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The New York Environmental Lawyer

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of the New York State Bar Association

Message from the Chair

Since my last message to the Section, three more serious environmental problems have grabbed both national and local attention. The events impacting the water supply of Flint, Michigan may have unnecessarily exposed the entire population of a major U.S. city to a contaminated water supply. Closer to home, a series of developing disclosures in Hoosick Falls, New York, indicates that both private and public drinking water wells are contaminated with the industrial chemical perfluorooctanoic acid (PFOA), a suspected carcinogen. In both cases, government stands accused of being slow to react. Finally, German car company Volkswagen has admitted that since 2006 it sold approximately eleven million diesel vehicles which were rigged to give false air emission test results. Half a million of these vehicles were sold in the United States.

If there is a common thread between these three disparate environmental transgressions, it is that on some level government agencies knew or should have known about the threats and taken action before they became environmental or public health threats—and huge public embarrassments!

Michael Lesser

New Issues: REV and the NYS Constitutional Convention

The waning months of 2015 also saw two new significant statewide issues surface on the environmental horizon that will impact the Section members and their clients.

Reforming the Energy Vision ("REV") is Governor Cuomo's comprehensive strategy to build a statewide clean, resilient, and affordable energy system. Among the staggering challenges set forth by the Governor is to have 50% of the state's energy generated by renewable fuels by 2030, and to have a 40% reduction in greenhouse gas emis-

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sions from 1990 levels. At the request of incoming NYSBA President Claire Gutekunst, the Section's Global Climate Change Committee has undertaken the difficult task of updating the Section's GCC reports of 2009 and 2011. In this endeavor, we are being assisted by the Pace Law School Environmental Center.

In related news, the Section's Agriculture and Rural Issues Committee took advantage of the Association's new webinar technology to present a program on the impact of GCC on that important segment of the environment and commerce. The Section also will Co-sponsor the upcoming June GCC program at Columbia University. In addition, we will have GCC segments at most of our upcoming programs. So, the Section's coverage of this important issue continues to be relevant and timely.

In unrelated but equally important news, the state, as mandated every 20 years, is rapidly approaching the 2017 vote on whether to hold a Constitutional Convention in 2019. Governor Cuomo also has set aside funds in the latest draft state budget to address the matter. If approved by the voters, process would potentially raise many issues that impact almost every aspect of government and policy. But, if there is a Constitutional Convention, at least two significant environmental issues could be at issue for the Environmental Law Section: potential changes to the Article 14, forever wild provision of the state constitution as it applies to the Adirondacks, and the insertion of an "Environmental Bill of Rights" into the state constitution as in other states' constitutions.

Both of these developments are not without controversy. But, as is our mandate, the Section is already working to educate our members and guide NYSBA through these complicated issues. Look for future news and Section programs on these developing matters.

The 2016 NYSBA Annual Meeting

By any measure, the January 2016 Annual Meeting was a rousing success. Approximately 170 members and others registered for the two-day CLE program. More than 120 also joined us for lunch, and at least 30 attended our Executive Committee meeting on Friday afternoon.

The high point of the meeting, however, was the presentation and spirited Q & A session by our distinguished lunch speaker, the Honorable Thomas P. DiNapoli, New York State Comptroller. Comptroller DiNapoli gave us a lesson in how the fiduciary of the state's pension funds can use that authority to influence state and national environmental policies. He also discussed when and if divestiture is an appropriate tool to effect environmental change.

On behalf of the Section, I also want to thank the four event co-chairs, the program panelists, our devoted NYSBA staff, Hilton employees, and our important sponsors and supporting law firms. In total, it took more than three dozen people and sponsors to put this program together. They all have my profound gratitude for lending the Section their time and talents. Well done!

Section Media, Membership, and Finances

Due to the strong efforts of our various committees and co-chairs, the Section's back office activities continue to prosper. Perhaps the best indicator of our progress is that the Section's finances have stabilized and improved. At this writing, the deficit spending of a few years ago has been reversed and we enter 2016 with an accumulated surplus of more than $70,000.00. To put that number in context, be aware that the surplus has not dwelled in such lofty financial heights since the early 2000s.

The Section's membership decline has also been reversed (for now). More than 100 new members have joined the Section over the past year with more than 20 in December 2015 and January 2016 alone. Total Section membership is now approximately 1,080. Much of this turnaround can be credited to the pro-active and coordinated efforts of both our Diversity and Membership Committees. I also believe that our efforts to improve our member services and benefits have been a strong factor in this resurgence.

Finally, due to the hard work of Editor-in-Chief Miriam Villani, the issue editors, student volunteers, and article contributors, *The New York Environmental Lawyer* is back on track for a faster publishing schedule. While the content quality has never suffered, the TNYEL had fallen into an infrequent publishing schedule due to the size of recent issues. By adjusting the content quantity of each issue, we can look forward to a more frequent publishing schedule.

In related news, the Section's online media (LinkedIn, blog, website) also continue to prosper and inform. We also await the advent of the new NYSBA Online Communities and Webinar programs. By using these varied resources we will improve our member services and benefits for the future.

Tentative 2016 Event Schedule

Below, please find the tentative schedule of Section programs including co-sponsored programs. As always, this listing is merely for convenience and to save the date **BUT IS SUBJECT TO CHANGE!** So, please check the Section's announcements and other media for more current information and additional events.

6/2	USEPA R2 Roundup program (NYC)
6/17	Columbia GCC program (NYC)
10/14-16	Environmental Law Section Fall Meeting (Cooperstown)
11/15	Hazardous Waste Remediation-BCP Update (Albany)

In closing, I cannot begin to express the appreciation I have for the NYSBA staff including Lisa Bataille, Kathy Plog, and Lori Nicoll. They make all of this possible. Finally, to again borrow a turn from the late and great radio personality Bob Grant, "Your influence counts! Use it!" Feel free to contact me or any of the Section officers if you have suggestions, questions, or if you require assistance.

Michael J. Lesser
2015-16 Chair, Environmental Law Section

Message from the Editor-in-Chief

Scientists reported that 2015 was the hottest year in recorded history by far, breaking a record set only the year before. Then, according to NOAA, February 2016 broke another heat record for the planet—the latest in a series of monthly broken records that bring the Earth closer to the ominous 2-degree Celsius rise predicted to lead to catastrophic consequences. February temperatures over both land and ocean averaged 2.18° Fahrenheit above the 20th century average. Since recordkeeping began in 1880, and as of this March 2016 writing, the top three months in terms of heat are December 2015, January 2016, and February 2016, and they all top 1°C warmer than the 20th century average. Average temperatures over land in February were 4.16°F/2.31°C above normal, the first time the 2-degree Celsius bar has been exceeded. February also marked the 10th consecutive month ranked as the hottest of that month in the 135-year record.

Scientists say the bulk of the record-setting heat is a consequence of the long-term planetary warming caused by human emissions of greenhouse gases. El Nino contributed to the rise, but was not the sole cause. The map of temperatures from February shows that some of the highest temperatures compared to average were in the far northern latitudes. El Nino primarily impacts tropical and mid-latitude regions.

As a result, Arctic sea ice set a record for the lowest February extent on record. Former NASA researcher and climate change expert James Hansen says melting ice sheets could cause a significant enough rise in a century to swamp coastal cities. Mr. Hansen's research, published in *Atmospheric Chemistry and Physics*, considers past climatic conditions, recent observations, and future models to warn the melting of the Antarctic and Greenland ice sheets will contribute to a worse sea level rise than previously understood. What's more, the paper states that the global sea level is likely to increase "several meters over a timescale of 50 to 150 years." Hansen's prediction is much worse than the Intergovernmental Panel on Climate Change (IPCC)'s. Hansen explains that the IPCC's assessment is more conservative because it does not factor in the possible disintegration of the polar ice sheets. http://www.atmos-chem-phys.net/16/3761/2016/acp-16-3761-2016.pdf.

The alarming record heat in the first few months of this year following the warmest year on record happened while nations around the globe are working to slow the growth of greenhouse gas emissions. Even so, people are still putting CO_2 into the atmosphere ten times faster than at any point in the past 66M years, with the resulting sea level rises, extreme weather events, coral bleaching, and drought being seen around the planet.

Clearly, more action is needed to reduce greenhouse gas emissions, to stop the negative impacts of the emissions, and to address those impacts that are occurring. The United States must continue to take an active role in that action plan both at home and abroad. The only way that can happen is if the government remains committed to making the environment a priority.

It is worrisome (okay, that's an understatement) that there are candidates running for the presidency who not only deny that climate change is occurring, but who call it a hoax. There are elected representatives in Congress who believe a snowball irrefutably proves climate change is not occurring. This is scary.

What if the United States, a world leader in all things including science, took a position against efforts necessary to reduce planet-warming emissions? What if the United States stepped back from its promise for the country to play a leadership role internationally in the low carbon global economy over the coming decades? What if greenhouse gas emissions were no longer regulated and emission production was given a full-speed-ahead approval? The results would be unfathomable, unimaginable.

We can do our part in preventing this terrifying scenario from becoming a reality. In November, we can vote for the environment. Please do that!

Miriam E. Villani

The views reflected in this column are those of the Editor-in-Chief of *The New York Environmental Lawyer* and are not necessarily the policies of the Environmental Law Section or the New York State Bar Association.

Message from the Issue Editor

As it just so happens, this issue of *The New York Environmental Lawyer* falls in a unique and transformative time for the nation, the Judiciary, and, potentially, for the field of environmental law.

Right now we have eight justices presiding on the United States Supreme Court. Justice Scalia's voice had been a venerable force for three decades, and regardless of one's personal view of his opinions (I'm sure some of our readers will never forgive him for his *Rapanos* opinion), his influence cannot be denied. Even more so than the election of a new president, this change to the Court's panel has had an immediate effect.

The New York Rifle and Pistol Association decided to discontinue its petition seeking to strike down New York's SAFE Act. Dow Chemical Company agreed to settle a billion dollar class-action price fixing suit in lieu of arguing before the Scalia-less court. The Court denied certiorari on cases involving nutritional supplement seller Direct Digital and Wal-Mart, either of which could have severely restricted aggrieved parties' ability to form or join class-action lawsuits. Some speculate these cases would have been entertained if Scalia were still on the bench.

Putting aside the Court's ideological shift, there are also special rules that apply when only eight justices sit on the panel. A majority still decides the outcome on the merits, and a 4-4 tie affirms the lower court decision, thus preserving the status quo.

The Supreme Court's oral argument docket includes several lawsuits that fall within the broad scope of environmental law. I'm sure that experts in all of these cases are weighing the benefits and risks of putting their fates into the hands of the new bench.

The Eighth Circuit case *Army Corps of Engineers v. Hawkes Co., Inc.,* 782 F.3d 994 (cert. granted December 11, 2015), presents the question of whether an agency's approved jurisdictional determination that certain property contains "waters of the United States" subject to the Clean Water Act (CWA) is "final agency action" subject to review in federal court under the Administrative Procedure Act (APA). In *Sturgeon v. Frost,* 768 F.3d 1066 (cert. granted October 1, 2015), the Court certified the question of whether section 103(c) of the Alaska National Interest Lands Conservation Act of 1980 prohibits the National Park Service from exercising regulatory control over State, Native Corporation, and private Alaska land physically located within the boundaries of the National Park System.

Two utility rate-setting cases that have raised significant preemption issues have been consolidated into one hour-long oral argument. *Maryland v. Talen Energy Marketing* and *Hughes v. Talen*, 753 F.3d 467 (cert. granted October 19, 2015) present the following combined questions: 1. When a seller offers to build a generation facility and sell wholesale power on a fixed-rate contract basis, does the Federal Power Act (FPA) field-preempt a state order directing retail utilities to enter into the Contract? 2. Does FERC's acceptance of an annual regional capacity auction preempt states from requiring retail utilities to contract at fixed rates with sellers who are willing to commit to sell into the auction on a long-term basis?

The eight-member Court could also potentially decide the fate of *West Virginia, et al. v. EPA, et al*. This Fourth Circuit case concerns a challenge against the federal Clean Power Plan, which has been under attack since its enactment in 2013. Implementation of the Plan is currently stayed by the Supreme Court pending completion of the litigation in the D.C. Circuit Court of Appeals. Regardless of the outcome, it is expected that a writ of certiorari will be filed.

The months leading up to the presidential election are certain to provide plenty of controversy, entertainment, and political drama. As we watch the battle for the next Supreme Court nominee unfold, we can all keep these environmental issues in mind, because these cases will be among the first to demonstrate how ever-changing the Supreme Court truly is.

Justin Birzon

Message from the Student Editorial Board

My interest in environmental law was recently piqued by the Jessup international Moot Court Competition. This year's problem concerned, in part, an activist organization whose purpose was to stop the manufacture and use of neonicotinoids following the release of articles linking the pesticide's use to bee colony collapse disorder. On the last day of the competition, the team advisor told us of a news article regarding neonicotinoids that had been published by the *Herald* that same day. Prior to reading the article, I had not considered neonicotinoids except through the scope of the competition. After, I found myself researching an area of law that was different, but still connected, to my passion for health law.

Law schools provide students with a variety of ways to learn outside of the classroom, with the moot court program being just one of many opportunities. These experiences may help to set apart the students who take advantage of the opportunities provided, but only if the legal community, including students, realizes the potential these experiences can offer. I recently spoke to a few of my classmates regarding their experience with these programs. I was surprised to hear that a number of my classmates have a lackluster view of the in-house clinics and field placements simply because the programs are provided through the school.

Not only do moot court competitions, in-house clinics, and field placements allow students to explore various practice areas, they also provide valuable real-world experience. From conducting client interviews and representing clients in court to examining case files and drafting documents, students are able to practice the skills they will need to succeed as attorneys. Because the programs are offered through the school, students, particularly those involved with the clinic, have the unique ability to moot with their peers and professors before engaging with clients. And, in light of the current job market where forty percent of the class of 2014 did not have full-time legal jobs ten months after graduation[1] and many firms expect one to two years of experience before considering an applicant, any experience that can lay the foundation for and build necessary skills should be viewed in a positive light.

Sarah A. Valis
Albany Law School '16

Endnote

1. American Bar Association, *2014 Law Graduate Employment Data* (Apr. 28, 2015), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2014_law_graduate_employment_data_042915.authcheckdam.pdf.

