control the "where."[9] The Court further held that caselaw interpreting the "strikingly similar" supersession clause of the state Mining Land Reclamation Law (MLRL) provided additional authority that, absent clear intent from the New York State Legislature, MLRL could not be used to preempt local zoning law.[10]

Conclusion

The decision of the Supreme Court of Ostego County was upheld by the Supreme Court, Appellate Division, Third Department on May 2, 2013, having also found that the state law did not preempt the Town's law, and that the Town's zoning law was valid and not preempted by the ECL.[11] It is important to note that the courts found that only the manner and methods of the drilling were to be relevant under the ECL, but that the location(s) of the drilling remained fully within a town's home rule authority.

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Endnotes

1. *Cooperstown Holstein Corp. v. Town of Middlefield*, 35 Misc. 3d 767, 943 N.Y.S.2d 722 (Sup. Ct., Otsego Co. 2012).
2. *Id.* at 769–70.
3. *Id.* at 770.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 771–74.
8. *Id.* at 777.
9. *Id.* at 777–78.
10. *Id.* at 778.
11. *Cooperstown Holstein Corp. v. Town of Middlefield*, 106 A.D.3d 1170, 964 N.Y.S.2d 431 (3d Dep't 2013).

* * *

Revell v. Guido, 956 N.Y.S.2d 343 (N.Y. App. Div. 3d Dep't 2012)

Facts

The plaintiffs in this case are both licensed real estate brokers who in 2005 purchased property in Saratoga County, on which there were nine rental houses. The seller, defendant Guido, is the sole member and shareholder of Real Property Solutions, LLC (hereinafter "RPS").[1] In 2003, the defendant was notified by the Town of Stillwater (hereinafter "Town") that its existing septic system was in violation of codes and needed to be replaced. In 2003, defendant installed a new septic system, which was certified by a licensed engineer. However, in 2004 the new system experienced problems, and the Department of Environmental Conservation (hereinafter "DEC") informed the defendant of the various violations and subsequent legal ramifications. As a result, the defendant and DEC entered into a consent order stating that the defendant would provide the DEC with plans for repairing and possibly replacing the septic system.

In 2004, the defendant replaced the septic system; however, the new system had alterations that had not been approved by the DEC, pursuant to requirements within the consent order.

In September 2005, the plaintiffs entered into a contract with the defendant for sale of the property, and agreed that "buildings on the premises are sold 'as is;'"

and included a "Septic System Contingency."[2] The Septic System Contingency stated that the testing of the septic system by the plaintiffs was a condition precedent to the sale of the property However, the plaintiffs decided against testing the system, waiving the condition.

The plaintiffs' bank required an environmental questionnaire be completed as part of a mortgage contingency.[3] The defendant completed the environmental questionnaire and denied knowing of any past environmental violations, that the property had ever experienced or had indications of contamination, or that there was need for additional attention to environmental issues on the property.[4] Defendant also represented that the septic system was "totally new." While the sale was pending, the engineer who installed the septic system sent a letter to the defendant detailing his concerns about the septic system. In November 2005, the contract was finalized, and in December 2005 the septic system failed and the plaintiffs commenced this lawsuit.[5]

Procedural History

The Supreme Court of Saratoga County granted plaintiffs' motion for partial summary judgment, ruling that the doctrine of caveat emptor is not a viable defense in commercial real estate transaction when the seller fails to disclose certain information that constitutes active concealment.[6] The Supreme Court found that though the plaintiffs had failed to exercise their rights to inspect the system, they were justified in relying on the bank's environmental questionnaire.[7] Defendant appealed, seeking summary judgment, or that questions of fact remained and therefore a judgment in favor of the plaintiff was unlawful.[8]

Issue

(1) Whether the doctrine of caveat emptor provides a complete defense?

(2) Whether the defendant not only knowingly misrepresented the condition of the property, but also whether the plaintiffs were justified in relying on the misrepresentation?

Holding

The Supreme Court, Appellate Division, Third Department, New York found that the lower court was correct in rejecting defendant's motion for summary judgment based on a defense of caveat emptor.[9] However, the Supreme Court also held that the lower court had improperly ruled that the plaintiffs had established justifiable reliance in their claim of fraudulent inducement because material facts remained to be determined for a jury, and in doing so reversed the summary judgment in favor of the plaintiffs and remanded the case to the lower court.[10]

Rationale

The court found that the doctrine of caveat emptor does traditionally apply to real property transfers, in that so long as the buyer is aware of the "as is" condition of the property, the seller is not liable for defects.[11] Based on this reasoning, the court held that a seller may still be liable if the information he or she failed to disclose rises to the level of active concealment, in that a material fact has been misrepresented. The buyer must show that he or she was justified on relying on defendant's representation.[12]

However, the Court noted that when a party has the ability to discover the truth through "ordinary intelligence," and fails to act, justifiable reliance is not warranted.[13] Here, the Court ruled that there were material facts at issue warranting a jury trial.

Issues left to the jury include whether the phrase "totally new" was knowingly made by the defendant to induce the plaintiffs' reliance, and if the plaintiffs truly relied on the environmental questionnaire.[14] Though the defendant's statement that the system was "totally new" was false, there is an issue of fact as to whether this was done so to intentionally deceive the plaintiffs.[15] The Court also held that there was an issue of fact as to whether the defendant believed the questionnaire was referring only to the current status of the property as opposed to the past and present status.[16]

The Court indicated a sense of skepticism at the fact that two licensed real estate brokers did not exercise a higher level of diligence, particularly because of the Septic System Contingency Clause.

Conclusion

This case demonstrates the complexities of "as is" contracts as they relate to environmental issues, in that the seller may not be protected even if misstatements were not made in bad faith.

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Endnotes

1. *Revell v. Guido*, 956 N.Y.S.2d 343 (N.Y. App. Div. 3d Dep't 2012).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at 1456.
6. *Id.* at 1457.
7. *Id.*
8. *Id.* at 1455.
9. *Id.* at 1456.
10. *Id.* at 1457–58.
11. *Id.* at 1456.
12. *Id.*
13. *Id.* at 1457.
14. *Id.* at 1457–58.

15. *Id.* at 1458.

16. *Id.*

* * *

Borough of Harvey Cedars v. Karan, 2013 WL 3368225 (N.J. Sup. Ct. July 8, 2013)

Facts

Respondents, the Karans, own a beachfront home in Harvey Cedars, New Jersey.[1] The home consisted of three floors with the upper two-thirds being used as living space.[2] All three levels provided the Karans a view of the beach and never had "a lick of water" touch it.[3]

Appellant, the Borough of Harvey Cedars, sought a permanent easement of more than one quarter of the Karans' home.[4] The easement was part of a dune construction project carried out by the U.S. Army Corps of Engineers and the N.J. Department of Environmental Conservation.[5] Appellant's role in the project was to acquire permanent easements to allow for the construction of dunes along the entire shoreline.[6] Each dune would be constructed to a height of 200 feet to protect the island from erosion.[7] The dune on the Karans' property blocked their previous view of the beach.[8]

Appellant successfully acquired sixty-six of the eighty-two permanent easements voluntarily.[9] The remaining property owners refused to consent to the easement.[10] Appellant, through an enacted ordinance, sought to acquire the remaining properties through eminent domain after the Karans refused a $300 offer by Appellant.[11]

Procedural History

Appellant instituted an eminent domain action in November, 2008.[12] The Karans successfully moved before trial to bar expert testimony about the benefits the dune-construction project would have on their property.[13] The trial court concluded that the benefit of the dune to the Karans' property would be "general" and not admissible to offset the value of the partial taking.[14] A jury, after being instructed only to consider "special" benefits received to offset loss, returned a $375,000 award as just compensation for the Karans.[15] The Appellate Division affirmed the award, finding that any benefit to the Karans' property was "general" and not special in nature.[16]

Issue

Whether a jury should have heard evidence of the benefits of the project to determine the fair-market value to calculate a partial-taking "just-compensation"?