EPA Update

Mary McHale

Chris Saporita

Joseph A. Siegel

Marla E. Wieder

Introduction

For the past few months, you couldn't flip through a paper without reading about drinking water problems. From Flint, Michigan to Hoosick Falls, New York, lead and perfluorooctanoic acid (PFOA) in drinking water systems dominated the headlines. While we cannot do justice to even summarizing the investigations and issues on either matter, EPA has established webpages to house information on both matters. To keep abreast of developments in Hoosick Falls, see: www.epa.gov/aboutepa/hoosick-falls-water-contamination. For Flint issues, see www.epa.gov/flint. Also in drinking water news, EPA recently released the Drinking Water Mapping Application to Protect Source Waters, or DWMAPS, which is a new online tool that lets you learn about your watershed and your water supplier, and if there are possible sources of pollution that could affect your water supply. See http://go.usa.gov/cpmHR.

In budget news, President Obama's proposed 2017 $8.2 billion budget for EPA invests in America's future and will help protect health and the environment for you and your community. The proposed budget emphasizes community protection, climate change and air quality, chemical plant safety, and more. For highlights of the proposed budget, see: http://www.epa.gov/planandbudget/fy2017.

SUPERFUND/PESTICIDES

Superfund—The evolution continues…

In December 2015, while we celebrated EPA's 45th anniversary, the Superfund program turned 35. The past 35 years have brought significant changes to the Superfund statute through amendments, changes to perspective, changes to practice through case law, changes to our understanding of threats through new science, and more recently, changes through budget restrictions. Our Superfund enforcement program has enabled thousands of site investigations and cleanups, and has required responsible parties to either conduct that work and or pay for cleanups at the various sites. The Superfund enforcement program's efforts to negotiate settlement agreements and issue orders for cleanup work accounts for nearly 70 percent of all the current cleanup work. For every dollar that the Superfund enforcement program spends, private parties commit eight dollars toward cleanup work. Through these efforts the program preserves taxpayer dollars and the scarce resources of the Superfund trust fund to address truly abandoned and orphaned sites and helps to make a visible difference in communities around the country.[1]

And speaking of change, in December, EPA changed the name of its division that oversees Superfund cleanups, landfills, and toxic and mine spills to one that better reflects the office's responsibilities. The Office of Solid Waste and Emergency Response (OSWER) has officially become the Office of Land and Emergency Management (OLEM).[2]

Show me the money…

In October 2015, the Government Accountability Office (GAO) released a report highlighting EPA's inability to start new Superfund cleanups due to funding shortfalls. The report noted that annual federal appropriations dropped by about half—from around $2 billion to $1.1 billion—between fiscal 1999 and fiscal 2013 and that the agency's spending on site-specific cleanups declined from $700 million to $400 million over that same period.[3] As a result of the financial shortfalls, the agency has had to prioritize finishing ongoing cleanups before beginning new ones. Obviously, delaying cleanups may increase total remediation costs as contaminants may migrate, disposal costs may increase, and sites may need to be recharacterized down the road.

In December 2015, New Jersey lawmakers rolled out a bill aimed at reviving the long expired 'polluter pays' tax that once funded Superfund cleanups.[4] Prior attempts

to revive the tax have proved unsuccessful. Needless to say the issue has been of special interest to New Jersey lawmakers whose state leads the nation in number of NPL sites. While this bill may ultimately go nowhere, as always, we thank you for trying.

And in more positive funding news, under President Obama's proposed budget, in FY 2017, EPA will increase the Superfund remedial program by $20 million to accelerate the pace of cleanups and fund additional construction projects, supporting states, local communities, and tribes in their efforts to assess and clean up sites and return them to productive reuse, and encourage renewable energy development on formerly hazardous sites when appropriate. EPA will also expand the successful Brownfields program, providing grants and supporting area-wide planning and technical assistance to maximize the benefits to the communities. In FY 2017, EPA is investing $90 million in funding for Brownfields Project grants to local communities, increasing the number of grants for assessment and cleanup of contaminated sites. The investment in Brownfields builds on the program's successful community-driven approach to revitalizing contaminated land and further supports the agency's efforts to make a visible difference in communities. See: http://www.epa.gov/planandbudget/fy2017.

Pardon the intrusion…

If you thought EPA's vapor intrusion guidance documents were page turners, wait until you read EPA's new proposed rule on subsurface intrusion. On February 29, EPA proposed adding a subsurface intrusion (SsI) component to the Hazard Ranking System (HRS), the system used to evaluate sites for placement on the NPL. The subsurface intrusion component would expand the number of available options for EPA and state and tribal organizations performing work on behalf of EPA to evaluate potential threats to public health from releases of hazardous substances, pollutants, or contaminants. The addition will allow an HRS evaluation to directly consider human exposure to hazardous substances, pollutants, or contaminants that enter regularly occupied structures through subsurface intrusion in assessing a site's relative risk, and thus enable subsurface intrusion contamination to be evaluated for placement of sites on the NPL. The comment period for this new rule closed on April 29, 2016.[5]

Progress on the Hudson River PCBs Superfund Site

In the Fall of 2015 and after only six years of in-river work, dredging of the upper Hudson River came to a close. In that time, approximately 2.75 million cubic yards of river mud contaminated with polychlorinated biphenyls (PCBs) were removed from a 40-mile section of the river. The dredging removed about 310,000 pounds of PCBs—twice what was originally estimated. According to GE, the company has spent over $1.5 billion on this cleanup project, which certainly ranks as one of the largest and most technically complex environmental dredging operations ever undertaken in the United States. Following the conclusion of the work, there were calls for EPA not to approve dismantling the dewatering facility by the federal Natural Resource Trustees (the U.S. Fish and Wildlife Service, and the National Oceanic and Atmospheric Administration), calls by several environmental groups for additional dredging, and much discussion on the levels of toxins that remain in the river system.[6] While a complex dialogue continues, an extensive long-term monitoring program will proceed, along with a comprehensive study of the shoreline areas (the floodplains) and the natural resource damage assessment. Additionally, in 2016 EPA is beginning its second five-year review of the remedy in order to assess the protectiveness of the remedy. If the remedy is not deemed protective, the agency said it will "consider what additional actions are needed."[7]

Pesticides—Methyl Bromide

As part of its ongoing work to address the illegal use of toxic pesticides containing methyl bromide in the Caribbean, in March, EPA issued complaints against two individuals and a pest control company in Puerto Rico for violating the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Clean Air Act. From 2013 to early 2015, Edwin Anduìjar Bermuìdez, doing business as Truly Nolen Pest Control De Caguas, and Wilson J. Torres Rivera, the owner of Tower & Son Exterminating, Corp., fumigated residences and other unauthorized locations in several Puerto Rico municipalities with pesticides containing methyl bromide. The use of methyl bromide is restricted in the U.S. due to its acute toxicity and because it is an ozone-depleting substance. As certified applicators, Mr. Anduìjar and Mr. Torres face civil penalties under FIFRA, as does Mr. Torres' company. Mr. Anduìjar and Tower & Son Exterminating, Corp. additionally face civil penalties under the Clean Air Act.[8]

The health effects of exposure to methyl bromide are serious and include headaches, dizziness, weakness and confusion. In severe cases exposure can cause central nervous system and respiratory system damage. Only certified applicators are allowed to use methyl bromide in certain approved locations and for purposes specified on a given product's label; methyl bromide products are not allowed to be used in dwellings. The labels for methyl bromide pesticides also require compliance with specific monitoring, health and safety, and storage instructions. The EPA has been focused on compliance with federal pesticides laws and the Clean Air Act in the Caribbean following an incident in March 2015, when a family vacationing in the U.S. Virgin Islands fell gravely ill after being exposed to methyl bromide that was sprayed in a resort condo unit below theirs.[9] See the EPA Update column in the last issue of *TNYEL* for details on that matter. Senators in the Virgin Islands have also recently called for a ban on methyl bromide use.[10] For more information on the EPA's regulation of pesticides, visit: http://epa.gov/pesticides.

AIR QUALITY

EPA issues Supplemental Finding for Mercury Air Toxics Rule

EPA proposed a supplemental finding on November 20, 2015, "that including a consideration of cost does not alter EPA's previous determination that it is appropriate to regulate air toxics, including mercury, from power plants."[11]

EPA's proposal responds to the Supreme Court's June 29, 2015 reversal and remand in *Michigan v. EPA*.[12] In *Michigan* the Court held that the EPA erred in concluding that cost did not need to be considered in the appropriate and necessary finding under Clean Air Act ("CAA") §112(n)(1)(A).[13] The *Michigan* decision remanded to the D.C. Circuit, but did not vacate, the National Emission Standards for Hazardous Air Pollutants from Coal-and Oil-fired Electric Steam Generating Units, commonly referred to as the "Mercury Air Toxics Rule" ("MATS").[14]

In the proposed supplemental finding, the EPA stated that it has "considered whether the cost of compliance estimated to be incurred by the utility sector under MATS is reasonable when weighed against, among other things, the substantial hazards to public health and the environment" resulting from emission of hazardous air pollutants ("HAPs") from coal-and oil-fired electric steam generating units ("EGUs").[15] The proposed supplemental finding also indicates that the EPA "considered the power industry's ability to afford the cost of compliance with MATS and still perform its primary and unique function—the generation, transmission and distribution of electricity—at a reasonable cost to consumers."[16] If finalized after consideration of comments, this supplemental finding "will confirm that coal- and oil-fired electric utility steam-generating units (EGUs) are properly included in the Clean Air Act (CAA) section 112(c) list of sources that must be regulated under section 112(d) of the CAA."[17]

In a December 15, 2015 *per curiam* order, the D.C. Circuit ruled that the MATS would remain in place while the Agency takes action to address the Supreme Court's June 29, 2015 remand.[18] The court noted that the "EPA has represented that it is on track to issue a final finding under 42 U.S.C. § 7412(n)(1)(A) by April 15, 2016."[19]

EPA Proposes Update to Transport Rule

On November 16, 2015, EPA proposed an update to the Cross State Air Pollution Rule (referred to as the Transport Rule or CSAPR).[20] The proposed update to CSAPR responds to the July 28, 2015 remand by the D.C. Circuit and addresses "interstate air quality impacts with respect to the 2008 ozone National Ambient Air Quality Standards (NAAQS)."[21] The 2008 ozone NAAQS was not addressed in the initial CSAPR rule.[22] This proposed rule also "is not meant to address the CAA's good neighbor provision with respect to the 2015 ozone NAAQS final rule."[23]

EPA is proposing to adopt a Federal Implementation Plan (FIP) "for each of the 23 states that may not have submitted approvable SIPs and whose emissions are projected to contribute to downwind air toxics problems."[24] The Clean Air Act gives the EPA "a backstop role" to issue FIPs "in the event that states do not submit approvable SIPs."[25] As discussed in the EPA Fact Sheet, the focus of the proposed FIP is on the power sector because EPA analysis shows that "the power sector has a substantial amount of cost-effective nitrogen oxide (NOx) reductions that could be achieved by 2017."[26] The proposed FIPs would "update the existing CSAPR NOx ozone-season emission budgets for each of the state's fleet of electricity generating units (EGUs) and implement these budgets through the existing CSAPR NOx ozone season allowance trading program."[27] And the proposed update rule "would reduce summertime emissions of oxides of nitrogen (NOx) from power plants in 23 states in the eastern half of the U.S., providing $1.2 billion in health benefits to millions of Americans."[28]

Final Startup, Shutdown, Malfunction Rule Challenged

The EPA's final Startup, Shutdown, Malfunction ("SSM") Rule[29] is being challenged in the D.C. Circuit.[30] The case will be fully briefed by mid-summer 2016.[31]

Consent Decree in *U.S. v. Tonawanda Coke Corporation*

On October 28, 2015, a consent decree valued at $12 million was entered in the United States District Court for the Western District of New York resolving violations of the Clean Air Act, Clean Water Act (CWA), and Emergency Planning and Community Right-to-Know Act (EPCRA) at Tonawanda Coke Corporation.[32] Under the settlement agreement with the United States and co-plaintiff the State of New York, Tonawanda Coke Corporation will pay $2.75 million in civil penalties: $1,750,000 to the United States and $1,000,000 to New York.[33] In addition, Tonawanda Coke will "spend approximately $7.9 million to reduce air pollution and enhance air and water quality and an additional $1.3 million for environmental projects in the area of Tonawanda, New York."[34]

Tonawanda Coke's "violations of the Clean Air Act resulted in releases of coke oven gas, which contains benzene and other harmful chemicals. Tonawanda failed to install air pollution controls on its coke ovens, failed to properly monitor equipment for coke oven gas leaks, failed to conduct required annual maintenance inspections of emission controls and proper operations and maintenance and failed to complete multiple required reports, among other violations. Exposure to benzene and other hazardous air pollutants found in coke oven gas can significantly harm human health and excessive exposure to benzene is a known cause of cancer."[35]

Under the Clean Air Act portion of the consent decree, Tonawanda Coke "must improve its processes, operations and monitoring for coke oven gas leaks, assess key equipment, repair or replace equipment, install new pollution controls and take many additional measures under a prescribed schedule. This work, estimated to cost approximately $7.9 million, will secure significant reductions of benzene, ammonia and particulate matter emissions from the plant, improving air quality in Tonawanda and protecting public health."[36]

The settlement includes the requirement that Tonawanda Coke install, coke oven battery pollution controls, known as "pushing controls," to limit coke oven gas emissions from the battery.[37] It is estimated that, once fully operational, these controls will reduce particulate matter by up to 162 tons per year.[38] Tonawanda Coke was also required to install a continuous monitoring system on the battery stack.[39]

In addition to the CAA violations, Tonawanda Coke's "Clean Water Act violations include discharging wastewater and other prohibited pollutants in its stormwater discharges to the Niagara River, discharging excessive amounts of cyanide, ammonia and naphthalene in its process wastewater, and allowing process water holding tanks to decay, pipes to leak and spill contamination structures to become ineffective."[40] At the lodging of the consent decree, Tonawanda Coke had "largely resolved" the CWA violations but agreed under the settlement to be "subject to an independent, third-party audit" of its CWA compliance and "to implement all necessary recommendations for improving facility operations."[41]

Finally, Tonawanda Coke failed to report, under EPCRA, that it "manufactured benzene and ammonia in quantities that exceeded the 25,000 pound per year reporting threshold."[42] Tonawanda Coke agreed to submit "several years' worth of information about its use and emissions of ammonia and benzene" under EPCRA.[43]

CLIMATE CHANGE

EPA Participates in the Successful Outcome at the Paris Conference of the Parties to the UN Framework Convention on Climate Change

On the climate change front, 2015 ended with a big celebration in Paris after 196 countries came to an historic agreement to address climate change. President Obama was one of more than 150 heads of state who gathered at the opening of the summit and whose leadership helped achieve the successful outcome. EPA Administrator Gina McCarthy, who participated in the talks, released a statement on December 12, 2015, at the conclusion of the Paris summit, indicating that:

> the agreement gives hope to families in the U.S and around the world that we are doing everything we can to leave a safer and healthier world for our kids and future generations. EPA will work tirelessly to share our expertise in defense of public health and the environment as we work together to implement this agreement. Today, we are unequivocally sending market signals that are spurring U.S. action, and unleashing businesses to think creatively and seize this opportunity to lead the world in developing a clean energy economy.[44]

The Administrator participated in a series of public events in Paris and discussed the progress that the United States has made under President Obama's Climate Action Plan.[45] She emphasized the benefits to be derived from EPA's Clean Power Plan, which is expected to reduce pollution from the power sector by 32 percent below 2005 levels by 2030. Administrator McCarthy also highlighted other measures to reduce greenhouse gases including "historic fuel economy standards for medium and heavy-duty vehicles, investments to cut energy waste in homes, buildings, and appliances, …a commonsense proposal to cut methane from the oil and gas operations…and domestic efforts to phase down the use of climate-damaging hydrofluorocarbons."[46] The Administrator was a speaker in several side events on the President's Climate Action Plan and the Clean Power Plan.[47]

EPA's 2017 Budget Request Prioritizes Support for Climate Change Actions

On February 9, 2016, the Obama Administration released its fiscal year (FY) 2017 budget for EPA. The budget request prioritizes actions that will reduce the impacts of climate change by providing $235 million for "efforts to cut carbon pollution and other greenhouse gases through common sense standards, guidelines, and voluntary programs."[48] The budget also includes $25 million in grant money to help states implement their respective state strategies under the Clean Power Plan. In addition, the budget provides for an additional $1 million for EPA's greenhouse gas standards for motor vehicles and a $4.2 million increase for vehicle engine and fuel compliance programs and critical testing capabilities to ensure compliance with the standards.[49]

For more information on the climate change aspects of the EPA's FY 2017 proposed budget, please visit: http://www.epa.gov/planandbudget/fy2017.

EPA Region 2 Announces Price Chopper's Participation in EPA's Methane-Reducing Food Recovery Challenge

On January 14, 2016, Region 2 and Price Chopper announced Price Chopper's participation in EPA's Food Recovery Challenge.[50] The Food Recovery Challenge is designed to reduce food waste generation by increasing donations of edible food that is no longer saleable and then composting the excess food. Regional Administra-

tor Judith A. Enck stated, "A staggering amount of edible food is wasted every day, winding up in landfills where it produces methane gas. This uneaten food accounts for almost 25 percent of U.S. methane emissions…The EPA commends Price Chopper for committing to feeding people and not landfills."[51] Food accounts for 21 percent of the waste deposited in landfills in the United States despite the harsh reality that 14.3 percent of U.S. households in 2013 were food insecure. By joining the Food Recovery Challenge, Price Chopper will receive technical assistance and access to EPA's waste tracking software. Price Chopper will establish benchmarks to measure its progress and submit progress reports to EPA. The Food Recovery Challenge, which has 800 participants, prevented and diverted 606,000 tons of food waste from incinerators and methane-producing landfills.[52] The Challenge complements EPA's Food Steward's Pledge, a program to engage with faith communities on the connection between food waste and climate change while addressing hunger.[53]

For more information on EPA's sustainable food programs, see http://www.epa.gov/foodrecovery. To learn more about the Food Steward's Pledge, including how to sign on, see http://www.epa.gov/communityhealth/pledge-action-steps.

Supreme Court Stays Clean Power Plan

On Feb. 9, 2016, the Supreme Court granted an application for a stay of EPA's "Carbon Pollution Emissions Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64,662 (Oct. 23, 2015) ("Clean Power Plan").[54] The Supreme Court stayed the Clean Power Plan pending the "disposition of the applicants' petitions for review" in the D.C. Circuit and "disposition of the applicants' petition for a writ of certiorari, if such a writ is sought."[55] The Court further indicated that if it grants such a writ, the "order shall terminate when the Court enters its judgment."[56] Justices Kagan, Breyer, Sotomayor, and Ginsburg voted to deny the stay application.

EPA issued the following statement regarding the stay on its Clean Power Plan web page:

> On February 9, 2016, the Supreme Court stayed implementation of the Clean Power Plan pending judicial review. The Court's decision was not on the merits of the rule. EPA firmly believes the Clean Power Plan will be upheld when the merits are considered because the rule rests on strong scientific and legal foundations. For the states that choose to continue to work to cut carbon pollution from power plants and seek the agency's guidance and assistance, EPA will continue to provide tools and support. We will make any additional information available as necessary.[57]

Pursuant to the D.C. Circuit scheduling order, briefing in the D.C. Circuit concluded on April 22, 2016, and the oral argument will be held on June 2, to be continued on June 3 if more time is needed.[58]

EPA Awards Wetlands Grants to Enhance Resilience in New York

EPA announced on Dec. 9, 2015 its award of $690,940 for wetlands protection to the St. Regis Mohawk Tribe, the NYC Department of Parks and Recreation, and the Research Foundation of SUNY.[59] Regional Administrator Judith A. Enck stated that "wetlands play a critical role in alleviating harmful effects of climate change, protecting against flooding and storm surges….These grants will help strengthen shorelines and the health of wetlands, protecting water quality and fish and wildlife habitats." The grant recipients will use the funds to develop water quality criteria, analyze and categorize stream networks by their sensitivity to storm water impacts, identify factors that predict wetland vulnerability, and prepare water management guidelines to protect downstream wetlands, among other projects.[60]

For more information on EPA's Wetland Program Development Grants, visit: http://www2.epa.gov/wetlands/funding-and-other-resources.

EPA Awards Grants to Improve the Health of the Long Island Sound Ecosystem and Enhance Climate Change Resilience

On November 12, 2015, EPA awarded thirteen grants, totaling $752,301, to local government and community groups in New York to enhance the health and ecosystem of the Long Island Sound.[61] The grants were funded through the Long Island Sound Futures Fund, a public-private grant program that pools funds from the EPA, the National Fish and Wildlife Foundation, and the U.S. Fish and Wildlife Service. The Long Island Sound Futures Fund was created in 2005 by the Long Island Sound Study. Upon awarding the funds, Judith A. Enck, EPA Region 2 Regional Administrator, said that "Long Island Sound is an amazing natural resource, which provides recreation and economic opportunities for millions of people. These projects are smart investments that will improve water quality and build resiliency in shoreline communities."[62] Among the projects funded by the grants were green infrastructure to treat polluted stormwater runoff into the Sound, educational programs, and student- and community-led monitoring programs and studies. For full descriptions of the Long Island Sound Futures Fund Grants, visit http://longislandsoundstudy.net/about/grants/lis-futures-fund/. To learn more about the Long Island Sound Study, see http://www.longislandsoundstudy.net.

Automakers Beat Greenhouse Gas Standards for Cars and Light Trucks

On December 16, 2015, EPA released two reports demonstrating that automakers performed better in 2014 than the light duty vehicle greenhouse gas standards.[63] One report, the Greenhouse Gas Manufacturer Performance Report, concludes that, for model year ((MY) 2014, manufacturers over-complied with the GHG standards by 13 grams of CO_2 per mile, the equivalent of about 1.4 miles per gallon (mpg). The other report, "Light-Duty Automotive Technology, Carbon Dioxide Emissions and Fuel Economy Trends: 1975 through 2015," demonstrates that fleet-wide model year 2014 fuel economy remained steady at the highest recorded level. These levels correlate with reducing cumulative emissions by roughly 60 million metric tons of CO2, which is approximately the amount of GHGs emitted due to the use of electricity each year in over 8 million homes.[64] These greenhouse gas standards for motor vehicles will ultimately save an American family that purchases a new MY 2025 vehicle more than $8,000 in lifetime fuel costs. In total, Americans will save $1.7 trillion in fuel costs and reduce greenhouse gas emissions by 6 billion metric tons while saving 12 billion barrels of oil.[65] More information on Fuel Economy Trends is available at http://epa.gov/otaq/fetrends.htm. More information on the Manufacturer Performance Report can be found at http://www.epa.gov/otaq/climate/ghg-report.htm.

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Any opinions expressed herein are the authors' own, and do not necessarily reflect the views of the U.S. Environmental Protection Agency. This Update is based on select EPA press releases available at http://www.epa.gov/newsroom, and other public information covering approximately 10/1/2015 through 3/1/2016. Note that water quality issues are not covered in this edition, but see our January 2016 EPA Update presentation posted on ELS's website for highlights.

DEC Update

By Randall C. Young

Proposed Regulations

On February 26, 2016, DEC released proposed comprehensive revisions to the state's solid waste management regulations, currently found in 6 NYCRR Part 360. The draft regulations include a new format. Currently, Part 360 includes multiple subparts that govern particular activities and facilities. The draft regulations no longer rely on these subparts. Instead, Parts 360 through 396 will be used to govern different categories of facilities or activities. The draft regulations and supporting information can be seen on the DEC website at: http://www.dec.ny.gov/regulations/81768.html.

Written comments on the draft regulations and DGEIS can be submitted by e-mail to: SolidWasteRegulations@dec.ny.gov. Comments may also be mailed to: Melissa Treers, P.E., New York State Department of Environmental Conservation, Division of Materials Management, 625 Broadway, Albany, NY 12233-7260, until 5:00 p.m. July 16, 2016. Public hearings regarding the proposed regulations and DGEIS will be held during the public comment period at the following times and locations:

June 2, 2016, 1:00 pm: Suffolk County Water Authority Education Center, 260 Motor Parkway, Hauppauge, NY 11788

June 6, 2016, 1:00 pm: NYSDEC, 625 Broadway, Albany, NY 12233

June 7, 2016, 1:00 pm: RIT Inn and Conference Center, Henrietta Ballroom, 5257 West Henrietta Rd., Rochester, NY 14467

Access to Information

Freedom of Information Law requests are the primary avenue by which the public, including attorneys are able to access information regarding facilities, sites, or activities regulated by the Department. However, DEC has placed a significant amount of information online, through links on its website: http://www.dec.ny.gov/public/373.html.

Tables, charts, and lists with up-to-date information regarding chemical and petroleum spills reported since 1978, bulk storage facilities, and sites which have been remediated or are being managed under one of DEC's Division of Environmental Remediation remedial programs, such as the State Superfund and Brownfield Cleanup programs, can be found at: http://www.dec.ny.gov/cfmx/extapps/derexternal/index.cfm?pageid=1. All sites listed on the "Registry of Inactive Hazardous Waste Disposal Sites in New York State" are included. The Database also includes the "Registry of Institutional and Engineering Controls in New York State." These datasets are updated nightly.

Checking for information online can sometimes help avoid spending time waiting for a response where no records exist regarding a site, and can make drafting requests easier. A review of the information online can make it easier to draft a request that will allow the DEC staff to quickly and accurately find the relevant records by gleaning specific addresses, facility names, and most importantly, facility identification numbers, spill numbers, and site control numbers used by DEC.

Finally, the more focused the request, the more easily it can be answered. DEC's files on some facilities are voluminous, covering decades across several programs. Limiting a request by time, document type, or information sought can make the file review and response faster, and limit the time the requestor spends looking through the responsive files trying to find relevant information.

Personnel Changes

Marc Gerstman retired from his position as Executive Deputy Commissioner for Environmental Conservation in December 2015. He had been serving as Acting Commissioner following the resignation of Commissioner Martens in July 2015. He had previously served as Deputy General Counsel and Director of Legal Affairs from 1985 to 1988, going on to become Deputy Commissioner and General Counsel from 1988 to 1994.

Edward McTiernan resigned from his position of General Counsel and Deputy Commissioner in November 2015, and has joined the firm of Arnold and Porter, LLP as a partner. He had served as Deputy Commissioner and General Counsel since 2011.

Jeanie Konz has left the DEC's office of General Counsel for a position with the Attorney General's office. Ms. Konz served as a real estate attorney for DEC before leaving briefly for a position with Office of Parks Recreation and Historic Preservation. She returned to DEC to work on natural resources issues before accepting her present position with the Attorney General.

Norman Nosenchuck, the longtime director of the Division of Solid and Hazardous Materials, passed away on December 15, 2015, at age 87. He started his career with DEC in 1966, forming and implementing the construction grants program that disbursed billions of dollars for construction of waste water treatment facilities across the state. After becoming division director for the Division of Solid and Hazardous Waste, he guided the modernization of the State's solid waste management facilities until he retired in 1998.

Thomas Berkman has been appointed to succeed Edward McTiernan as Deputy Commissioner and General Counsel. He served as Deputy General Counsel from 2011 to January 2016. He came to DEC after serving in the Attorney General's Office, where he worked from May of 2008 until March of 2011.

Timothy Eidle has been promoted to serve as the section chief for the Natural Resources section in the Office of General Counsel's Bureau of Water and Natural Resources. He has worked at DEC since 1998, focusing on natural resource law, including fish and wildlife and endangered species issues.

Michele Stefanucci has joined the Office of General Counsel as a senior attorney in the Water and Natural Resources Bureau. Ms. Stefanucci previously worked for the Office of General Counsel after serving as attorney for the State's Freshwater Wetland Board of Appeals. She left DEC for a position with the State Department of Education, but has returned and will resume her focus on issues related to wetlands and land management.

Caitlin Stephen has accepted a position as Empire Fellow in the Office of General Counsel, Central Office, focusing on issues related to air. She holds a B.A. in Political Science and a B.S. in Psychology, both from George Washington University, and a J.D. from Cornell Law School.

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 prepared or endorsed by NYSDEC.