Rationale

The court began its analysis by taking a retrospective of its "takings" jurisprudence.[17] While its formulas for fair market value in total takings have been consistently applied, it found a less straightforward approach in calculating fair market value in partial-takings.[18] A particular problem in its jurisprudence has been differentiating between general and special benefits conferred on a landowner.[19]

The court concluded that the use of terms such as general and special benefits obscured the principles of compensation.[20] By examining its total-takings cases, the court found that general benefits are those that have a "possibility" of happening in some ambiguous point in the future.[21] These benefits should be excluded from the calculation of just compensation.[22] Thus, special benefits are those that may be reasonably calculated arising from the public improvement project.[23] In short, benefits used in the calculation of fair market value should be those that are quantifiable and perceived at the time of taking.[24]

Conclusion

The court held that the benefits to the Karans' property should have been heard by the jury.[25] It concluded that the trial court and Appellate Division erred in preventing a jury from hearing the quantifiable storm protection benefits the dune-construction project would bring to the Karans' property.[26] This ruling kept the jury from hearing a crucial component to calculating the fair-market value for just compensation.[27] Thus, the Appellate Division's judgment was reversed, the condemnation award vacated and remanded for proceedings consistent with the court's opinion.[28]

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Endnotes

1. *Borough of Harvey Cedars v. Karan*, 2013 WL 3368225, *2 (N.J. Sup. Ct. July 8, 2013).
2. *Id.*
3. *Id.* at *5.
4. *Id.* at *2.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at *3.
13. *Id.*
14. *Id.*
15. *Id.* at *3-*6.
16. *Id.*
17. *Id.* at *8-*18.
18. *Id.* *9, *15
19. *Id.* at *11.
20. *Id.* at *15.
21. *Id.* at *12.
22. *Id.*

23. *Id.*
24. *Id.* at *15.
25. *Id.* at *19.
26. *Id.*
27. *Id.*
28. *Id.*

* * *

Brodsky v. United States NRC, 704 F.3d 113 (2d Cir. 2013)

Facts

The Atomic Energy Act of 1954 (AEA) gives defendant, United States Nuclear Regulatory Commission (NRC), authority to grant exemptions to its licensees from specific fire safety protocols.[1] A nuclear power plant licensed by NRC may install a fire barrier that will protect certain safety structures from a fire that may not be extinguishable in a timely manner.[2] Since 1987, defendant Entergy Nuclear Operations, Inc. (hereinafter "Entergy") has utilized a fire barrier called Hemyc at its Indian Point nuclear power plant, operating unit No. 3 (hereinafter "Indian Point 3"), located in Westchester County, New York.[3]

In 2005, "NRC informed its licensees that Hemyc… did not perform for one hour as designed because of shrinkage of the material during testing."[4] In 2006, NRC directed all its power plant licensees to ensure compliance with fire safety regulations and to respond to NRC with information confirming such compliance.[5] Entergy responded that because of its use of Hemyc, it was not in compliance with the fire safety protocols; however, it had put into place certain monitoring and fire detection measures to remedy such noncompliance.[6] Entergy then requested an exemption from NRC's required one-hour fire resistance rating, asking NRC to allow for a reduction to a 30-minute fire resistance rating in areas protected by Hemyc.[7] The following year, NRC awarded an exemption after Entergy requested an allowance for a 24-minute rating at one of the sites.[8]

"[P]laintiffs Richard Brodsky, a former member of the New York State Assembly; the Westchester's Citizens Awareness Network; and the Sierra Club" requested the NRC reconsider the exemption, which NRC denied.[9]

Procedural History

Plaintiffs commenced an action in federal court, Southern District of New York, alleging that the exemption awarded to Entergy violated the Administrative Procedure Act (APA), the Atomic Energy Act (AEA), and the National Environmental Policy Act (NEPA).[10] The district court awarded summary judgment in favor of Entergy.[11] Plaintiffs appealed and the Second Circuit considered only the plaintiffs' claim that NRC violated NEPA because the public was denied the right to participate in the exemption process.[12]

Issue

Whether NRC's grant to Entergy of an exemption to fire safety protocols, without first allowing for public participation, prevented NRC from weighing all the factors essential to exercising its judgment in a reasonable manner, in violation of NEPA?

Rationale

The court discussed NEPA's requirement that environmental impact information regarding projects be made available to the public before federal agency decisions are made.[13] In particular, "regulations require a draft EIS [Environmental Impact Statement] to be circulated for public comment prior to its adoption."[14] In the present case, however, NRC did not issue an EIS, but did issue an environmental assessment (EA) and a finding of no significant impact (FONSI).[15] NEPA requires an agency "to 'involve environmental agencies, applicants, and the public' only 'to the extent practicable,'" when issuing an EA, "[a]nd only in 'limited circumstances' must an agency make a FONSI 'available for public review.'"[16] The court stated it "will not readily second guess an agency decision not to hold a public hearing in a particular case[,]" and the decision as to how much public involvement is practicable is left to agency discretion.[17] Here, because the plaintiffs were challenging NRC's discretion not to notify or solicit feedback from the public regarding the challenged exemption, the court must consider "whether the lack of public input prevented [NRC] 'from weighing all the factors essential to exercising its judgment [under NEPA] in a reasonable manner.'"[18]

The court reasoned that it was not capable of deciding this issue because there was nothing in the record explaining why NRC decided not to provide notice of Entergy's exemption request or afford an opportunity for public comment and NRC offered no evidence demonstrating that public participation was impracticable or inappropriate.[19]

Conclusion

Unable to "guess at the agency's reasons" for not affording public notice or participation, the Second Circuit vacated and remanded the judgment of the district court with respect to the NEPA challenge, with instructions for it in turn to remand to NRC to supplement the administrative record to provide an explanation for its denial.[20]

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Endnotes

1. *Brodsky v. U.S. Nuclear Regulatory Comm'n*, 704 F.3d 113, 116 (2d Cir. 2013).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at 117.

6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 115, 118.
10. *Id.* at 118.
11. *Id.*
12. *Id.*
13. *Id.* at 120.
14. *Id.* at 121.
15. *Id.* at 117.
16. *Id.* at 121 (*quoting* 40 C.F.R. § 1501.4(b), § 1501.4(e)(2)).
17. *Brodsky*, 704 F.3d at 121-22.
18. *Id.* at 121.
19. *Id.* at 122.
20. *Id.* at 123-25.

* * *

Clean Water Advocates of New York, Inc. v New York State Dep't of Envtl. Conservation, 103 A.D.3d 1006, 962 N.Y.S.2d 390 (N.Y. App. Div. 3d Dep't 2013)

Facts

Wal-Mart Real Estate Business Trust and Wal-Mart Stores ("Wal-Mart") submitted a Stormwater Pollution Prevention Plan (SPPP) to the Department of Environmental Conservation (DEC).[1] The plan was part of a proposal for Wal-Mart to construct a Wal-Mart Supercenter in Lockport, Niagara County.[2] DEC approved the plan.[3] Clean Water Advocates of New York, Inc. ("Clean Water Advocates") challenged DEC's approval under CPLR article 78.[4]

Procedural History

Clean Water Advocates appealed the dismissal of its CPLR article 78 action. Supreme Court Albany County (New York) dismissed the suit for lack of standing.[5]

Issue

Whether Clean Water Advocates has standing to bring a CPLR article 78 suit to challenge DEC's determination regarding Wal-Mart's SPPP relating to its proposal for a Wal-Mart Supercenter in Lockport, Niagara County?[6]

Rationale

Appellate Division held that Clean Water Advocates does not have standing to bring the CPLR article 78 challenge to DEC's determination.[7] An organization has standing to sue if one or more of its members would have standing to sue which ensures that the organization is the appropriate representative for the asserted claim.[8] A member has standing if two requirements are met. First, the member must have suffered an injury, which is protected by the relevant statute.[9] And second, the member must suffer harm that is in some way different than the harm suffered by the general public.[10]

In this case, Clean Water Advocates claimed that a member, Ms. Woodhouse, was injured by the SPPP because of her proximity to the project site.[11] However, Clean Water Advocates' assertion did not establish that Ms. Woodhouse suffered any specific injury, but merely asserted that proximity to the site should be sufficient.[12] Nor did Clean Water Advocates' claim establish that DEC's acceptance of the SPPP would cause any future harm to Ms. Woodhouse's property or the property of any other member.[13] Clean Water Advocates also presented evidence that stormwater discharge into the Tonawanda Creek, the Erie Canal, Lake Ontario and Niagara River constituted harm.[14] However, the evidence failed to identify how the SPPP affected the water sources to cause injuries to the members. Furthermore, even if the SPPP caused injuries to the members, the evidence did not demonstrate how Clean Water Advocates' members' injuries were different from those suffered by the general public.[15]

Therefore, Clean Water Advocates' claim failed to meet the requirements for standing. First, Ms. Woodhouse did not suffer any injury by her proximity to the project site.[16] Nor did Clean Water Advocates' other members suffer an injury merely by DEC's approval of the SPPP.[17] Furthermore, any injury caused by stormwater discharge into public waterways was speculative and did not establish that the injury to Clean Water Advocates' members was unique. Consequently, Clean Water Advocates was not an appropriate representative for the asserted claim.[18] Clean Water Advocates lacked standing for the CPLR article 78 suit.

Conclusion

The court affirmed the Supreme Court's dismissal of the petition based on lack of standing.[19]

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Endnotes

1. *Clean Water Advocates of New York, Inc. v New York State Dep't of Envtl. Conservation*, 103 AD3d 1006, 962 N.Y.S.2d 390, 391 (3d Dep't 2013).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* (*quoting Matter of Finger Lakes Zero Waste Coalition, Inc. v. Martens*, 95 A.D.3d 1420, 944 N.Y.S.2d 336 (3d Dep't 2012)).
9. *Id.* (citing *New York State Assn. of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 778 N.Y.S.2d 123 (2004); *Matter of Colella v. Board of Assessors of County of Nassau*, 95 N.Y.2d 401, 718 N.Y.S.2d 268 (2000); *Matter of Brunswick Smart Growth, Inc. v. Town of Brunswick*, 73 A.D.3d 1267, 901 N.Y.S.2d 387 (3d Dep't 2010)).

10. *Id.* at 392 (*citing Soc'y of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 570 N.Y.S.2d 778 (1991); *accord Matter of Save the Pine Bush, Inc. v. Common Council of City of Albany*, 13 N.Y.3d 297, 890 N.Y.S.2d 405 (2009); *see Matter of VTR FV, LLC v. Town of Guilderland*, 101 A.D.3d 1532, 957 N.Y.S.2d 454 (3d Dep't 2012)).
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 393.
16. *Id.* at 392.
17. *Id.*
18. *Id.*
19. *Id.* at 393.

* * *

Ozark Society v. United States Forest Service, et al., 2012 WL 994441 (E.D. Ark. 2012)

Facts

Under the National Forest Management Act, the United States Forest Service (USFS) must prepare a forest management plan for each national forest. This includes an environmental impact statement, which is required for any "major federal action" under the National Environmental Policy Act (NEPA).[1] In 2005, both a forest management plan (2005 Revised Land and Resource Management Plan) ("2005 RLRMP") and an environmental impact statement were produced for Ozark National Forest.[2] The Final Environmental Impact Statement ("2005 FEIS") "anticipat[ed] '10 federal wells and 5 wells on reserved and outstanding minerals for the planning period'" of ten years.[3]

Following the discovery of increased natural gas development potential in Ozark National Forest, USFS and the Bureau of Land Management (BLM) produced a Reasonable Foreseeable Development document ("2008 RFD"), showing the increased gas development potential in Arkansas, a Changed Conditions Analysis (CCA) and a Supplemental Information Report (SIR).[4] Based on information from BLM's 2008 RFD, the USFS's CCA and SIR predicted "as many as 1,730 wells with a resulting disturbance of approximately 10,316 acres on USFS lands over a ten-year period."[5] The SIR found that the "direct, indirect, and cumulative effects of ongoing land management activities on federal lands" and the impacts of the new gas well development predictions were "minimal" and did not exceed the scope of the effects outlined in 2005 FEIS.[6] Because the effects were found to be "minimal," USFS decided no "correction, supplement or revision" was needed for the 2005 RLRMP or 2005 FEIS.[7]

Procedural History

The plaintiff moved for a preliminary injunction asking the court to enjoin conventional fracturing, hydraulic fracturin.g, and horizontal drilling in Ozark National Forest and, under the Administrative Procedure Act (APA), to require defendants to rescind any authority to conduct surface disturbing activities in the forest which had not yet commenced.[8]

Issues

(1) Whether defendants took a "hard look," as required by NEPA, at new information from the 2008 RFD regarding the effects of gas leasing and development in Ozark National Forest. (2) Whether defendants' decision to not supplement the 2005 FEIS constitutes a final agency action under the APA.

Rationale

To succeed on a motion for preliminary injunction, a plaintiff must establish that: (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm; (3) the balance of equities weighs in his favor; and (4) the injunction is in the interest of the public.[9] Plaintiff alleged defendants violated NEPA and requested judicial review for defendants' actions under the APA. Under NEPA, a federal agency must prepare an environmental impact statement for any "major Federal actions significantly affecting the quality of the human environment."[10] The Supreme Court later stated that an agency must take a "hard look" at new information relevant to environmental concerns bearing on the proposed action to determine if the initial EIS needs to be supplemented.[11] Under the APA, a private right of action and waiver of sovereign immunity will be allowed for challenges to "discreet and final agency actions."[12] An action must "mark the consummation of the agency's decision making process" and must determine rights or obligations or contain legal consequences.[13]

Plaintiff alleged that defendants violated NEPA, through defendants' use of the SIR, by failing to take a "hard look" at the effects of gas leasing in Ozark National Forest, and by not allowing public participation in the process.[14] Plaintiff asserted that the 2008 prediction of a 150% increase in the number of gas wells should be considered significant new information requiring a "hard look."[15] Plaintiff also contended that the SIR was a "final agency action" because it was an agency decision to not supplement the 2005 EIS, and, thus, denied plaintiff from participating in the public comment process.[16]

Defendants argued that the SIR is "merely a report," which did not authorize any further natural gas development or commit agencies to any further actions, and not a "major Federal action," unlike the 2005 forest management plan.[17] Defendants asserted that the SIR and 2008 RFD did change the foreseeable environmental impact of the forest management plan because the 2008 RFD's prediction that 1,730 wells would be drilled was inaccurate, as only 42 wells were drilled in Ozark National Forest since 2005.[18] Defendants also claimed the SIR was not a final agency action under the APA.[19]

With respect to the likelihood of plaintiff's success on the merits, the court found that the USFS's decision to forgo supplementation to the EIS under the NEPA was not a "major federal action."[20] The court cited *Norton v. Southern Utah Wilderness Alliance*, in which the U.S. Supreme Court found an increase in off-the-road vehicle use was not a "major Federal action" requiring a supplementation to the existing EIS under the NEPA.[21] In *Norton*, the Supreme Court held that the approval of a land use plan was a "major Federal action," which is completed upon approval.[22] The court also determined the SIR was not a "final agency action subject to judicial review" because pursuant to *Lujan v. National Wildlife Federation*, there must be some concrete agency action which harms or threatens harm to the claimant.[23]

Additionally, the court found no threat of irreparable harm to the plaintiff. Plaintiff claimed that defendant's ability to grant drilling permits for Ozark National Forest threatened plaintiff's interest in the aesthetic and recreational values associated with the forest.[24] Defendant argued that there was no approval for any unconventional fracking projects or new drilling wells based on the SIR, and only 42 of the predicted 1,730 wells had been drilled since 2005.[25] Therefore, there would not be any harm to the plaintiff. Because plaintiff did not show that the irreparable harm was "actual and imminent, not conjectural or hypothetical," the court held that plaintiff failed to establish a likely threat of imminent irreparable harm.[26]

Lastly, the court briefly addressed the public interest and balance of equities factors needed to grant a preliminary injunction. The court found that, while the decision-making processes for gas leasing and development in Ozark National Forest does involve the public, national forests serve many recreational, wildlife, fish, mineral, food, timber, and other purposes.[27] Therefore, the public interest factor could not weigh in favor of either party, nor did the balance of harms.

Conclusion

The court denied plaintiff's motion for preliminary injunction because plaintiff failed to establish a likelihood of success on the merits or threat of irreparable harm by not proving a violation of NEPA or a private right of action under the APA.

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Endnotes

1. *Ozark Soc'y v. U.S. Forest Serv., et al.*, 2012 WL 994441, at *1 (E.D. Ark. 2012).
2. *Id.*
3. *Id.* (quoting Defs.'s Resp. to Mot. Prelim. Inj. (2005 FEISD at 3-82)).
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at *2.
9. *Id.*
10. *Id.* at *3 (quoting 42 U.S.C. § 4332).
11. *Id.* (citing *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 385 (1989)).
12. *Id.* (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990)).
13. *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)).
14. *Id.*
15. *Id.*
16. *Id.* at *4.
17. *Id.* at *3.
18. *Id.*
19. *Id.*
20. *Id.* at *4.
21. *Id.* at *3 (citing *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004)).
22. *Id.* (citing *Norton*, 542 U.S. at 73).
23. *Id.* at *4 (citing *Lujan*, 497 U.S. at 891).
24. *Id.* at *5.
25. *Id.*
26. *Id.* (quoting *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009)).
27. *Id.* (citing 16 U.S.C. § 528; 43 U.S.C. § 1701).

* * *

Alliance for the Wild Rockies, et al. v. Krueger, et al., __ F. Supp. 2d __, 2013 WL 3187275 (D. Mont. June 25, 2013)

Facts

In 2011 the Forest Service authorized the East Boulder Project, which involves 650 acres of logging.[1] In 2012, the Forest Service authorized the Bozeman Municipal Watershed Project, which involves logging and burning over several thousand acres over 5–12 years.[2] The projects were to take place partly in a designated critical habitat for Canada lynx located in the Gallatin National Forest.[3]

In authorizing these projects, the Forest Service relied on the Northern Rockies Lynx Amendment ("Amendment"), which applies to the Gallatin National Forest.[4] The Forest Service adopted the Amendment in 2007 after a formal consultation with the Fish and Wildlife Service (FWS) under Section 7(a)(2) of the Endangered Species Act (ESA),[5] upon which the FWS concluded that the Amendment would not jeopardize lynx or destroy or adversely modify its critical habitat.[6] The FWS later designated a critical lynx habitat in the Gallatin National Forest in 2009.[7] The Forest Service never reinitiated consultation on the Lynx Amendment after the FWS designated the lynx critical habitat.[8]

Procedural History

Plaintiffs brought this action raising claims concerning the two projects' potential impacts on Canada lynx, grizzly bears, old growth, "snags," sensitive species, and

roadless areas.[9] Specifically with regard to the impacts on the Canada lynx, plaintiffs argued that the projects would violate the ESA and the National Environmental Policy Act because the agencies' analysis of the projects relied on the Amendment,[10] and the Amendment was flawed because it did not address the designation of lynx critical habitat.[11] The plaintiffs sought to enjoin both projects because the agencies failed to reinitiate consultation.[12]

Issues

(1) What is the standard to enjoin a project for a procedural violation of the ESA? (2) Whether the agencies have made a sufficient showing that the projects will not destroy or adversely modify critical lynx habitat to rebut a presumption of irreparable harm?