Member Profiles

Long-Time Member: Walter Mugdan

For this issue we have focused our Long-Time Member profile on Walter Mugdan, who is Director of the Emergency and Remedial Response Division of EPA Region 2 and a former chair of the Section. His environmental career was inspired by an Earth Day event he attended when he was a sophomore in college. He has been employed by the same employer (USEPA) for more than 40 years and, nevertheless, has had a wide variety of professional leadership positions. He started as an environmental attorney, served as Regional Counsel and functions now more as an administrator than an attorney, directing the office that operates the Region 2 Superfund, brownfield, emergency response, and homeland security programs. He has an impressive list of awards and accomplishments including the Presidential Rank Distinguished Executive Award.

Walter has handled many significant, high profile litigations. He handled the Westway case, starting in his second year out of law school. The Westway project was a plan to build an interstate highway on the west side of Manhattan, mostly on land that would be added to Manhattan by fill. The litigation included 3 years of permit hearings with more than 80,000 pages of transcript. He also had a major role in the PCB cleanup of the Hudson River, first as an attorney and later as an administrator. After decades of work and very intense negotiations, GE agreed to perform a very complicated cleanup at a cost of more than $1.5 billion. The Passaic River project in New Jersey is another high profile case that he has been handling. The primary contaminant of concern is dioxin from the manufacture of agent orange (a Viet Nam War defoliant), but there are numerous other contaminants and parties to make this an especially complex case. EPA's proposed cleanup is, to date, the most costly cleanup in Superfund history.

Walter is also well known to the environmental bar because of the amount of lecturing and publishing he does. He has been Director of the Annual EPA Trial Advocacy Institute since 1992, on the Board of Advisors and a faculty member at the NYC Environmental Law and Leadership Institute since 2006, a faculty member at the EPA New Superfund Attorney Training Course since 1995, a faculty member at the NYU Summer Institute on Environmental Law from 1995-2009, and an adjunct faculty member at Pace University Law School from 1997-2002 (teaching Superfund Law). His list of publications and speaking engagements at conferences is longer than most people's resumes. His writings demonstrate both technical expertise in the law and a broader scope understanding of the policies underlying the law and the practicalities of implementation.

Walter's hobbies include outdoor activities such as hiking, skiing and kayaking. He also has an interesting hobby as an environmental attorney. He is the president of a conservation and park stewardship group whose activities sometimes have him acting as a private party permit and grant applicant—giving him a valuable taste of how burdensome it is to be on the other side of government bureaucracy! And, as many of you know, Walter has been an active member of the Environmental Law Section for decades, including his five-year term as an officer.

Aaron Gershonwitz

* * *

New Member Profile: Claudia Braymer

We are pleased to turn our attention to this issue's highlighted new member, Claudia Braymer. Many know her from her deep involvement in the Environmental Law, Municipal Law, and Young Lawyers Sections of the New York State Bar Association, the Women's Bar Association of New York, Adirondack Chapter, or the Warren County Bar Association. Others know Claudia because she is one of the most interesting young members of our Section.

Claudia is a rugby player. She is a world-class rugby player. She began playing the sport while studying at Penn State as an undergrad, where she found that rugby was a passion. She later played as a member of the USA Rugby Women's National Team from 2005 to 2010. More recently, in the spirit of introducing a younger generation to rugby, Claudia has started a youth rugby club in Glens Falls.

Claudia is an attorney at the Glens Falls, NY law firm of Caffry & Flower, where she has practiced since 2011. At Caffry & Flower, Claudia handles a wide variety of controversies spanning the breadth of environmental law, zoning and land use law, real estate, and related litigation.

Her environmental cases often involve local stakeholders, property owners, and advocacy groups that are fighting against various aspects of development. She is one of the attorneys currently defending the journalist who was sued for trespass when he canoed on a stream that the Supreme Court and the Third Department have determined is subject to the public's right of navigation—the case is pending before the Court of Appeals.

Claudia noted that when litigating environmental disputes, judicial decisions are unpredictable. Judges often fail to consider the policies behind the litigated environmental statutes, and decide serious issues on the letter of the law. This can result in cases being dismissed without any serious analysis of the environmental causes of action.

Of course, progressive environmental changes do not always happen through case law, and Claudia has grappled with effective governance and advocacy. She decided that, in some cases, the most effective way to improve environmental protections is through the legislative process. This realization has led Claudia to her position as the Warren County Supervisor for the Third Ward of Glens Falls. Notably, the famed Adirondack Rail Trail is in her district, and Claudia is at the center of the debate between two competing uses of a local railway—continued use as a railway versus a bike and hiking path. Continued use as a railway came under heightened scrutiny last summer when the railroad operator proposed to use the Warren County railway to transport waste oil train cars into the interior of the Adirondack Park for indefinite storage.

Although Claudia originally hails from Pennsylvania, she began forging a lifelong connection with New York's Adirondack Park at a young age. She recounts fantastic memories of her summers in the Adirondacks hiking and canoeing. She has since concluded that Glens Falls is the "perfect place" to converge her family goals and lifestyle of outdoor activities, including cross-country skiing, and her career goals. Claudia resides in Glens Falls with her husband and family.

While at Albany Law School, Claudia served on the *Albany Law Review* and Environmental Law Society. She authored the article "Recreation and Public Access in the Adirondack Forest Preserve." Claudia was also a 2006 Women and Public Policy Fellow at the Rockefeller College of Public Affairs and Policy.

Claudia graduated from Pennsylvania State University in 2002, with a degree in Environmental Resource Management. After graduating from Penn State, she worked as an environmental consultant for Booz Allen Hamilton. She graduated cum laude from Albany Law School in 2009.

Keith Hirokawa

Member News

Professor Nick Robinson was honored by the Jay Heritage Center at a dinner on May 14, 2016. The John Jay Medal was bestowed upon Professor Robinson for his work on behalf of the Center. The Center said: "As a longstanding board member and legal advisor for the Jay Heritage Center and its predecessor, the Jay coalition, Nick Robinson has been instrumental in preserving the landmark home of John Jay in Rye. His efforts have safeguarded an American Founder's legacy and protected one of our most precious natural resources, Long Island Sound." Congratulations Nick!

In Memoriam:

Henry L. Diamond

1932-2016

The Section is very sorry to report that Henry Diamond, one of the early pioneers in environmental law, passed away. Below are the words of remembrance by his firm Beveridge & Diamond where he was one of the founders.

We are saddened to announce the passing of one of our founders, Henry L. Diamond.

Henry was an early advocate for conservation and greatly influenced the development of environmental law in the United States. His work on the Outdoor Recreation Resources Commission under President Kennedy laid the foundation for the creation of the Land and Water Conservation Fund and our national system of protecting wilderness areas and wild and scenic rivers.

He later served as Executive Director of the 1965 White House Conference on Natural Beauty. This bipartisan event helped to elevate environmental issues on the national agenda in the years leading up to the establishment of the U.S. Environmental Protection Agency and the passage of the major federal environmental legislation that guides our nation today. He was a member and Chairman of the President's Citizens Advisory Committees on Recreation and Natural Beauty and Environmental Quality.

He served as the first Commissioner of New York's Department of Environmental Conservation. As Commis-

sioner, he led a 533-mile bike ride across the entire state of New York to advocate for the successful legislative passage and voter approval of the Environmental Quality Bond Act of 1972 that provided $1.2 billion for water and air pollution control and land acquisition.

In 1975, Henry moved to the private sector, joining the nascent environmental law firm that would become Beveridge & Diamond. His practice included advising leading companies and numerous municipalities on high profile environmental matters. He also served as a mentor to many young lawyers inside and outside the firm.

While in private practice, Henry remained a tireless advocate for land and water conservation. He served on more than 30 boards and commissions, including Resources for the Future, the Environmental Law Institute, The Woodstock Foundation, The Jackson Hole Preserve, Inc., and Americans for Our Heritage and Recreation. He chaired the National Park Service 75th Anniversary Conference which produced the influential Vail Report, and co-authored the 1996 survey *Land Use in America*. He recently co-chaired the bipartisan Outdoor Resources Review Group, sponsored by Senators Jeff Bingaman and Lamar Alexander. The Group's report, *Great Outdoors America*, served as a catalyst for President Obama's America's Great Outdoors initiative.

Henry's close friendship with Laurance Rockefeller over many years allowed him to facilitate some of Mr. Rockefeller's gifts to the National Park Service. These included the JY Ranch in Wyoming, additions to Hawaii's Haleakala National Park, areas in the U.S. Virgin Islands, and the establishment of the Marsh-Billings-Rockefeller National Historical Park in Woodstock, Vermont. His *pro bono* work included representing the Rails-to-Trails Conservancy in its defense of the constitutionality of rail banking.

Henry's contributions to conservation and the field of environmental law were widely recognized. In October of last year, the Environmental Law Institute (ELI) presented Henry with its Environmental Achievement Award before an audience of more than 700 environmental professionals from the private sector, government and non-profit communities. With assistance from some of Henry's "contemporaries and collaborators," we produced a brief tribute video that debuted at the ELI award dinner after warm introductory remarks from former U.S. Park Service Superintendent Bob Stanton.

In 2011, he received the Secretary of the Interior's Lifetime Conservation Achievement Award, the Interior Department's highest honor for a private citizen. He was also the recipient of Pugsley Medal of the American Academy for Park & Recreation Administration in 2008.

As Pat Noonan, founder and Chairman Emeritus of The Conservation Fund, said in the ELI Tribute video, "Henry Diamond embodies the values of public service, political insight, and private sector activity. He has blended all of those into his life's work in a remarkable mosaic that has led to the conservation field, the environmental field, and sustainability that we now have today. It's a remarkable legacy."

Earlier this year, Henry penned an inspiring charge to us all in an article in the ELI *Forum* entitled "Lessons Learned for Today." Calling for a return to the spirit of the 1965 White House Conference, Henry wrote, "We must return to the spirit of that afternoon in 1965, where government-citizen cooperation, high-level leadership, and bipartisanship can again be brought to bear on today's unfinished agenda. We cannot allow complacency to take hold. There is work to be done."

As all of Henry's friends and colleagues observed throughout the years, he was renowned as a witty story teller, a master at trivial pursuit, and an iconic commentator on political talent and the lack thereof. He loved biking, hiking, reading history, and listening to the oral histories of presidents and other leaders.

Henry was an exceptional lawyer, a fine mentor to his colleagues, and a devoted conservationist. We are proud to uphold the high standards and traditions of excellence he set.

Thank you, Henry.

A Henry Diamond ELI Award Tribute Video is available on the Beveridge & Diamond website at www.bdlaw.com/news-1857.html.

Scenes from the

Environmental Law Section

ANNUAL MEETING PROGRAM

January 29, 2016
New York Hilton Midtown

Michael Lesser
and Hon. Thomas P. DiNapoli

Michael Lesser, Terresa Bakner
and Larry Schnapf

Lou Alexander, Hon. Thomas P.
DiNapoli and Michael Lesser

Hon. Thomas P. DiNapoli, Marla Wieder, Larry Schnapf,
Kevin Bernstein

Hon. Thomas P. DiNapoli, Michael Lesser, Marla Wieder
and Larry Schnapf

THOMAS P. DiNAPOLI
STATE COMPTROLLER

110 STATE STREET
ALBANY, NEW YORK 12236

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

February 1, 2016

Michael J. Lesser
Chair, Environmental Law Section
New York State Bar Association
1 Elk Street
Albany, NY 12207

Dear Mr. Lesser:

My thanks to you and your colleagues for honoring me with the Environmental Law Section of the New York State Bar Association Award.

It was my privilege to address your luncheon event and I was humbled by your generous words of introduction.

I commend you and your members for the outstanding leadership you all provide on behalf of environmental issues.

Best wishes for continued success and know how grateful I am for this recognition.

Sincerely,

Thomas P. DiNapoli
State Comptroller

ENVIRONMENTAL LAW SECTION COMMITTEE REPORT

Committee Name: Mining & Oil and Gas Exploration Committee

Committee Co-chairs: Alita Giuda and Adam Schultz

Date of Report: December 21, 2015

The Committee has undertaken and/or completed the following projects in the current year:

During calendar year 2015, the committee co-chairs reached out to the roster of members to gauge interest, and held an organizational and introductory conference call. During that call we discussed the committee's responsibilities, and ideas for writing, CLE, or other events on behalf of our committee. We began exploring one of our CLE ideas with the Section, namely a program discussing the state of oil and gas development in New York post-SGEIS. This program was ultimately developed and included in the Section's fall meeting with two presentations, one related to a proposed natural gas well utilizing propane gel technology, and the second discussing recent issues with the disposal of oil and gas drilling waste in New York landfills.

Committee Co-chair Alita Giuda was one of the co-chairs for the Section's Fall meeting, and Co-chair Adam Schultz presented at the meeting in the oil and gas panel. Additionally, the committee posted summaries of two relevant cases for the mining industry (and SEQRA review in general) on the Section's LinkedIn group page. All committee members have been encouraged to do the same.

Significant case law affecting our committee focus in the current year includes:

Troy Sand & Gravel Co., Inc. v. Town of Nassau, 125 A.D.3d 1170 (3d Dept. 2015) (holding that a municipality may not conduct an independent environmental review of mining proposal outside of completed, coordinated SEQRA review process on the basis of zoning requirements).

Cobleskill Stone Products, Inc. v. Town of Schoharie, 126 A.D.3d 194 (3d Dept. 2015) (reversing partial summary judgment order below, which found that vested rights had not been established, noting that vested rights for mining projects do not require a permit be obtained prior to a zoning change as a prerequisite).

Dolomite Products Company, Inc. v. Town of Ballston and Town Board of the Town of Ballston and I.M. Landscape Associates, LLC, Index No. 2014-2987 (Sup. Ct. Saratoga Co. 2015) (finding that proposed asphalt plant had demonstrated vested rights with respect to zoning amendment banning asphalt plants because the Town engaged in a clear pattern of ongoing course of actions, which "inordinately delayed the application" and prohibited the project from going forward).

Significant Regulations Affecting our Committee focus in the current year include:

— Proposed Part 490: proposing sea level rise projects to be utilized in considering sea level rise impacts for major permits, including mining.

— Part 212: comprehensive update to air permitting program which creates uniform process to determine air regulatory requirements applicable to all "process operations."