Rationale

Recently, in *Salix v. U.S. Forest Service*,[13] the court decided that the Forest Service must reinitiate consultation on the Amendment to determine the Amendment's effects on the critical habitat on a programmatic level.[14] In that case the court did not determine the standard for an injunction because the plaintiffs did not challenge any projects.[15] Here, the plaintiffs sought an injunction, so the court turned to the existing case law to determine the applicable standard, noting that the standard for ESA cases is more liberal than the traditional standard.[16]

The court found that there were two lines of cases in the Ninth Circuit addressing the issue of who bears the burden of proof in ESA cases.[17] In the first line of cases, the plaintiff does not bear an initial burden to show that irreparable harm is likely.[18] There is a rebuttable presumption of irreparable harm under these cases; the agency can avoid an injunction if it can show that the challenged action will not jeopardize the species or destroy or adversely modify its habitat.[19] In the second line of cases, the plaintiff bears the initial burden to show that irreparable harm is "at least likely."[20] Otherwise, the court would be unable to craft an injunction to address a specific harm.[21]

To reconcile these cases, the court adopted a burden shifting approach, under which: (1) if a plaintiff alleges "a specific irreparable harm" so that the court may craft an injunction to address that specific harm, the court will presume irreparable harm; (2) the agency may rebut the presumption by showing that the project will not jeopardize the species or its critical habitat; (3) if the agency makes such a showing, then an injunction should be issued only if the plaintiff shows that harm is "at least likely"; and (4) if the parties present "a close question," the court should err on the side of issuing the injunction.[22]

Applying the new standard to the facts of this case, the court found that plaintiffs met their initial burden by alleging in the complaint that the projects would adversely impact lynx habitat.[23] The court therefore presumed that the project would irreparably harm lynx critical habitat and shifted the burden to the agencies to show that the projects would not destroy or adversely modify lynx critical habitat.[24]

The agencies failed to make their requisite showing.[25] In fact, the court found that the agencies admitted that both projects would adversely affect lynx critical habitat in the project areas.[26] The agencies argued that the projects would not adversely modify lynx critical habitat because the amount of critical habitat that would be affected is relatively small in relation to the critical habitat overall.[27] The court rejected this argument because the agencies relied on the Amendment and its biological opinion, which were flawed and therefore unreliable.[28] The court held that to meet their burden, the agencies would have to support their argument with evidence independent of the Amendment.[29]

Conclusion

The court granted plaintiffs' motion for summary judgment regarding claims related to lynx critical habitat and reinitiation of consultation on the Amendment, enjoining the agencies from implementing the projects pending completion of reinitiated consultation. The court granted defendants' motion for summary judgment with regard to all other claims and issues.

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Endnotes

1. *Alliance for the Wild Rockies, et al. v. Krueger, et al.*, __ F. Supp. 2d __, 2013 WL 3187275, at *1 (D. Mont. June 25, 2013).
2. *Id.*
3. *Id.*
4. *Id.* at *2.
5. *Id.* citing 16 U.S.C. § 1536(a)(2) (2012).
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at *1.
10. *Id.*
11. *Id.* at *2.
12. *Id.* at
13. __ F.3d __, 2013 WL 2090811 (D. Mont. May 16, 2013).
14. *Alliance for Wild Rockies*, 2013 WL 3187275, at *3, citing *Salix*, 2013 WL 2090811 at *16.
15. *Id.*, citing *Salix*, 2013 WL 2090811 at *17.
16. *Id.*, citing *Salix*, 2013 WL 2090811 at *16.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at *4, citing *Salix*, 2013 WL 2090811 at *17.
22. *Id.* at *6.

23. *Id.* at *7. The court noted that in most cases the initial burden will be satisfied by the allegations in the complaint. It found that in this case, specific allegations included damage to denning, foraging, and prey habitat. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* For instance, the Forest Service wrote in one environmental assessment of the East Boulder Project that "substantial amounts of cover could be removed for lynx and their prey species" and some areas were already "considered a permanent habitat loss for lynx." FWS wrote in its biological opinion of that project that hundreds of acres of critical habitat would be affected due to the reduction of prey habitat. Similarly, the Forest Service's reports show that the Bozeman Project would render 1.164 acres of lynx habitat unsuitable and the FWS concluded in its biological opinion that the project would destroy prey habitat.

27. *Id.* at *8.

28. *Id.* at *8–9.

29. *Id.* at *9.

* * *

Frigault v. Town of Richfield Planning Bd., 2013 N.Y. App. Div. LEXIS 4770 (N.Y. App. Div. 3d Dep't June 27, 2013)

Facts

Local citizens and property owners, as petitioners, and the Town of Richfield Planning Board ("Board"), as respondent, cross-appealed a judgment by the Madison County Supreme Court granting petitioner's Article 78 declaratory judgment to annul the Board's granting of a special use permit to Monticello Hills Wind, LLC ("Monticello").[1]

In March of 2011, Monticello requested a permit to proceed with a project that included the construction of wind turbines and related facilities in the Town of Richfield.[2] After reviewing the proposed project for its potential environmental impacts, the Board issued a negative State Environmental Quality Review Act (SEQRA) declaration and granted the permit on the condition that Monticello would agree to negotiate ongoing obligations and responsibilities with the Town of Richfield ("Town").[3] Petitioners initiated an Article 78 proceeding to annul the Board's findings, alleging that the Board did not comply with SEQRA, a provision of the Public Officers Law, the Town Law, and the Town's special use permit ordinance.[4] The Supreme Court found that the Board's SEQRA review was adequate, but held that the resolution to issue the special use permit must be annulled due to violations of Section 274-b of the Town Law and the Town's special use permit ordinance.[5] Both parties appealed.

Procedural History

The Supreme Court of New York, Appellate Division Third Department, reversed the Supreme Court's decision annulling the negative declaration, and upheld the Supreme Court's annulment of the resolution granting the special use permit.[6]

Issues

1. Whether the Board complied with the requirements of SEQRA when issuing the negative declaration?

2. Whether the violations of the Open Meetings Law, Town Law, and provisions of the Town of Richfield Land Use and Building Management Ordinance required an annulment of the Board's resolution granting the special use permit?

Rationale

The Appellate Division agreed with the Supreme Court that the Board had complied with its requirements under SEQRA.[7] The Appellate Division recognized that, while the threshold which triggers the requirement of an Environmental Impact Statement is low, and that type I actions (such as the project at issue) carry a presumption of significant environmental impact, an agency may still issue a negative declaration if it determines that there will be no adverse environmental impacts or that the impacts will not be significant.[8] The Appellate Division noted that the Board "engaged in a lengthy SEQRA review process, which included hiring an outside consulting firm and conducting no less than 11 Board meetings between the time the permit application was filed in March 2011 and the issuance of the negative declaration in November 2011[,]" and determined that the Board took the requisite "hard look" to identify environmental impacts, as required under SEQRA.[9]

The Appellate Division then turned to the violation of the Open Meetings Law to determine if an annulment of the resolution granting the special use permit was necessary. The Supreme Court had determined that the Open Meetings Law was violated when the Board failed to anticipate the number of attendees and had to relocate the meeting to accommodate the number of citizens in attendance.[10] The Appellate Division disagreed, and cited the notification to the citizens in attendance by the Town Attorney that the meeting would be moved, and the note placed on the original meeting cite advising those not yet in attendance that the meeting had been moved as being adequate notification to those seeking to attend the meeting.[11] The Appellate Division determined that even if a technical violation of the Open Meetings Law[12] had occurred, that the resolution passed at the meeting was not void, but voidable upon a showing of good cause.[13] The Appellate Division held that the moving of the meeting was not meant to frustrate attendance but to ensure it, and therefore cause to invalidate the resolution did not exist.[14]

Despite these findings, the Appellate Division found that the Supreme Court had properly annulled the special use permit due to a violation of section 274-b of the Town Law which requires a public hearing on the permit application, as well as written notice to the County Plan-

ning Department of the hearing accompanied by certain written materials pertaining to the project.[15] Further, the Appellate Division agreed with the Supreme Court that a violation of the Town's Land Use and Building Management Ordinance also required an annulment of the special use permit.[16]

Conclusion

The Appellate Division held that the resolution of the Board, which granted the negative declaration must be reinstated, but that the annulment of the resolution granting the special use permit must be upheld.[17]

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Endnotes

1. *Frigault v. Town of Richfield Planning Bd.*, 2013 N.Y. App. Div. LEXIS 4770, at *1 (N.Y. App. Div. 3d Dep't June 27, 2013).
2. *Id.* at *1.
3. *Id.* at *2.
4. *Id.* at *2–*3.
5. *Id.* at *3.
6. *Id.* at *14.
7. *Frigault*, 2013 N.Y. App. Div. LEXIS 4770 at *7.
8. *Id.* at *3.
9. *Id.* at *5, *6.
10. *Id.* at *8–*9.
11. *Id.* at *8.
12. *See* N.Y. Pub. Off. §§ 100–111 (Consol. 2013).
13. *Frigault*, 2013 N.Y. App. Div. LEXIS 4770 at *10.
14. *Id.*
15. *Id.* at *11.
16. *Id.* *11–*12.
17. *Id.* at *14.