— EPA/ACOE definition of "WOTUS," applicable to all regulated entities that may impact waterbodies.

Significant government policies affecting our Committee focus in the current year include:

— June 2015 issuance of Findings Statement for the potential significant adverse environmental impacts related to high volume hydraulic fracturing cannot be sufficiently mitigated, and thus this technology may not be used.

Property Contamination and Leasing: The Federal Law

By Larry Schnapf

Prior to the enactment of modern environmental laws, liability for contamination in leasing transactions was governed solely by contract and tort principles. In the absence of an express agreement or misrepresentation, the tenant was expected to make its own careful examination of the conditions of the property and the vendor or landlord would not be liable for any existing harm or defects.[1] Tenants were traditionally liable for harm caused to persons or property and for dangerous conditions or nuisances created without the landlord's knowledge or acquiescence.[2]

The general rule was that the lessor would not be liable to the lessee or others for harm for dangerous conditions existing at the time of the transfer[3] or created after the lessee took possession of the property.[4] Over time, the courts crafted a number of exceptions to this principle. One exception was that a landlord could be subject to liability if it knew, or had reason to know, of a condition that posed an unreasonable risk of physical harm to persons, the lessor had reason to believe that the lessee would not discover the dangerous condition, and the lessor concealed or failed to disclose this condition to a lessee or sublessee.[5]

Another exception was that a lessor may be held liable for tenant activities that constitute a nuisance, such as environmental contamination, if the lessor consented to such action or knew that the tenant's operations would likely release contaminants and the landlord failed to take precautions to prevent such damage.[6]

Modern formulations link liability of lessors and lessees to a failure to exercise reasonable care and incorporate concepts of comparative negligence. A lessor has a duty to exercise reasonable care for any risks that are created by the lessor and a duty to disclose any latent dangerous condition that the landlord knows, or should know, is unknown to the lessee.[7] This includes disclosure of dangerous latent conditions that were not created by the lessor.[8] The obligation hinges on whether the lessee appreciates the danger posed by the condition and not simply if the dangerous condition is open or obvious. The lessor's duty is not cut off by a lessee's failure to exercise reasonable care to discover dangerous conditions.[9]

In New York, landlords and tenants have been held liable for contamination under common-law principles such as strict liability, nuisance, trespass and negligence. Owners who have failed to abate contamination caused by their tenants have been found liable for creating or maintaining a nuisance.[10] While some states allow transferees to bring a nuisance action against its transferor on the grounds that "the creator of a nuisance remains liable even after alienating his property," New York courts have held that a nuisance action can only be maintained between adjoining landowners and is not a proper claim in a suit between successive landowners, or operators of the same property.[11]

New York has a three-year statute of limitations for claims for personal injury and damage claims relating to exposure to hazardous substances. The clock starts on the date the injuries are discovered or should have been discovered by a reasonably diligent party.[12]

The Federal Law

Numerous federal environmental laws can impose liability on owners or operators of contaminated property. One of the principal laws of concern is the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[13]

CERCLA liability is probably the most significant environmental law for commercial leasing transactions. It applies to the release of hazardous substances.[14] The federal Environmental Protection Agency (EPA) is authorized to perform cleanups in cases of release of hazardous substances[15] and seek reimbursement of its costs from four categories of potentially responsible parties (PRPs) who may be strictly, jointly and retroactively liable for cleanup costs.[16] Private parties who incur cleanup costs may also seek reimbursement from PRPs.[17] Indeed, because the New York State Superfund law does not expressly authorize the New York State Department of Environmental Conservation (NYSDEC) to recover its cleanup costs, NYSDEC customarily uses CERCLA to seek cost recovery.

Liability for Property Owners and Tenants Under CERCLA

The types of CERCLA PRPs that may be liable include current and past owners and operators of contaminated property. The liability for past owners or operators under CERCLA is not necessarily congruent with the liability of current owners or operators. Parties that currently hold title or possession of contaminated property may be liable for historic contamination that occurred prior to the time the owner acquired title or the operator came into possession of the property.[18] However, past owners or operators are only liable if they owned or occupied the property "at the time of disposal" of the hazardous substances.[19]

Current landlords may be considered CERCLA owners based on their ownership of property, even if the owner did not place the hazardous waste on the site or cause the release.[20] Furthermore, a current passive landlord or sublessor does not have to exercise any control over the disposal activity to be liable as a CERCLA owner.[21]

Tenants may be liable as an owner if they had sufficient indicia of ownership, or as an operator, based on their

control of a property. When deciding if a tenant should be considered a "*de facto* owner," courts will examine rights and obligations of the tenant under a lease to see if effective control of the property had been handed over to the tenant. Some factors courts have considered include:

- If there is a long-term lease, where the lessor cannot direct how the property is used;
- If the lessee can sublet without permission of the owner;
- Whether the lessee is responsible for paying all costs, including taxes, assessments and operation and maintenance costs; and
- Whether the lessee is responsible for making any and all structural changes and other repairs.

The leading case in New York for determining liability of tenants and subtenants is *Commander Oil v. Barlo Equipment Corp.*,[22] where the plaintiff initially leased one parcel to the defendant, Barlo Equipment Corp. (Barlo), in 1964, and a second parcel to Pasley Solvents & Chemicals, Inc. (Pasley), in 1969. Barlo used its parcel for office and warehouse space, while Pasley operated a solvent repackaging and reclamation business on its leasehold. In 1972, the plaintiff consolidated the leases so that Barlo was the lessee for both parcels and was sublessor for the Pasley lot. Under the new lease, Barlo was responsible for basic maintenance and payment of taxes on both lots.

In 1981, contamination was discovered on the Pasley parcel. Eventually, the plaintiff entered into a consent order with the EPA to implement a cleanup and sought contribution from Barlo for the costs incurred at the former Pasley lot on the theory that Barlo was a CERCLA owner. The plaintiff did not proceed against Barlo under an "operator" theory because Barlo never conducted operations at the Pasley parcel. The district court granted summary judgment to the plaintiff, ruling that Barlo was a CERCLA owner by virtue of its "authority and control" over the Pasley lot.[23] After a bench trial, the district court ruled that although Pasley was responsible for all of the response costs associated with its lot, the costs had to be allocated between the plaintiff and Barlo since Pasley was "financially irresponsible."

On appeal, Barlo argued that CERCLA owner liability was restricted to owners of record, while Commander Oil urged a more expansive definition that relied primarily on the right to control property, whether the right is possessory or is a recorded property interest. The Second Circuit acknowledged that most district courts have held that site control is a sufficient indicator to find lessees or sublessors liable as CERCLA owners. However, the appeals court also noted that the circuit precedent provided that CERCLA "owner" and "operator" liability should be treated separately, and suggested that relying solely on a site control analysis could essentially make all operators into owners and thereby render most operator language superfluous.

The court recognized that while the typical lessee should not be held liable as an owner, there might be circumstances when liability would be appropriate.[24] However, the court emphasized that in reaching such a conclusion, the critical analysis was the relationship between the owner and the tenant/sublessor, and not the lessee/sublessor's relationship with its sublessee.

Turning to the lease, the court concluded that Barlo did not possess sufficient attributes of ownership over the Pasley lot based on, in part, on the following:

- Barlo was limited to using its parcel and only "for that business presently conducted by tenant on a portion of the same premises leased hereunder";
- Barlo was required to obtain written consent from Commander Oil before making "any additions, alterations or improvements" on the land, which alterations would become Commander Oil's property in any event;
- The lease required Barlo to obtain written approval from Commander Oil to sublet the property, and prohibited subletting to any entity that had "any connection with the fuel, fuel oil or oil business";
- Barlo was prohibited from doing anything that would "in any way increase the rate of fire insurance" on the property, and from bringing or keeping upon the premises "any inflammable, combustible or explosive fluid, chemical or substance."

The court acknowledged that Barlo possessed some attributes of ownership with respect to the Pasley lot; however, when viewed in totality, the Second Circuit held that Barlo lacked most of the rights that come with ownership and reversed the district court ruling.

In *Scarlett & Associates, Inc. v. Briarcliff Center Partners, LLC*,[25] a federal district court found there was a genuine dispute of material facts as to whether a managing agent of a shopping center was a CERCLA operator of a tenant dry cleaning business. The agent did not maintain an office or have personnel at the site, nor did it have keys to any leased space or have the power to evict tenants. The managing agent said its principal responsibilities were to attempt to rent space to tenants approved by the owner, collect rent, maintain the common areas of the center, pay bills in a timely manner, and send excess revenues to the owner.

The owner pointed to language in the management services agreement that the agent was to obtain all necessary government approvals and perform such acts necessary to ensure that the owner was in compliance with all laws. The court noted that the managing agent sent the dry cleaner a certified letter advising of certain environmental reporting requirements and requested copies of the documentation that the dry cleaner was required to provide to the EPA or an explanation as to why the dry cleaner was exempt from providing such documentation. The court

said that this correspondence, combined with the other evidence of record indicating that the managing agent generally was responsible for managing and maintaining the shopping center and performing all acts necessary to effect compliance with laws, rules, ordinances, statutes, and regulations, was sufficient to create a genuine issue as to whether the agent managed the operations of the dry cleaner specifically related to pollution, and it therefore met the definition of a former "operator."

Defenses

Third-Party Defense

CERCLA originally contained three affirmative defenses to liability: act of God, act of war, and the third-party defense. From a practical standpoint, the third-party defense was the only viable defense available to property owners or operators. To establish that defense, the owner or operator would have to show that the disposal or release was:

- *solely* caused by a party;
- with whom it had no direct or indirect *contractual relationship*;
- the defendant exercised *due care* with respect to the hazardous substances; and
- took *precautions* against foreseeable actions or omissions of third parties.[26]

Most courts broadly construed the phrase "*in connection with a contractual relationship, existing directly or indirectly*" to encompass virtually all forms of real estate conveyances. As a result, lessors of property that was contaminated by a current or former a tenant could not successfully assert the third-party defense on the grounds that a lease constituted a "contractual relationship" with the responsible party (i.e., lessee).

The concept that the mere existence of a lease can preclude an owner from asserting a third-party defense when the contamination is solely caused by a tenant is rather harsh especially in the case of truly absentee landlords with so-called "triple-net leases" or long-term ground leases.

The good news is that the Second Circuit has adopted an expansive view of the third-party defense so that it is a viable defense for owners or operators in New York. The federal courts in New York generally take a narrow view of the phrase "contractual relationship" and have held that the existence of a "contractual relationship" does not bar an owner or operator from invoking the defense.[27] Instead, a party will be precluded from asserting the defense only if there is some relationship between the disposal or release that caused the contamination and the contract, or a relationship which allows the landlord to exert some form of control over such activities.[28]

Perhaps the seminal case on third-party defense is *New York v. Lashins Arcade*,[29] where a current owner of a shopping center was able to successfully invoke the third-party defense because it did not have a contractual relationship with a former dry cleaner tenant who had discharged hazardous substances into the ground 15 years prior to acquisition.

Assuming that a prospective purchaser or tenant could overcome the "contractual relationship" hurdle, it would still have to establish that it satisfied the third prong of the test to exercise due care in dealing with the hazardous substances, and the fourth prong, which requires taking precautions against the foreseeable actions of omissions of third parties. The property owner in *Lashins Arcade* established that it had exercised due care such as maintaining water filters, sampling drinking water, instructing tenants to avoid discharging into the septic, inserting use restrictions into leases, and it performed periodic inspections to assure compliance with this obligation. In contrast, a bank that had subleased its space to a dry cleaner was unable to assert the third-party defense because it had failed to assess environmental threats after discovery of disposal would be part of due care analysis.[30]

Innocent Landowner Defense

Because the third-party defense was largely unavailable to purchasers or tenants of contaminated property, Congress enacted the innocent purchaser defense in 1986. Under this defense, a purchaser (or tenant) who "did not know or had no reason to know" of contamination would not be liable as a CERCLA owner or operator.[31] To establish that it had no reason to know of the contamination, a defendant must demonstrate that it took "all appropriate inquiries…into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices."[32]

Since it relies on an affirmative defense, the innocent purchaser has the burden of establishing that it satisfied the elements of the defense. Not surprisingly, most courts narrowly construed the innocent purchaser defense. If a purchaser did not discover contamination before taking title, but contamination was subsequently discovered, courts generally concluded that the purchaser did not conduct an adequate inquiry and, therefore, could not avail itself of the defense.

Further complicating matters, CERCLA did not establish specific requirements for what constituted an appropriate inquiry. As part of the 2002 amendments, the EPA was required to promulgate an All Appropriate Inquiries (AAI) rule. The AAI rule became effective on November 1, 2006.[33]

Bona Fide Prospective Purchaser (BFPP) Defense

The principal drawback of the innocent purchaser defense is that a purchaser or tenant cannot know, or have reason to know, that the property was contaminated. To incentivize redevelopment of contaminated properties, Congress added the BFPP to CERCLA as part of the 2002

amendments.[34] This defense allows a landowner or tenant to knowingly acquire or lease contaminated property after January 11, 2002 without incurring liability for remediation, if it can establish the following pre-acquisition requirements:

- All disposal of hazardous substances occurred before the purchaser acquired the facility;[35]
- The purchaser is not a potentially responsible party or affiliated with any other PRP for the property through any direct or indirect familial relationship, any contractual or corporate relationship, or as a result of a reorganization of a business entity that was a PRP;[36]
- The purchaser conducted "all appropriate inquiries" into the past use and ownership of the site.[37]

After taking title, a purchaser also must comply with a number of "continuing obligations" to maintain its BFPP status.

Contiguous Property Owner (CPO) Defense

Congress also added the CPO[38] defense in 2002. This defense provides liability protection to a person owning or leasing property that has been contaminated by a contiguous or adjacent property.

A person seeking to qualify for the CPO must comply with the same pre-and post-acquisition obligations as a BFPP. However, while the BFPP can knowingly acquire contaminated property, a CPO must not know or have reason to know of the contamination after it has completed its pre-acquisition AAI investigation. If an owner cannot qualify for the CPO defense, it may still be able to qualify for the BFPP defense.