* * *

Matter of BCD Tire Chip Mfg. Inc. v. New York State Dept. of Envtl. Conservation, 2013 N.Y. Misc. LEXIS 2865 (N.Y. Sup. Ct., Fulton County 2013)

Facts

Since 2004, BCD Tire Chip Manufacturing Inc. (BCD) has operated a scrap tire factory and recycling facility in Hagaman, New York.[1] BCD accepts waste tires and mechanically shreds the waste tires into four-inch-by-four-inch chips, known as tire derived aggregate (TDA).[2] The TDA is then shipped to private and public customers, oftentimes to municipal entities for use in landfills.[3]

BCD was issued a Solid Waste Management Facility Registration when operation began at the Hagaman facility.[4] In 2010, the New York State Department of Environmental Conservation (DEC) inspected the facility and found that BCD was storing in excess of 1,000 tire equivalents in the form of TDA, which, without a permit, was in violation of 6 NYCRR § 360-13.1 (b).[5] BCD agreed to reduce the amount of tire equivalents to fewer than 1,000.[6] However, subsequent investigations revealed that BCD remained noncompliant and no attempt was made to apply for a permit.[7] In 2011, DEC commenced an administrative enforcement proceeding against BCD alleging that BCD was operating a waste tire storage facility without a permit.[8] While the enforcement action was pending, the DEC contracted with BCD to remove waste tires from DEC facilities on three separate occasions.[9]

On March 26, 2013, the Commissioner of the DEC (the Commissioner) adopted the summary report submitted by ALJ Nicholas Garlick and issued an order finding that BCD violated 6 NYCRR § 360-13.1 (b) by storing more than 1,000 waste tire equivalents without a permit.[10] The Commissioner ordered BCD to cease accepting additional waste tires and to either apply for the required permit, bring the facility into compliance, or permanently close the facility.[11]

Procedural History

On April 5, 2013, BCD commenced a combined special proceeding pursuant to CPLR Article 78 and an action for declaratory judgment pursuant to CPLR 3001 to vacate and annul the order issued by the Commissioner.[12] On April 8, 2013, a temporary stay was granted pending a hearing on the merits of the petition.[13]

Issue

(1) Whether there was a rational basis for the Commissioner's finding of BCD's violation?

(2) Whether that determination was arbitrary or capricious?[14]

Rationale

The court first addressed the possibility that the enforcement proceeding should be barred due to the doctrine of unclean hands. The court noted that hiring the noncompliant BCD for waste tire removal undercuts and diminishes the arguments put forth by DEC.[15] That information is not relevant to the ultimate question of BCD's liability, but can be taken into consideration when calculating the amount of a civil penalty.[16]

The court then moved on, holding that in reviewing the enforcement proceeding, the court could only ascertain whether there is a rational basis for the decision or whether it is arbitrary or capricious.[17] Both the ALJ's report and the Commissioner's decision found that BCD's TDA constituted waste tires. Since the TDA stored at BCD's facility was derived from more than 1,000 waste tires, BCD was required to obtain a permit for the facility.[18]

Both New York law and DEC regulations define a waste tire as "any solid waste which consists of whole

tires *or portions of tires*."[19] Furthermore, New York law defines a "noncompliant waste tire stockpile" as a facility where 1,000 or more waste tires *or mechanically processed waste tires* have been accumulated, stored, or buried without a permit.[20] The ALJ found that DEC, for over twenty years, has consistently regulated tire processing facilities storing more than 1,000 waste tire equivalents, including TDA, by requiring a permit.[21]

Conclusion

The court found that there is a rational basis for the Commissioner's determination and that it was neither arbitrary nor capricious.[22] Thus, the Commissioner's Order was upheld and DEC must submit a proposed judgment for the court's review.[23] The judgment shall provide BCD with 60 days to notify DEC whether it will apply for a permit, bring the facility into compliance, or permanently close the facility.[24] The court suggested that, because members of the tire shredding business community provide jobs and a cleaner environment, the DEC and legislature must work to create an expedited process for obtaining a permit or variance, which would in turn ensure that New York is truly open for business. "that between the legislature and DEC something needs to be done to allow similar tire shredding businesses, who are providing valuable jobs and a cleaner New York, an easier, more affordable, and expedited process to obtain a permit or variance, thus ensuring that this state is truly 'open for business.'"[25]

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Endnotes

1. *Matter of BCD Tire Chip Mfg. Inc. v. New York State Dept. of Envtl. Conservation*, 2013 N.Y. Misc. LEXIS 286, *1 (N.Y. Sup. Ct., Fulton County 2013).
2. *Id.* at *2.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at *2-*3.
9. *Id.* at *3.
10. *Id.* at *4-*5.
11. *Id.* at *5.
12. *Id.* at *1.
13. *Id.*
14. *Id.* at *6.
15. *Id.* at *3.
16. *Id.* at *3-*4.
17. *Id.* at *6 (*quoting Flacke v. Onondaga Landfill Sys.*, 507 N.E.2d. 282 (1987)).
18. *Id.* at *7.
19. *Id.*at *7-*8 (*quoting* 6 N.Y.C.R.R. § 360-1.2 [b] and E.C.L § 27-1901 [13]).
20. *Id.* at *8.
21. *Id.*
22. *Id.* at *9-*10.
23. *Id.* at *12-*13.
24. *Id.* at *13.
25. *Id.*

* * *

Recent Legislation

National Mitigation Fisheries Coordination Act, H.R. 2261

House of Representatives bill 2261 is a bill to ensure the continued success of fisheries mitigation programs.[1]

The National Mitigation Fisheries Coordination Act is sponsored by Representative Eric A. "Rick" Crawford (AR-1).[2] The bill is co-sponsored by Representative David P. Roe (TN-1) and Representative Lynn A. Westmoreland (GA-3).[3]

The main purpose of the proposed legislation is to "impose a charge for conducting mitigation fishery activities."[4] Currently, the funding for the program is extremely inconsistent and has led to Federal water project development agencies backing the programs.[5] In addition to the imposition of a charge, the Act describes the Fishery Mitigation Plans that must be implemented in detail.[6]

The Mitigation of Fisheries is a key part of the overall statutory structure of the Fish and Wildlife Act, as well as other measures aimed at balancing the impact of constructing dams and similar "water diversion projects."[7] There are a number of benefits the general public receives from dams, including "inexpensive energy, flood control, water storage for municipal and agricultural purposes," and recreation.[8] However, it is extremely important that fisheries and other wildlife and habitat are protected. This bill ensures that the programs are being adequately funded and thus ensures many benefits for a number of communities.[9]

This bill was introduced on June 5, 2013, and first referred to the Committee on Transportation and Infrastructure.[10] At the same time, the bill was also referred to the Committee on Natural Resources.[11] Subcommittees that are within Transportation and Infrastructure and Natural Resources are currently considering the bill.[12] As of now, there are no related bills.[13]

As stated, protection of wildlife and habitat is very important when relying on water diversion for the production of energy. The following states have Mitigation Fishery Facilities, and would undoubtedly benefit from the funding stability this legislation provides: Arkansas,

Georgia, Kentucky, Missouri, Montana, North Dakota, Pennsylvania, South Dakota, Tennessee, Utah, West Virginia, Wisconsin, and Wyoming.[14]

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Endnotes

1. H.R. 2261, 113th Cong. (2013) (*Thomas*).
2. *Id.* (identifying the sponsors and co-sponsors of the legislation).
3. *Id.*
4. *Id.* at § 3(a).
5. *Id.* at § 2(4).
6. *Id.* at § 3(b).
7. *Id.* at § 2(1–2).
8. *Id.* at § 2(1).
9. *Id.* at § 2(5).
10. H.R. 2261, 113th Cong. (2013) (*Thomas*) (provided on *Thomas* in the "All Information" section).
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at § 3(f).