Innocent Seller's Defense

An innocent purchaser who then becomes a seller can assert this defense if it discloses the existence of hazardous substances that may have occurred after taking title and if it complied with the "due care" and "precautionary" prongs of the third-party defense.[39]

CERCLA Secured Creditor Exemption

Lenders who without participating in the management of a facility hold indicia of ownership to protect a security interest in the facility are also exempt from liability.[40] However, banks that have foreclosed on property or have been overly involved in the management of a borrower's operation have been held liable as owners or operators of the property.

Contractual and Equitable Defenses

While the statutory defenses are the only ones available to defendants in government cost recovery actions, traditional equitable defenses are available to defendants in private party cost recovery actions or contribution actions such as laches, release, waiver, or unclean hands to reduce liability in private cost recovery actions. Defendants may also raise procedural defenses to government cost recovery actions such as response costs were not consistent with the National Contingency Plan[41] and the remedy was not cost-effective.

CERCLA Liens

CERCLA provides the EPA with two types of statutory liens. The EPA may impose a non-priority lien on property where it has performed response actions. The lien becomes effective when the EPA incurs response costs or notifies the owner of the property of its potential liability, whichever is later. The lien is subject to the rights of holders of previously perfected security interests.[42]

The EPA may also file a windfall lien when it has performed a response action at a site owned or operated by a BFPP and the response actions have increased the fair market value of the property above the fair market value that existed before the response action was initiated.[43] The windfall lien is to be measured by the increase in fair market value of the property attributable to the response action at the time of a sale or other disposition of the property. The lien will arise at the time the EPA incurs its costs and shall continue until the lien is satisfied by sale or other means, or the EPA recovers all of its response costs incurred at the property. In lieu of the EPA imposing a windfall lien on the property, the BFPP may agree to grant the EPA a lien on any other property that the BFPP owns or provide some other assurance of payment in the amount of the unrecovered response costs that is satisfactory to the EPA.

Resource Conservation and Recovery Act (RCRA)[44]

Under this law owners or operators of facilities that treat, store or dispose of hazardous waste must comply with certain operating standards and may also be required to undertake corrective action to clean up contamination caused by hazardous or solid wastes. The federal government may also issue a corrective action order to an owner or operator of a Treatment, Storage and Disposal Facility or generators of hazardous waste subject to RCRA.[45] The government may also issue orders for injunctive relief to address hazardous waste posing an "imminent and substantial endangerment" to public health and the environment.[46]

RCRA also imposes a full range of regulatory requirements on owners and operators of Underground Storage Tanks that are used to store petroleum or hazardous substances.[47] Some parts of the UST program are administered by the NYSDEC in lieu of EPA enforcement.[48]

Unlike with CERCLA, private parties are not entitled to recover their cleanup costs under RCRA. Instead, private parties may seek injunctive relief ordering persons who contributed to the past or present handling, storage, treatment, transportation, or disposal of hazardous waste to remediate hazardous waste contamination that is posing

an "imminent and substantial endangerment" to public health and the environment.[49] Indeed, this provision is becoming a powerful litigation tool particularly for sites contaminated by gas stations[50] and the dry cleaners.

Endnotes

1. This concept has sometimes been referred to as "caveat lessee."
2. *State of N.Y. v. Monarch Chems.*, 90 A.D.2d 907, 456 N.Y.S.2d 867 (3d Dep't 1982).
3. Restatement of the Law, Second, Torts, § 356.
4. Restatement of the Law, Second, Torts, § 355.
5. Restatement of the Law, Second, Torts, § 358.
6. *Monarch Chems.*, 90 A.D.2d 907.
7. Restatement of the Law, Third, Torts: Liability for Physical and Emotional Harm, § 53.
8. *Id*. comment (e).
9. Consistent with modern notions of comparative responsibility, such failure would constitute negligence and either reduce the recovery of a lessee or subject the lessee to liability to third parties who are harmed by the dangerous condition. *Id*.
10. *Copart Indus., Inc. v. Consolidated Edison Co.*, 41 N.Y.2d 564 (1977); *Monarch Chems.*, 90 A.D.2d 907; *State of N.Y. v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985).
11. *Nashua Corp. v. Norton Co.*, 1997 U.S. Dist. LEXIS 5173 (N.D.N.Y. Apr. 15, 1997).
12. CPLR 214-c; *Jensen v. General Elec. Co.*, 82 N.Y.2d 77 (1993); *Aiken v. General Elec. Co*, 57 A.D.3d 1070, 869 N.Y.S.2d 263 (3d Dep't 2008); *Atkins v. Exxon Mobil Corp.*, 9 A.D.3d 758, 780 N.Y.S.2d 666 (3d Dep't 2004).
13. 42 U.S.C. §§ 9601 *et seq*.
14. Petroleum is excluded from the definition of hazardous substances. 42 U.S.C. § 9601(14). Because of the so-called petroleum exclusion, neither EPA nor private parties may seek reimbursement of costs incurred to remediate contamination from leaking gasoline underground storage tanks (USTs). *White Plains Hous. Auth. v. Getty Props. Corp.*, 2014 U.S. Dist. LEXIS 174308 (S.D.N.Y. Dec. 16, 2014). However, the petroleum exclusion does not apply to contaminants added to petroleum during normal use, such as waste oil. *City of N.Y. v. Exxon Corp.*, 766 F. Supp. 177, 186 (S.D.N.Y. 1991).
15. 42 U.S.C. § 9604.
16. 42 U.S.C. § 9607(a).
17. Innocent parties may seek 100% recovery of their costs (known as cost recovery actions) under 42 U.S.C. § 9607(a)(4)(B) while PRPs may file contribution actions under 42 U.S.C. § 9613(f)(1) if they incur costs that exceed their allocated share of the liability.
18. 42 U.S.C. § 9607(a)(1).
19. 42 U.S.C. § 9607(a)(2).
20. *Shore Realty Corp.*, 759 F.2d 1032.
21. *Bedford Affiliates v. Manheimer*, 1997 U.S. Dist. LEXIS 23903 (E.D.N.Y. Aug. 6, 1997); *United States v. A & N Cleaners & Launderers*, 788 F. Supp. 1317 (S.D.N.Y. 1992).
22. 215 F.3d 321 (2d Cir. 2000).
23. For support of its holding that Barlo was a CERCLA owner, the district court relied on *Delaney v. Town of Carmel*, 55 F. Supp. 2d 237 (S.D.N.Y. 1999) and *A & N Cleaners & Launderers, Inc.*, 788 F. Supp. 1317. These cases interpreted the term "owner" to extend beyond the fee or record owner to anyone possessing the requisite degree of control over the property.
24. The court provided three rare instances where the lessee did not have a typical lease but instead may have obtained a priority of ownership rights: (i) sale-leaseback arrangements…if the lessee actually retains most rights of ownership with respect to the new record owner; (ii) extremely long-term leases where, according to the terms of the lease, the lessee retains so many of the indicia of ownership that he is the de facto owner; and (iii) where a lessee/sublessor has impermissibly exploited more rights than originally leased.
25. 2009 U.S. Dist. LEXIS 90483 (N.D. Ga. Oct. 30, 2009).
26. 42 U.S.C. § 9607(b)(3) (emphasis added).
27. *But see U.S. v. Occidental Chemical Corp.*, 965 F. Supp. 408 (W.D.N.Y. 1997) (a deed can serve as an indirect contractual relationship that can prevent a property owner from asserting the third party defense).
28. *Westwood Pharms., Inc. v. Nat'l Fuel Gas Distrib. Corp.*, 964 F.2d 85 (2d Cir. 1992). *But see A & N Cleaners & Launderers, Inc.*, where a bank that was sublessor who maintained complete control and responsibility for property where a release occurred was deemed to be an owner for CERCLA purposes.
29. 91 F.3d. 353 (2d Cir. 1996). Compare *Lashins* conduct to the purchaser/owner in *Idylwoods Assoc. v. Mader Capital Inc.*, 956 F. Supp. 410 (W.D.N.Y. 1997).
30. *United States v. A&N Cleaners & Launderers, Inc.*, 854 F. Supp. 229 (S.D.N.Y. 1994).
31. 42 U.S.C. § 9601(35)(A).
32. 42 U.S.C. § 9601(35)(B)(i)(I).
33. 40 C.F.R. § 312.
34. 42 U.S.C. § 9607(r).
35. 42 U.S.C. § 9601(40)(A).
36. 42 U.S.C. § 9601(40)(H).
37. 42 U.S.C. § 9601(40)(B). EPA promulgated its AAI rule at 40 C.F.R. § 312.
38. 42 U.S.C. § 9607(q).
39. *Westwood Pharms. v. Nat'l Fuel Gas Distrib.*, 964 F.2d 85 (2d Cir. 1992).
40. 42 U.S.C. § 9601(20)(A).
41. 40 C.F.R. § 300.
42. 42 U.S.C. § 9607(l).
43. 42 U.S.C. § 9607(r).
44. 40 C.F.R. pts. 239–282.
45. 42 U.S.C. § 6928(h).
46. 42 U.S.C. § 6973.
47. 42 U.S.C. §§ 6991–6991m.
48. A discussion of New York state law is beyond the scope of this article.
49. 42 U.S.C. § 6972(a)(1)(B).
50. Because petroleum is excluded from the CERCLA definition of hazardous substances, RCRA § 7002 is often the only federal remedy available to owners or operators of property contaminated with petroleum.

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Resolving Conflicts Between Endangered Species Conservation and Renewable Energy Siting: Wiggle Room for Renewables?

By Gregg Badichek

Two federal policies—the protection of endangered species, and the rapid creation of a renewable energy infrastructure—currently exist in significant legal tension. While both are important for the development of necessary sustainability, climate change induced by the continuous burning of carbon based fuels likely poses a greater threat to endangered species than does the growth of commercial scale renewable energy sites. This paper outlines several points of conflict between the two policies and subsequently considers the extent to which federal agencies responsible for renewable energy oversight and development possess "wiggle room" under the Endangered Species Act. A few recommendations for greater leeway are then offered.

I. Introduction

It is a widely accepted proposition that the United States' energy infrastructure must undergo a dramatic restructuring away from traditional fossil fuel energy sources, and toward low-carbon renewable energy sources, if the most catastrophic effects of anthropogenic climate change are to be avoided in the long term.[1]

Surprisingly, Congress has not been wholly inactive in pursuing this goal, and the federal and state governments have made considerable progress in revamping the nation's energy infrastructure.[2] However, due to the considerable ecological disturbances that accompany large-scale infrastructural change generally and renewable energy development specifically, this vital policy runs up against another, older Congressionally endorsed effort: the protection of threatened and endangered wildlife species.

This article presumes that it is preferable to risk the individual lives and, if necessary, existence of some species in pursuit of rapid renewable energy infrastructure development. The alternative option—prioritization of species' survival over energy reformatting, resulting in inaction—would increase global climate risk, and ultimately threaten more species and habitats in the long term. The relevant question is: what "wiggle room" do federal agencies, both administering the ESA and subject to its provisions, have that allows them to facilitate the development of a renewable energy infrastructure while complying with the act?

Part II of this article provides background of the two policies, and contextualizes the conflict between them. Part III provides technical details of major renewable energy sources and technologies, and specific ways in which they harm wildlife. Part IV transitions to the legal framework that underlies the conflict. Part V presents "wiggle room" in the statutory framework that would facilitate speedier development of renewable energy infrastructure. Part VI offers potential solutions and statutory innovations that would further expedite renewable energy development.

II. Dueling Policies

Integral to this article's inquiry is an examination of laws and actions supporting the two environmental policies, endorsed by Congress, that ultimately clash—endangered and threatened species protection, and the rapid development of a national renewable energy infrastructure—and the reasons that they were not designed to complement one another.

A. Endangered and Threatened Species Protection

Over a century of jurisprudential developments constitute the corpus of federal laws protecting wildlife. Congress has protected wildlife by statute since the passage of the Lacey Act in 1900.[3] This act makes it unlawful to import, export, sell, acquire, or purchase fish, wildlife or plants that are taken, possessed, transported, or sold: 1) in violation of U.S. or Indian law, or 2) in interstate or foreign commerce involving any fish, wildlife, or plants taken possessed or sold in violation of State or foreign law.[4] Illegal trade of animals and plants results in civil and criminal penalties and permit sanctions.[5]

Subsequently, and throughout the 20th century, Congress passed numerous statutes that protect particular species and groups of species.[6] 1972 saw the notable passage of the Marine Mammal Protection Act (MMPA), which prohibits the taking of marine mammals in U.S. waters and by U.S. citizens on the high seas, and the importation of marine mammals and their products into the U.S. [7] In contrast to earlier, pointed conservation laws, the MMPA was the first legislation promoting an ecosystem approach to natural resource management and conservation.[8] This approach thoroughly permeated the conceptual underpinning of the subsequent Endangered Species Act.

The presence of a considerable body of wildlife legislation ultimately permitted the employment of statutory focus on demographic conceptions of species: namely,

endangered and threatened species. This came to the fore with the passage of the seminal Endangered Species Act of 1973 (ESA), which, as the predominant conservation law dealing with threatened and endangered species, is the most important legislation to the conflict described in this article. Built upon the basic framework of the earlier, insufficient Endangered Species Preservation Act of 1966,[9] the new law reflected the "policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species,"[10] and was enacted "to provide a means whereby the ecosystems upon which endangered[11] species and threatened[12] species depend may be conserved."[13] The ESA empowers the Departments of the Interior and Commerce, through the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively "Service(s)") respectively, to take legal measures to protect these wildlife and their habitats.[14]

B. Renewable Energy Infrastructure

More recently, Congress has presented a clear policy supporting the widespread development of renewable energy infrastructure. In 2001, President Bush ordered that "[f]or energy-related projects, agencies shall expedite their review of permits or take other actions as necessary to accelerate the completion of such projects" in a safe and environmentally sound manner.[15] The Energy Policy Act of 2005 (EPA) commanded that the Secretary of the Interior should, by 2015, have approved non-hydropower renewable energy projects located on the public lands totaling at least 10,000 megawatts.[16] This meant that the Bureau of Land Management (BLM) had to approve leases for that amount of renewable energy development on public land. This goal was met in October 2012 with the Secretary's approval of the Wyoming Wind Project Site.[17]

The American Reinvestment and Recovery Act of 2009 (ARRA), which encapsulated the stimulus package launched in response to the financial crisis of 2008, created numerous subsidies for wind, solar, and geothermal energy development. The act ultimately allowed the Department of Energy (DOE) to invest more than $31 billion in clean energy projects across the nation.[18] The act also provided tax incentives for renewable development, extending the Production Tax Credit for wind energy development through 2012,[19] and implementing an option to elect a 30% Investment Tax Credit or cash grant in lieu of the Production Tax Credit, and expanding a federal loan guarantee program managed by the DOE.[20]

Several states have aligned their policies with Congress. Many have adopted renewable portfolio standards (RPSs), tools mandating that a certain percentage of retail electricity sold in the state must derive from renewable sources such as wind, solar, and biomass.[21] Most states currently have either mandatory RPS programs or voluntary Renewable Portfolio Goals in place,[22] with percentage targets varying considerably among them.[23]

The executive branch under President Barack Obama has actively supported the move toward large-scale renewable energy infrastructure development, particularly as a means of climate change mitigation.[24] Notably, the administration has declared ambitious goals that dwarf the benchmark set by the 2005 EPA: to install 100 megawatts of renewable capacity across federally subsidized housing by 2020, permit ten gigawatts of renewable projects on public lands by 2020, deploy three gigawatts of renewable energy on military installations by 2025, and double wind and solar electricity generation in the United States by 2025.[25] Regarding federal permitting, the President has ordered all agencies to "take all steps… to execute Federal permitting and review processes with maximum efficiency and effectiveness."[26] The administration has also called for Congress to make permanent the renewable energy Tax Production Credit.[27]

C. The Tension Between These Two Policies

These efforts demonstrate the strong desire of both Congress and the Executive Branch to reinforce the protection of threatened and endangered species while also quickly developing a robust national renewable energy infrastructure. Utility-scale renewable facilities often come at the cost of a large amount of incidental taking of endangered and threatened species populating the ecosystems where renewable energy resources are abundant. However, facilities of considerable size are integral to fulfilling both the federal renewable energy policy goal and the scientific recommendation to mitigate anthropogenic climate change via rapid transition away from fossil fuel economics.

The tension between these two policies can be partially explained by chronological misalignment: the majority of America's larger infrastructural ambitions—the interstate highway system, the Intracoastal Waterway, the oil and gas pipeline system, the electric power grid, the airport and air traffic network, and the major river navigation and flood control systems—had been largely accomplished before the passage of the ESA in 1973.[28] The federal government did not then contemplate the eventual necessity for renewable energy resources, nor the universal dangers that anthropogenic climate change would eventually pose.[29] For this reason, the ESA's legal framework does not contemplate the accommodation of infrastructural endeavors on such a titanic scale. This oversight, combined with the specific harms that renewable facilities impose upon threatened and endangered species,[30] produces a cumbersome and contradictory system that effectively undermines the ambitions of both policies.

III. The Renewable Landscape

While comprehensive technical details are beyond the scope of this article, it is worth briefly describing renewable operations and the manners in which specific energy sources and facilities harm endangered and threatened

species. Of primary concern to the federal policies described, the development of renewable energy resources nationwide, and this article, are wind and solar power, and their respective impacts on specific threatened or endangered species.

A. Wind

Wind energy is the most important energy source in the developing renewable infrastructure. It became the primary source of new U.S. energy in 2012, then producing 43 percent of new generating capacity.[31] Wind energy produces no carbon pollution during operation, and, in the nation's windiest corridors, is limited only by transmission and storage.[32] Generally, wind turbines require a higher initial capital investment than comparable fossil fuel energy generators, yet cost far less over their operating lives due to the absence of fuel costs.[33] The ESA presents one of the few major hurdles to otherwise environmentally positive wind energy development.

1. Technical Facts

Wind turbines generally consist of three blades mounted to a tower; wind propels the blades, which power a generator located within the structure. The turbines operate most effectively when the blades are situated at altitudes higher than 100 feet.[34] Control mechanisms within the turbines maintain maximum speeds of typically fifty-five miles per hour in order to avoid wind speed damage.[35] Wind farms comprise numerous wind turbines, substations, and typically transport roads.[36] Larger wind farms can span hundreds of square acres, and may contain hundreds of turbines.

2. Threats to Wildlife

Wind turbines threaten birds and bats through direct mortality risk. Wind farms operate best on landscapes where wind blows strongly and reliably; flying animals utilize these same windy corridors to efficiently propel themselves great distances. Inevitably, some of these animals collide with the turbines and are killed.[37] Contrary to scientists' and developers' hopes that bats' echolocation abilities would deter them from wind turbines, these animals appear to be attracted to the turbines instead.[38]

Wind farms likewise pose implications for wildlife habitats. Wind farms require about 100 times as much land as coal and nuclear counterparts to produce a comparable amount of energy[39] and thus interfere with roosts and nests located across the farm area. Large-scale construction of this nature fragments habitats,[40] while laying of transport roads and substations often requires grading and vegetation removal.[41] These effects harm both aerial and land-based species.

Relevant to and illustrative of easily-triggered ESA prohibitions, wind farms are known for dangers they pose to the endangered Indiana bat, a species with a vast range of at least twenty midwestern and eastern states;[42] much of its habitat overlaps significantly with current or planned wind farm locations.[43] Because the ESA prohibits the taking of even individual members of an endangered or threatened species, the Indiana Bat poses tremendous difficulties and delays for the permitting of wind facilities.

3. Offshore Wind

Wind farms may be sited in coastal waters to capture the significant wind resources abundant there.[44] Offshore wind in state and federal waters blows more reliably than land-based, utility-scale energy source counterparts.[45] Development of this resource is therefore a significant tactic in the strategy for fulfilling the country's renewable energy policy goals; for this reason, the Department of Energy has allocated over $227 million since 2011 to facilitate it.[46]

The majority of offshore wind projects would be located quite far from land, in areas where the water is deep enough that traditional support structures, such as steel piles fixed to the seabed, cannot be reliably placed.[47] Coastal turbines pose the same threats to nearby birds and bats as land-based turbines; an additional danger is possible, as the impact from sounds generated by turbine operation and construction on local marine species is not yet understood.[48]

B. Solar

The sun's rays are a promising source of clean energy. Every hour, the sun projects more energy onto Earth than the human race uses in an entire year.[49] Commercial solar energy facilities have been proven to be fairly land-intensive.[50] Unlike wind energy, solar energy can typically not share land with agricultural systems. However, solar energy systems may be placed on degraded, otherwise unused land and brownfields.[51] Solar energy is also a promising option for small-scale, distributed systems, such as rooftop solar panels. Overall, solar energy use has been surging for nearly twenty years, while capital investment costs have continued to fall.[52]

1. Technical Facts

Electricity-generating solar systems, known as "active" solar,[53] fall into two categories: photovoltaic cells, also known as solar panels, and concentrated solar power (CSP). Solar panels permit sunlight to collide with semiconductor materials, which convert the light directly into electricity.[54] However, solar panel efficiency is fairly low. CSP utilizes mirrors to direct sunlight to a fluid-filled focal point, which heats the fluid sufficiently to boil encapsulated water and power a traditional steam-turbine generator.[55] CSP has only been proven to operate efficiently at a commercial scale, and is therefore always land-intensive.[56]

2. Threats to Wildlife

Both categories of active solar energy pose direct mortality risks to wildlife. CSP facilities tend to attract birds who confuse the mirrored panels for water bodies, and

instinctively home in on them, unknowingly plunging themselves into superheated air streams.[57] Siting of CSP and solar panel facilities in the nation's sunniest areas harms the habitat of the ground dwelling species such as the desert tortoise, listed as threatened under the ESA.[58] These animals may be killed during construction and maintenance activities associated with solar facilities and transmission corridors.[59]

Like wind farms, solar facilities threaten wildlife through habitat alteration. Facilities that may span thousands of acres are typically fenced off, cleared of vegetation, and graded, effectively segmenting desert corridors that local species would naturally traverse.[60]

IV. Legal Framework

Based on the common harms that renewable facilities inflict on certain protected species, as described in Part III *supra*, it is clear that the majority of utility scale facilities will need to comply with the legal framework for species conservation. The ESA is of primary relevance to this framework, as is a federal district case applying it in the context of wind energy development.

A. The Endangered Species Act

The ESA creates a vast regulatory framework with which energy developers must comply in order to construct facilities that may adversely affect endangered or threatened species. Five discrete ESA elements characterize the conflict between renewable energy infrastructure development and protection of endangered and threatened species: the listing provision, the take prohibition, the interagency consultation requirement, the incidental take provisions, and the citizen suit provisions.

1. The Listing Provision

Section 4 of the ESA authorizes the administrating agencies to designate by regulation, "on the basis of the best scientific and commercial data available," endangered and threatened species.[61] These categorizations extend ESA protection to the listed species. Determinations involve a variety of scientific factors,[62] and subsequently require the agency to designate "critical habitat"[63] in which the listed species dwell.[64] The agencies must also develop "recovery plans" for the listed species, unless there is a determination that such a plan would not promote the conservation of the species.[65]

2. The Take Prohibition

Section 9 of the ESA prohibits the "take"[66] of listed species by all persons, including private and public entities subject to federal jurisdiction. A take includes "harm," which the Services have defined to include a significant habitat modification that leads to actual death or injury of protected species.[67] There is no "de minimis" exception to this prohibition: a take of even one individual of a listed species violates the ESA.

Relevant here, both private renewable energy developers and federal action agencies that intend to lease or permit federal lands for development must comply with the take prohibition.

3. The Interagency Consultation Requirement

In cases where federal agencies are acting in a manner that may cause harm to wildlife, or where private activities implicate a "federal nexus,"[68] the ESA's extensive interagency consultation provisions, provided in Section 7(a)(2),[69] are activated. Ultimately, "action agencies"—the agency considering leasing or permitting activity on federal land— must use "best scientific and commercial data available," to "consult" with the relevant Service to ensure that actions they carry out, fund, or authorize do not "jeopardize" the continued existence of listed species or "adverse[ly] modif[y]" their critical habitat.[70]

Prior to the jeopardy determination, the action agency must take several determinative steps to ascertain whether such a determination is even necessary.[71] Initially, the action agency must determine whether a listed species or critical habitat may be adversely affected by its action. If the agency determines that its action may not adversely affect either, then the ESA is not relevant insofar as the action is concerned; conversely, if there is a possibility of harm, the action agency must engage the relevant Service through informal consultation.

If informal consultation results in a determination that the action is likely to adversely affect a listed species, the action agency must then submit a request for formal consultation with the Service. Formal consultation may last up to ninety days, and requires the agencies to share information about the proposed project and species likely to be affected.[72] At the conclusion of the ninety-day consultation period, the Service then has forty-five days to determine whether the proposed activity will jeopardize the continued existence of a listed species.

A jeopardy determination by the Service leaves the action agency with a limited number of options:

i. implement reasonable and prudent alternative provided by the Service, often obtained in consultation with the action agency;[73]

ii. modify the proposed project and consult again with the Service;

iii. decide not to undertake, fund, or authorize the project;

iv. disagree with the opinion and proceed; or

v. apply for an exemption.[74]

In the event of a non-jeopardy determination, the Service will inform the action agency whether any reasonable and prudent measures should be applied, and activate the incidental take procedure.

4. The Incidental Take Provisions: Statements and Permits

Incidental take "results from, but is not the purpose of, carrying out an otherwise lawful activity."[75] Action agencies that must obey the interagency consultation provisions, and private actors subject only to the take prohibition, may incidentally take listed species through respective approval processes before the Services.

a. Incidental Take Statement

Action agencies who have received a non-jeopardy determination following formal consultation with the Service will receive an incidental take statement, which includes the amount of anticipated take due to the action in question, reasonable and prudent measures to minimize the take, and terms and conditions that must be observed when implementing the minimizing measures.[76]

b. Incidental Take Permit and Habitat Conservation Plan

A private developer's application for an incidental take permit (ITP) activates a rigorous approval process under Section 10 of the ESA. The applicant must submit a habitat conservation plan (HCP) to the Service; this detailed document allows the applicant to comply with the ESA despite the likelihood of harm to a listed species though maximum possible mitigation of incidental takes.[77] The HCP outlines: the impact which will likely result from such taking; what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps; what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and any such other measures that the Service may require.[78]

To approve the HCP, the Service must determine that:

i. the taking described in the plan will be incidental;

ii. the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of the taking;

iii. the applicant will ensure that adequate funding for the plan will be provided;

iv. the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

v. any other measures the Service requires will be met.[79]

Upon approving the HCP, the Service will provide the private applicant with an ITP, which legally binds the applicant to the commitments in its HCP.[80]

5. Citizen Suit Provision

The ESA provides that virtually any person may commence litigation to enjoin violations of the act or to compel the Service to perform its nondiscretionary statutory duties.[81] The vast majority of ESA enforcement occurs through the citizen suit mechanism.[82]

B. *Animal Welfare Institute v. Beech Ridge Energy, LLC*

In this case from the federal district court of Maryland,[83] a plaintiff conservation group sued to enjoin the operation of a wind farm for failing to apply for and obtain an ITP despite the project's high likelihood of adversely impacting the Indiana Bat. The plaintiff's theory of ESA violation was that the defendant's construction and future operation of the wind project would impermissibly take members of the species. The court made three holdings relevant to the interaction between the ESA and wind development, and possibly renewable energy development more broadly:

i. The ESA's citizen-suit provision allows allegations of wholly future violations of the statute, and does not require actual harm to have occurred;[84]

ii. in an action under the Section 9 prohibition on takes, a plaintiff must establish by a preponderance of the evidence, a relatively low standard of persuasion, that the challenged activity is reasonably certain to imminently harm, kill, or wound the listed species;[85] and

iii. injunctive relief is appropriate where such takes are reasonably certain as shown by a preponderance of the evidence.[86]

This case appears to stand for two propositions: an expanded reading of the ESA citizen suit provision, allowing allegations that rely on a likelihood of wholly future takes based on a mere preponderance of the evidence; and that renewable energy developments, or at least wind projects, do not receive special treatment, consideration, or exemption under the take prohibition and ITP procedures of the ESA.[87]

On the other hand, the opinion affirms that the protection of endangered species and the development of renewable energy need not be in conflict; rather, the latter must follow the legal permitting procedures established pursuant to the former, an obligation which the defendants inexcusably neglected.[88] Indeed, the injunctive relief commanded only partial cessation of turbine operations, and only under circumstances where Indiana Bats would be endangered;[89] the injunction would be lifted upon the receipt of an appropriate ITP.[90] Had defendants applied for and received an ITP, they would have been shielded from Section 9 liability.