* * *

An Act to Amend the Soil and Water Conservation Districts Law, in Relation to Authorizing Directors of Soil and Water Conservation Districts to Carry Out Preventative and Control Measures for the Spread of Invasive Species, S.4396

On March 26, 2013 Senator Young introduced Bill 4396 (S.4396) in the N.Y. Senate, "[a]n act to amend the soil and water conservation districts law, in relation to authorizing directors of soil and water conservation districts to carry out preventative and control measures for the spread of invasive species."[1] This is a new bill and was not previously introduced in prior senate sessions.[2] The Senate passed S.4396 on June 20, 2013 and delivered it to the Assembly, who referred it to the Environmental Conservation Committee.[3] S.4396, if enacted, would amend Section 9 of the Soil and Water Conservation Districts Law by adding a new subdivision 16.[4] The amendment would allow soil and water conservation districts to carry out control measures to prevent the spread of invasive species.[5] If enacted, the bill would become effective immediately.[6]

Rationale

The state is under threat from invasive species.[7] In 2012, soil and water conservation districts (SWCDs) reported treating 6,551.5 acres for invasive species.[8] The species include both flora and fauna and have the potential to alter New York's natural resources.[9] Last year, SWCDs conducted 62 projects to control invasive weeds, such as Giant Hog Weed, across the state.[10] SWCDs also engaged in projects to prevent the spread of the Emerald Ash Boar and several aquatic species which are spreading across the state.[11] SWCDs requested this new amendment to further empower their ability to combat the spread of invasive species.[12]

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Endnotes

1. The N.Y. Senate, S4396-2013: "An Act to Amend the Soil and Water Conservation Districts Law, in Relation to Authorizing Directors of Soil and Water Conservation Districts to Carry Out Preventative and Control Measures for The Spread of Invasive Species," OPEN, http://open.nysenate.gov/legislation/bill/S4396-2013.
2. *Id.*
3. *Id.*
4. An Act to Amend the Soil and Water Conservation Districts Law, in Relation to Authorizing Directors of Soil and Water Conservation Districts to Carry Out Preventative and Control Measures for the Spread of Invasive Species, S.4396, 236th N.Y. Leg. Sess. § 1, *available at* http://open.nysenate.gov/legislation/bill/S4396-2013.
5. *Id.*
6. *Id.* at § 2.
7. The N.Y. Senate, Memo in Support of S.4396: "An Act to Amend the Soil and Water Conservation Districts Law, in Relation to Authorizing Directors of Soil and Water Conservation Districts to Carry Out Preventative and Control Measures for the Spread of Invasive Species," OPEN, http://open.nysenate.gov/legislation/bill/S4396-2013.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*

* * *

An Act to Amend the Public Authorities Law, in Relation to Emerging Technology Industrial Classifications for Clean Environment and Energy Technologies, S.3206

On January 31, 2013 Senator Parker introduced Bill 3206 (S.3206) to the N.Y. Senate, an act to amend the Public Authorities Law, in relation to emerging technology industrial classifications for clean environment and energy technologies.[1] The Senate referred the bill to the Commerce, Economic Development and Small Business Committee, where it subsequently died.[2] Similar bills were introduced in the 2010, 2011, and 2012 legislative sessions.[3] All three died in committee before being brought to the floor.[4] If enacted S.3206 would amend Section 3102-e of the Public Authorities Law by adding a new subparagraph seven.[5]

The addition of subparagraph seven would add clean environmental and energy technologies to the list

of emerging industrial classifications.[6] This would allow companies active in these fields to be classified as "Qualified Emerging Technology Companies" (QETC).[7] A QETC would be eligible to receive capital tax credits and other investment opportunities.[8]

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Endnotes

1. The N.Y. Senate, S3206-2013: An Act to Amend the Public Authorities Law, in Relation to Emerging Technology Industrial Classifications for Clean Environment and Energy Technologies, OPEN, http://open.nysenate.gov/legislation/bill/S3206-2013.
2. *Id.* at § 1.
3. The N.Y. Senate, Memo in Support of S.42066: An Act to Amend the Public Authorities Law, in Relation to Emerging Technology Industrial Classifications for Clean Environment and Energy Technologies, OPEN, http://open.nysenate.gov/legislation/bill/S3206-2013.
4. *Id.*
5. *Id.* at § 1.
6. *Id.*
7. The N.Y. Senate, Memo in Support of S.42066: An Act to Amend the Public Authorities Law, in Relation to Emerging Technology Industrial Classifications for Clean Environment and Energy Technologies, OPEN, http://open.nysenate.gov/legislation/bill/S3206-2013.
8. *Id.*; N.Y. Pub. Auth. Law § 32102-e (1)(b) (2013).

* * *

An Act to Amend the Environmental Conservation Law, in Relation to Amending the Liquefied Natural and Petroleum Gas Act to Exempt Storage and Transportation of Small Quantities of Liquefied Natural Gas, S.1119

On January 9, 2013, Senators Maziarz, Gallivan, and O'Mara introduced Bill S1119A in the New York Senate, "[a]n act to amend the environmental conservation law, in relation to amending the liquefied natural and petroleum gas act to exempt the storage and transportation of small quantities of liquefied natural gas."[1] On March 26, 2013, the Senate passed S.1119 and referred it to the Committee on Environmental Conservation.[2] If enacted, the bill would take effect immediately and add a new section to the Environmental Conservation Law.[3] S.1119 only applies to facilities with a storage capacity of less than forty thousand gallons and located outside of cities with populations of less than one million.[4] The bill would exempt the storage and transportation of small quantities of liquefied natural gas (LNG) from the Liquefied Natural and Petroleum Gas Act, in an effort to promote the use of LNG as a cheaper and cleaner alternative to diesel.[5]

Rationale

LNG is a domestic fuel source that can be used as an alternative to diesel for heavy-duty trucking.[6] LNG is becoming a fuel of choice for major fleet operators because it has lower exhaust emissions, is a reliable domestic energy source, and is cheaper than diesel.[7] Due to this trend, engine manufacturers are developing engines geared towards LNG.[8] Studies prepared or commissioned by the New York State Energy Research and Development Authority have found that there is need in New York for LNG as a transportation fuel and that this exemption will result in economic benefits within New York without compromising the safety of LNG transportation and storage.[9]

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Endnotes

1. The N.Y. Senate, S1119A-2013: "An act to amend the environmental conservation law, in relation to amending the liquefied natural and petroleum gas act to exempt the storage and transportation of small quantities of liquefied natural gas," OPEN, http://open.nysenate.gov/legislation/bill/S1119A-2013.
2. *Id.*
3. *Id.*
4. *Id.*
5. The N.Y. Senate, Memo in Support of S1119A: "An act to amend the environmental conservation law, in relation to amending the liquefied natural and petroleum gas act to exempt the storage and transportation of small quantities of liquefied natural gas," OPEN, http://open.nysenate.gov/legislation/bill/S1119A-2013.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

* * *

Great Lakes Ecological and Economic Protection Act of 2013, S. 1232, 113th Cong. (2013)

In June, Senator Levin of Michigan introduced a bill "[t]o amend the Federal Water Pollution Control Act to protect and restore the Great Lakes."[1] The Great Lakes Ecological and Economic Protection Act of 2013 (GLEEPA) provides three major changes to the existing legislation in addition to formally extending the goals previously established in the Great Lakes Restoration Initiative Action Plan ("Initiative"), the Great Lakes Regional Collaboration Strategy, and the Great Lakes Water Quality Agreement.[2] GLEEPA seeks to (1) establish the Great Lakes Advisory Board for a more collaborative approach to addressing Great Lakes issues, (2) have a broader approach to restoration that includes focusing on biodiversity and the control of invasive species, and (3) extend and increase funding available for Great Lakes projects.[3]

The main focus of GLEEPA is to ensure that the tax dollars spent to protect and clean up the Great Lakes are used in the most efficient and productive manner possible. This will be achieved by establishing the Great

Lakes Advisory Board ("Advisory Board"), members of which will be appointed from various localities within the Great Lakes Region.[4] The members of the advisory board must include, among its 12 to 20 members, at least one Great Lakes Governor, one Great Lakes Mayor, and one Great Lakes Tribal Leader.[5] The remaining members are to be affiliated with agencies and areas that ensure even geographic representation of the Great Lakes region.[6] This composition of the advisory board seeks to allow for the equal representation of state, local municipality, and tribal interests.

The Advisory Board will take over responsibilities from the Program Office, which previously was not required to have members of its representation actually be from the Great Lakes Region.[7] The Advisory Board will meet directly with the Great Lakes Interagency Task Force ("Task Force"), which is composed of several members of the President's cabinet.[8] This direct involvement of the Advisory Board, being locally connected and concerned with the issues facing the Great Lakes, with the Task Force will act as "a direct conduit to the Federal Government" for a more local and comprehensive approach to solving the Great Lakes' problems.[9]

The existing statute places "particular emphasis on goals related to toxic pollutants" and to creating projects to control and remove such pollutants.[10] The emerging recognition that ecosystem health requires more than just reducing toxic pollutants is shown in GLEEPA by adding three priority areas to the original concern of toxic substances. First, the recognition, prevention, and control of invasive species and the impacts they cause to native ecosystems.[11] Second, the protection of near-shore health with emphasis placed on discovery and mitigation of nonpoint source pollution.[12] Third, an importance on habitat and wildlife protection, which includes wetlands preservation and restoration.[13] These additional areas of priority will provide for protection of the whole Great Lakes ecosystem so that it can remain vibrant and productive for future generations.

The final element of GLEEPA is that it extends and expands funding available to implement restorative projects for the Great Lakes.[14] The current legislation requires that the Administrator submit an annual budget to Congress with a comprehensive report detailing necessary federal funding.[15] There was no set limit that was appropriated or could be requested for implementing projects.[16] GLEEPA proposes a federal funding limit of $475,000,000 annually, from 2014 through 2018, to support the Initiative and Great Lakes Water Quality Agreement.[17] These funds are for implementation of restorative and preventative projects and cannot be used for development of any water infrastructure other than green projects that improve habitat and ecosystem functions of the Great Lakes.[18] The operation and maintenance costs of the projects are still required to be funded from non-federal sources, the same as is required under the existing legislation.[19] The final budget changes extend the previously allotted $50,000,000 each year for research and public information programs through 2010 and raises this to $150,000,000 annually for 2014 through 2018.[20]

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Endnotes

1. Great Lakes Ecological and Economic Protection Act of 2013, S. 1232, 113th Cong. (2013).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. The Great Lakes Interagency Task Force was created in Executive Order 12240. Great Lakes, 33 U.S.C.A. § 1268 (2008).
9. 159 Cong. Rec S5266-01 at S. 1232.
10. Great Lakes, 33 U.S.C.A. § 1268.
11. S. 1232.
12. Nonpoint pollution is fertilizer and nutrient runoff from agricultural production. These are not necessarily toxic, but the nutrients lead to algal blooms that can destroy near-shore aquatic habitats. *Id.*
13. *Id.*
14. *Id.*
15. Great Lakes, 33 U.S.C.A. § 1268.
16. *Id.*
17. S. 1232.
18. *Id.*
19. *Id.*
20. *Id.*

* * *

An Act to Amend the Environmental Conservation Law, in Relation to the State Smart Growth Public Infrastructure Criteria, S.5363

On May 16 2013, Senator Flanagan introduced bill S.5363 (the "Bill") to amend the environmental conservation law (ECL), in order to exempt school districts from the reporting requirements of the Smart Growth legislation.[1] The Bill was cosponsored by Senators Felder, Ranzenhofer, and Seward.[2] On June 13, 2013, the Bill passed in the Senate, was delivered to the Assembly, and subsequently referred to the Committee on Environmental Conservation.[3]

In 2010, the New York Smart Growth Public Infrastructure Policy Act was enacted to encourage environmentally sound, safe and responsible development in New York State by the reuse of existing infrastructure.[4]

The legislation "outline[d] requirements for various state agencies to fund infrastructure projects in accordance with smart growth criteria, [such as ensuring] that public funding is granted for construction projects which use, maintain or improve existing infrastructures and protect natural resources."[5] The Smart Growth "legislation applied to all municipalities, including school districts."[6]

The Bill, if enacted, would amend Section 6-0107(1) of the ECL to eliminate an administrative reporting requirement on both local school districts and the State Education Department that was part of compliance with the Smart Growth legislation.[7]

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Endnotes

1. New York State Senate, *Bill S5363-2013, Exempts School Districts from the Requirements of Smart Growth,* Open Legislation, http://open.nysenate.gov/legislation/bill/S5363-2013.
2. *Id.*
3. *Id.*
4. *Id.*; New York State Senate, Press Release, *Senator Montgomery's "Smart Growth Public Infrastructure Policy Act" Passes Senate & Assembly*, http://www.nysenate.gov/press-release/senator-montgomerys-smart-growth-public-infrastructure-policy-act-passes-senate-assemb.
5. New York State Senate, Press Release, *supra.*
6. New York State Senate, *Bill S5363-2013*, *supra*.
7. *Id.*

* * *

Federal and State Partnership for Environmental Protection Act of 2013

Introduced on June 3, 2013 by Representative Johnson of Ohio, the Federal and State Partnership for Environmental Protection Act of 2013 (the Act) is an act to amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[1] The CERCLA amendments "relat[e] to State consultation on removal and remedial actions, State concurrence with listing on the National Priorities List, and State credit for contributions to the removal or remedial action."[2]

The Act amends CERCLA to make Federal consultation with affected States mandatory in removal and remedial actions, rather than permissive.[3] The Act also mandates such consultation "during the process of selecting, and in selecting, any appropriate remedial action," rather than merely before determining action.[4] Furthermore, the Act ensures that State and local officials are afforded the opportunity to more fully participate in CERCLA actions.[5]

The Act further amends CERCLA to allow State credit for costs expended on removal actions in addition to credits that were previously allowed for remedial action.[6] The Act also defines the types of funds for which credits can be granted, "including oversight costs and in-kind expenditures."[7]

In addition, the Act requires that the President provide, in writing, the basis for not including sites, which were submitted by States, on revisions of the National Priorities List.[8] Furthermore, "[t]he President may not add a facility to the national list over the written objection of the State, unless (i) the State, as an owner or operator or a significant contributor of hazardous substances to the facility, is a potentially responsible party, (ii) the President determines that the contamination has migrated across a State boundary, resulting in the need for response actions in multiple States, or (iii) the criteria under the national contingency plan for issuance of a health advisory have been met."[9] The Act also mandates state concurrence, with respect to listing on the National Priorities List, in adding sites as well as deleting sites, rather than merely deleting sites.[10]

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Endnotes

1. Federal and State Partnership for Environmental Protection Act of 2013, H.R. 2226, 113th Cong. (2013) (text of the legislation).
2. *Id.*
3. *Id.* at § 2(a), (c), (d)(1).
4. *Id.* at § 2(b).
5. *Id.* at § 2 (d)(2).
6. *Id.* at § 3 (1)(A), (2).
7. *Id.* at § 3 (1)(B).
8. *Id.* at § 4(a)(1).
9. *Id.*
10. *Id.* at § 4(b).

Message from the Outgoing Chair

(Continued from page 2)

request to the ELS membership to do likewise in both your personal and professional capacities including any organization with which you are affiliated. This is one of the most powerful actions you can undertake and the time to act is now.

Divestiture proved a key tool in the fight against apartheid in South Africa, and as we fight now to stave off the terrible threats from climate change we would be wise to take this powerful step and send as clear a message as we can that we will not wait to see how bad climate change may get. To risk the wholesale chemical alteration of the ocean, which is already measurably warmer and 30% more acidic than it was just 40 years ago, is to risk the alteration of the food chain on which the majority of life on earth depends. The warming of the ocean affects global weather patterns to which the entire planet is subject. And a warmer ocean evaporates more readily, releasing more water vapor to the point where our atmosphere is also 40% wetter than it was 40 years ago. Warmer temperatures and more rain decreases agricultural productivity and makes it harder to grow grain. Corn won't fertilize in such warmth. Thus we are undermining our food base on both land and sea. So, who are the radicals now? Those of us who wish to preserve life and the ecosystems with which we have evolved? Or those who wish to continue business as usual and alter the chemical composition of the ocean and the temperature of the planet? I'd go with the real conservatives on this one.

Not only must we divest our personal and professional holdings in the oil and gas industry, but we must promote alternative, sustainable energy use, and resist the continued use of fossil fuels. That means we must continue to urge the President to ban the XL Pipeline from crossing the U.S. boarder and we must press Governor Cuomo to make permanent the ban on hydrofracking in New York State. Vermont has banned hydrofracking, as has Quebec and France. When leading scientists such as James Hansen, long a leader and hero in the environmental community especially in the field of climate change, says that if we allow the dirty tar sands to be dug up and burned it will be "game over" for resisting the worst of the threats from climate change. This is not hyperbole. Nor is it coming from me, your Chair. The world's leading scientists are talking about genuine threats to human civilization. They have earned the right to be heeded.

Some argue that hydrofracking produces natural gas which burns "cleaner" than conventional oil and gas and therefore is an improvement, a "bridge." But it is a bridge to nowhere and such arguments miss the point. Our future, the future of a planet conducive to life as we know it, with relatively predictable weather patterns, growing seasons and stable borders, depends on a carbon level in the atmosphere around 350 parts per million. We have recently exceeded 400 ppm and we are rising about 2 ppm per year. Just burning the fossil fuel in Canada's Tar Sands alone, according to Mr. Hansen, will push us from 400 ppm to 540 ppm. As I've noted in my earlier journal columns, the last time we were at 400 ppm was the Pliocene era about three million years ago, which produced sea levels that reached anywhere from 15 feet to 130 feet above today's ocean level. And, as I've noted, we are well on our way to 500–700 ppm and virtually no climate change scientist anywhere in the world not affiliated with the oil and gas industry thinks that human civilization can survive with any resemblance to today's world at those carbon levels. We must move away from fossil fuels and that includes natural gas.

I've been a member of this Section for over 25 years and I've never heard any Section discussion of environmental threats such as those we all face now. We are in unchartered waters. The effects of climate change may kill 20 million people by 2030. Recently, historically high flooding in Pakistan displaced over 20 million people. That is like evacuating everyone between Boston and Baltimore. This is the scale we are dealing with and it is only the beginning. It is up to each of us to recognize this threat and act accordingly. And act we must because if Congress has proven anything over the past few years it is that the power to block change is much easier to wield than that required to enact change. But as long as we have a democracy we have hope that the power of the individual can rise above the power of moneyed interests. To achieve this lofty goal we need leadership and education and our Section can play a major role on both fronts.

From the Questionnaire I know that some of you are not convinced. Some of you think the threats are overblown, that distinguished leaders such as Al Gore are not to be trusted. We disagree on this. All I can do is hope that you will continue to read the reports that I see at the Agency and that are readily available to the public and easily found online. The facts speak for themselves. No matter where you look you will see evidence of climate change-induced alterations in the steady climb of global temperatures, earlier migrations in fall of birds, fish, even insects, and earlier returns in spring, earlier blooms of flowers in spring, and later onset of snow in fall, decreasing snowcaps and melting glaciers, and altitudinal migration upwards of flora and fauna seeking to germinate in temperatures such species have evolved with. The increasing number of storms and their increasing ferocity is precisely what climate change models have predicted on a global scale. Ice core and ancient seabed analysis reveals a warming planet and ancient sea level marks dramatically illustrate how high the seas were the last time carbon exceeded 400 ppm. Already there are tens of millions of environmental refugees fleeing rising tides and lands that

are no longer arable. Such patterns and countless others have been observed and described for decades. It is well past time we took notice and responded. As educated lawyers in a position to lead, our failure to do so would be inexcusable.

The programs our Section put on over the past year touched on some of these issues and many others. I want to thank the many Section members who devoted their time and energy to make such programs a success (and I apologize for any unintentional omissions of those deserving thanks): the Co-Chairs of the annual January meeting in New York City, Marla Wieder and Michael Zarin; and the CLE folks who helped put on so many CLE programs including Jim Rigano, Jim Periconi and Maureen Leary. Thanks to our Membership Committee Rob Stout and Jason Kaplan for their efforts which again led to our Section being awarded by NYSBA for our efforts to recruit more minority members, and thank you to Joan Matthews and John Greenthal for their efforts to ensure minority participation on our panels at our programs. I also want to recognize Peter Casper, Yelann Momot, and Walter Mugdan who did excellent work for the Section's Minority Fellowship Program.

This year's Legislative Forum was another well-attended, successful, event and I thank Mike Lesser, John Parker, Drew Wilson and Jeff Brown for their efforts. And, of course, thanks to Miriam Villani for this wonderful *Journal*. Wendy Marsh, Doug Zamelis and Gary Bowitch put on a wonderful Oil Spill Symposium, and Howard Tollin deserves extra thanks for representing the Section at both the House of Delegates and the Section Council. Finally, I wish to praise Terresa Bakner not only for her outstanding work as a Section officer, but for going above and beyond co-chairing both the Annual and Fall Meetings. Well done and thanks to all.

As Chair it was my honor to present awards on behalf of the Section and remember some of our former members and dear friends. I presented a plaque and Certificate of Remembrance to Hat Savage, Art's wife, and at the Annual Meeting Professor Nick Robinson spoke for the Section in recalling Art's important work preserving portions of the Adirondack Mountains and serving as our Section's first Chair in 1981. I presented a plaque and Certificate of Remembrance expressing the love many of us had for Drayton Grant. And I awarded the Adirondack Wild a plaque recognizing its great work in environmental education and protection in the Adirondacks (as a winter "46er" the Adirondacks is one of my favorite places on earth). I presented certificates recognizing the outstanding work of J. Cullen Howe (our first Blogger), and Janice Dean for her work with the Membership Committee. And I presented a certificate to Zaheer H. Tajani, winner of the Minority Fellowship. Thank you to the 2012 Awards Committee, Barry Kogut (Chair), Miriam Villani, Lou Alexander and Laurie Silberfeld.

The past year has been a busy and a productive one for our Section and next year will be more of the same. Thank you all for your support and tolerance. I'll sit down now and while I won't necessarily be any quieter, at least this will be my final message as Chair. It has been a pleasure. Perhaps the pleasure has been all mine, but it has been a pleasure nevertheless.

Carl R. Howard

Message from the Incoming Chair

(Continued from page 3)

reinvigoration of our committee structure, adding new subject areas if relevant and pruning if necessary. So, we invite each committee to reassess its purpose and operations with the goal of marketing itself and the Environmental Law Section to present members and prospective members alike. One means of doing so, although certainly not the exclusive route, is for each committee to commit to at least one activity, or one article in our Section's journal *The New York Environmental Lawyer*, each year. During the Annual Meeting in January 2014, we will invite committees to bring the Executive Committee up to date on their activities or proposed activities for the following year.

During the Cabinet Retreat, and regularly during our monthly conference calls, Section communications were also discussed. This includes information passed among members by means of the *Journal*, the Section Blog, and other evolving media. I cheerfully admit to being an antediluvian in a digital world, which may have something to do with having passed the half century mark in life. However, I recognize, along with most others, the imperative to quickly adopt, and adapt to, increasingly fast and effective modes of communication, where personal and professional information as well as legal analysis and updates no longer await traditional print media. Our *Journal*, I continue to believe, is a Section cornerstone, but there is no reason why it cannot be supplemented by electronic publications which provide different kinds of communications. We have had success with webinars, and the blog also comes immediately to mind, although Mike Lesser has suggested others. We welcome proposals and, with proposals, volunteers to devise practical and effective means of spreading ideas, analysis and legal updates to members and—a consistent theme—to help attract new membership.

Meanwhile, the 2014 Awards Committee, chaired by past Section chair Barry Kogut and consisting of Janice Dean, Steve Russo and Kevin Ryan has been appointed, as has the Nominating Committee, chaired by Laurie Silberfeld—an official function of the Secretary—consisting of Gail Port, Lou Alexander, Walter Mugdan, and Phil Dixon—performing yet another task for us. These are all people who have been active in Section activities in varying capacities, and can be expected to bring thoughtful and discerning judgment to moving the Section forward. Kevin Healy has agreed to serve as the Section representative on the planning committee for the EPA Region 2 Conference held annually at Columbia Law School, presided over by our former Chair, Mike Gerrard. The Section is co-sponsoring that event, notice of which will be provided in more detail at a later date. Wendy Marsh and Kevin Bernstein will be co-chairing the Annual Meeting in January, for which themes are under discussion.

On a final note, I will turn from administrative matters to an idea involving our Section's history, which corresponds in so large a part with the general development of environmental law in New York, the region and the Nation. Several years ago, we recognized the Section's Founders at the Fall meeting with a brief ceremony and some tokens of our appreciation. That acknowledgment was due and timely, and I now think that some further recognition is becoming overdue. There were many more Founders present then than we have now. The march of mortality has become increasingly apparent over just the past couple of years as we've written commemorations and attended memorials for individuals who not only were significant actors in the Section's creation and early development, but also for whom personal affection had grown over the years. Those of us who have been active in the Section over the past couple of decades can easily recall at least a half dozen such recent passings, but it is easy to lose sight of what those individuals' specific contributions were in the formation of the Section and, indeed, how they shaped those aspects of environmental law that became public policy. While it is well to memorialize those we lose, it seems to me to be more important to honor those we still have. I invite proposals as to how we can do this. Perhaps the acknowledgment can be attached to next year's Fall meeting, or, alternatively, maybe a stand-alone event would be more appropriate. On the latter, the tribute paid to Phil Weinberg by Section members along with Phil's colleagues from his days in the Attorney General's Office comes to mind—and Phil, by the way, was a Founder and early Section Chair, and he also effectively created the AG's Environmental Protection Bureau.

Several benefits of an appropriate recognition, coupled with a written and updated compilation of the Section's history, are immediately apparent. First, it is simply right, on a personal level, for obvious reasons: one likes to feel that youthful dedication and contributions are still appreciated in the fullness of age. However, it is also a means of connecting newer members to the Section's history in almost an organic sense. We are not simply a law group that is involved with recent changes in tax codes, or property trends, or insurance coverage or novel tort theories. Rather, from the beginning this Section was committed to the development of thoughtful and sound public policy that would accrue to the benefit of our communities, our State and the Nation, ourselves and our children, and, that being the case, the Section's early members helped devise new legal theories and remedies towards that end. Our members represent all kinds of clients, some of whom may chafe against environmental regulations, yet understanding those regulations and how they further public policy is crucial to that representation. In that sense, paying homage to our early leaders, their efforts and aspirations, also gives proper recognition to our Section as a vehicle for achieving important and lasting benefits to not only the natural world, but also to the health and well-being of the individuals, families and communities that in the aggregate make up our social world. As we look for the next generation of members and leaders, we would do well to reflect on those who came first. Ideas anyone?

Kevin Reilly

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Publication Submission Deadlines: On or before the 1st of March, June, September and December each year.

Miriam E. Villani, Editor-in-Chief

This publication is published for members of the Environmental Law Section of the New York State Bar Association. Members of the Section receive a subscription to the publication without charge. The views expressed in articles in this publication represent only the authors' viewpoints and not necessarily the views of the Editor or the Environmental Law Section.

ISSN 1088-9752 (print) ISSN 1933-8538 (online)

THE NEW YORK ENVIRONMENTAL LAWYER

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