V. Wiggle Room Under Existing Statutory Framework

As described *supra*, renewable energy projects often disagree with certain listed species. Under *Beech Ridge*, mere likelihood of taking a single member of a listed spe-

cies, based on a preponderance of evidence, is grounds for an injunction on operations that have not been granted an ITP. Near all applicants therefore need to comply with the incidental take procedure or risk greater susceptibility to legal battles and an injunction. The ESA thus hampers the development of renewable energy infrastructure temporally, through delayed project approval and completion, and financially, through increased costs of compliance and greater legal risk.

Developers, both with and without a federal nexus in their renewable project, must utilize all available "wiggle room" within the statutory framework to facilitate development and the obtainment of an ITP. Wiggle room is available to developers with or without a federal nexus, and includes the following categories: programmatic Section 7 consultation; Expanded HCPs under Section 10; ITP authority delegation; the "No Surprises" rule; exemptions from Section 7 requirements provided by the Endangered Species Committee; guidance; and listing and prosecutorial discretion.

A. Programmatic Section 7 Consultation

Federal agencies may attempt to facilitate the placement of multiple large-scale utility projects across great, interstate swaths of federal land. Rather than fully consult with Service pursuant to Section 7 for each individual project on that land, the agencies may instead engage in a programmatic consultation that largely satisfies the Section 7 requirement for future individual projects within the area.[91] This programmatic consultation can be integrated into a broader programmatic environmental impact statement (PEIS) prepared by the agencies to fulfill the requirements of the National Environmental Policy Act of 1969 for federal approval of the same projects.[92] A programmatic consultation's frontloaded costs would be preferable to full interagency consultations for each individual project in the area, which would delay infrastructural development and thereby disincentivize capital investment into the projects.

A major federal renewable energy projects conceived in light of the 2005 EPA's ambitious 10,000 megawatt goal exemplifies the programmatic Section 7 innovation.

In 2008, the Bureau of Land Management (BLM) and the DOE began the PEIS for Solar Energy Program for utility-scale solar energy[93] development on BLM administered federal lands in six southwestern states.[94] The Program designated for analysis viable Solar Energy Zones (SEZs), but excluded other areas from consideration to maximize species conservation. In February 2012, the BLM began formal consultation with the FWS under Sections 7(a)(1) and 7(a)(2).[95] Consultation was completed in July of that year, and produced a programmatic biological opinion describing likelihood of harm to dozens of listed species in the assessed areas.[96] Notably, the biological opinion determined that solar projects in SEZs are not likely to jeopardize the continued existence of these species or to destroy or adversely modify designated critical habitat.[97] By laying consultation groundwork for future solar projects on the land in question, the Program allows permitting of individual solar projects in analyzed SEZs to proceed a more efficient, standardized, and environmentally responsible manner than it otherwise would.[98]

B. Expanded Section 10 HCPs

1. General Conservation Plans

Private developers whose projects do not involve a federal nexus may also take advantage of a large-scale approval mechanism to facilitate the granting of ITPs under Section 10. In 2007, FWS developed the General Conservation Plan (GCP) to streamline and reduce processes associated with HCP submission and ITP provision.[99] The GCP approach allows the Service to develop a Section 10 conservation plan suitable for the needs of a designated local area and the listed species therein, and to issue ITPs to landowners who demonstrate compliance with the GCP. Ultimately, a finalized GCP would make ITP issuance formulaic and expeditious, thus greatly facilitating abundant project development in the given area.[100] Furthermore, the GCP process shifts the burden of developing a suitable conservation plan to the agency, thus freeing developers to apply resources on other facets of their projects.[101]

2. Regional Habitat Conservation Plans

A grander, related mechanism is the Regional Habitat Conservation Plan (RHCP),[102] which expands the HCP process over a broad region and unifies the ITP processes for all listed species within that region.[103] Individual projects within that region could utilize the RHCP and obviate further permitting processes.[104] Interested private and public parties along with the FWS typically prepare RHCPs; benefited parties thus share a regulatory burden that would otherwise greatly delay private project development.

Because the RHCP mechanism can cover vast geographical corridors and account for multiple listed species within them, it can greatly expedite utility-scale commercial wind and solar development.[105] Currently, three major renewable energy RHCPs are in various stages of completion:

i. The Great Plains Wind Energy HCP: Covering four listed species[106] in a 200 mile-wide, 1500 mile-long corridor—approximately 268 million acres—through the country's center, this plan intends to "comprehensively address potential wind energy development impacts to listed or sensitive species, allowing for more effective conservation and a more efficient permit process."[107] The Plan's primary developer is a coalition of fifteen wind energy companies,[108] working in concert with two FWS regional offices and the wildlife agencies of the nine affected states[109] in the Plan area. Plan completion was scheduled for 2015.[110]

ii. The Midwest Habitat Conservation Plan: This Plan covers twenty-seven million acres and thirty federally listed species.[111] Its developers comprise a coalition of eight affected midwestern states,[112] the FWS, and representatives of the wind industry.

iii. The Desert Renewable Energy Conservation Plan: focused entirely in California and encompassing multiple renewable energy sources,[113] this Plan covers 22.5 million federal and non-federal acres. The Plan also intends to facilitate the state's RPS and other renewable energy ambitions.[114] Overseeing it is a coalition of federal and state agencies, local governments, environmental advocates, and renewable energy industry representatives.[115] Plan completion was scheduled for 2015.[116]

In addition to offshore wind development, the regions covered by these plans could, according to the Department of Energy, provide renewable energy sufficient to meet the electrical needs of the country "several times over."[117] Promisingly, the development of these RHCPs appear to demonstrate a broad movement toward preferred use of the mechanism;[118] despite the frontloaded financial requirements and long time frames required for completion,[119] these tools will considerably expedite the renewable infrastructure development in areas where the energy is most abundant.

3. ITP Authority Delegation

Developers who choose to comply with the criteria of a GCP or an RHCP, and thus avoid submitting their own HCP, must still apply for an ITP to receive insulation from take liability.[120] To facilitate this process, the Service may delegate ITP approval authority to local governments situated within the expanded plan territory so long as they sign onto the plan's criteria. The local government can then issue ITPs to renewable energy developers sited inside their jurisdiction.[121] This approach shifts significant administrative burden away from the Service and onto local governments; doing so not only expedites ITP issuance and facilitates project development, but also promotes tighter interaction between permit issuer and developer.

4. The "No Surprises" Rule

The "no surprises" rule[122] is an ITP policy under which the Service cannot be held accountable for unforeseen circumstances that adversely affect listed species once the developer has been issued an ITP for that species. A situation of this nature could arise, for example, where a developer's mitigation plan, contained in its HCP, has been approved by the Service and ultimately proves insufficient. The rule effectively clarifies conservation costs for the developer by hemming the risk that they will increase, and redistributes liability over the project's lifespan to the Service.

5. Exemptions

Perhaps the most infamous abrogating provision in the ESA regards a federal-nexus developer's ability to obtain from the Endangered Species Committee an exemption from the Section 7(a)(2) prohibition on jeopardizing a listed species in situations where a listed there exists no reasonable alternative to the action.[123] In effect, exemption from this requirement allows species' continued existence to be jeopardized. In other words, the Committee can allow a species' extinction.

The Committee comprises seven members, each possessing a single vote on the exemption determination: the head officials of six relevant federal agencies,[124] and a representative from the state in which the species' existence is to be determined. Five votes in favor of an exemption are sufficient. These votes represent the committee's opinion that the project under consideration satisfies the following criteria:[125]

i. there are no reasonable and prudent alternatives to the agency action;

ii. the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

iii. the action is of regional or national significance; and

iv. neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources…[126]

Additionally, the Committee must establish "reasonable mitigation and enhancement measures…to minimize the adverse effects of the agency action upon the [species]."[127]

The Committee's ability to permit extinction initially seems to make exemption a viable means for renewable energy projects with a federal nexus to proceed expeditiously; given the great abundance of solar and wind energy sources available on federal lands, the exemption option should expedite the energy infrastructure's transformation. However, exemptions are limited in application due to the narrow circumstances under which they must be applied: only federal nexus actions that jeopardize the continued existence of the species, and have no reasonable and prudent alternatives of application, are under consideration for an exemption. It is difficult to imagine a renewable energy project involving a federal nexus that both jeopardizes a species' existence and has no alternatives. This structural limitation explains the infrequency of Committee meetings.[128]

6. Guidance

The Service may employ non-binding, communicative guidance to facilitate development of renewable energy projects in as efficacious a manner as possible, while en-

suring compliance with ESA prohibitions. Such guidance could outline the most efficient procedures for a developer to follow in order to quickly gain project approval and reduce the likelihood of legal liability during operation.

The FWS applied this method by crafting its Land-Based Wind Energy Guidelines in March 2012, based on the recommendations of the Wind Turbine Guidelines Advisory that the agency had commissioned in five years earlier.[129] The Guidelines promote a five-tiered methodology to project monitoring and communication between the wind project developer and the FWS that is intended to "form the best practical approach for conservation of species of concern."[130]

Although the guidelines intend to promote compliance with the ESA, in the cheapest and most efficient manner possible, adherence to them is voluntary and does not "relieve any individual, company, or agency of the responsibility to comply with laws and regulations."[131] However, a documented history of a developer's efforts to maintain communication with the FWS and adhere to the guidelines may benefit them in the event of violation.[132]

Despite the obvious shortcomings of voluntary guidelines, guided communication between project developers and Services would benefit the move toward a renewable energy infrastructure by both facilitating individual projects and developing a standardized, reusable development procedure for situated projects.

7. Listing and Prosecutorial Discretion

The Service, upon determining that creation of renewable infrastructure is necessary to the grander well-being of endangered and threatened species, could simply choose not to list species or prosecute violations of the ESA. However, the majority of ESA enforcement occurs through the act's citizen suit provision, through which any person can either commence litigation to enjoin ESA violations, or compel the Service to perform its nondiscretionary statutory duties.[133]

VI. Potential Solutions and Improvements

Services and action agencies clearly have some discretion within the current ESA statutory framework to facilitate the development of a renewable energy infrastructure. However, these options are limited. Major amendments to the ESA that explicitly provide renewable energy projects with special leeway would be the most effective means of expediting infrastructural transformation, but it is also unlikely given the current legislative climate. This Part suggests additional means of facilitating renewable development under the current statutory framework.

A. Land Ranking within RHCPs

RHCPs already represent a substantial innovation in the large-scale incidental take permitting and expediting ESA compliance; these collaborations allow insight as to siting in locations within the vast area where there is a lower likelihood of taking a listed species. Services could enhance RHCPs by "rank" areas within the considered region at which a taking may occur.[134] Rather than simply advise which parts of the region would be unsuitable for development, the agency might rate locations according to the likelihood of taking, and make development more "expensive" as the likelihood and number of listed species affected by the project increases.[135] Under this approach, development on areas of low concern would not change, while development on regions of moderate concern where listed species transit more frequently would obligate the developer to adopt more stringent commitments.[136] These commitments might be embodied in technological or mitigation requirements, such as the usage of safer wind turbines or solar panels designed to ward off aerial animals. Molding RHCPs in this flexible fashion would benefit both clashing policies: it will open up a greater amount of land to the development of renewable energy sources, attach development incentives to the potential of threatened species, and ultimately preserve more listed species.

B. Triggering an Exemption from Section 7 Interagency Consultation

As described *supra*, it is difficult to obtain an exemption from the Section 7(a)(2) non-jeopardy requirement because only federal-nexus projects that jeopardize a listed species' existence *and* have no reasonable alternatives can come under the Endangered Species Committee's consideration. Even then, the Committee would need to determine that allowing the extinction outweighs preserving the species, benefits the public interest, and is of national importance. Only rarely would an exemption applicant—likely a federal agency rather than a private developer—craft a project of this magnitude. It is perhaps ironic that an exemption could allow an action agency to more easily implement a project significant enough to threaten a listed species' existence than a safer, more conservative project with numerous alternatives.

Based on the policy supporting the development of a renewable energy infrastructure, federal agencies could align their positions such that the granting of an exemption is more likely. Initially, an action agency, such as the BLM, could design a renewable energy project, like the Solar Energy Program described *supra*, of magnitude sufficient to jeopardize the continued existence of a listed species. Following programmatic Section 7 consultation, the Service could maintain the position that the project meets threshold requirements for exemption consideration.[137] The Committee would then need to determine if the project satisfies the criteria for an exemption. By recognizing that catastrophic climate change would very likely wipe out listed species, the Committee could feasibly determine that a large-scale renewable energy project has no reasonable and prudent alternatives; offers benefits

that outweigh conserving species; is in the public interest, and is of national—indeed, global—significance.[138]

Even if an alignment of action agency and Committee positions with the renewable energy policy yielded an exemption, however, the result would suffer from drawbacks. First, the decision would be susceptible to judicial review.[139] Second, an exemption as to one jeopardized, listed species would not necessarily aid the action agency in regards to ESA requirements concerning other listed species that would be affected in a less dramatic fashion.

C. Enhanced Service Guidance

Services could more regularly employ informal, non-binding guidance mechanisms to facilitate renewable energy development. These agencies could create a set of universally applicable guidelines analogous to those that the FWS formulated for utility-scale wind power. Perhaps the five-tiered approach described therein could be generalized for application to development of all major renewable energy schemes, such as utility-scale solar, offshore wind, and distributed wind and solar.[140] Following a developer's demonstration of compliance with the guidelines, the Service could issue "no take" letters indicating there is no risk of taking a listed species.[141] Such letters would indicate the agency's concurrence that the project in question was designed to avoid taking listed species, though they would not necessarily authorize a take were one to occur. Regardless, the letter would help the developer to secure financing and local and state approvals for the project.[142]

D. ESA Amendments

Amending the ESA to accommodate renewable energy development would be the most reliable way of ensuring that the act does not significantly inhibit the development of this new and necessary infrastructure. Given the current political and legislative climate, amendment seems unlikely. However, were political realities set aside, and ESA amendment possible, the following measures would prove beneficial.

1. The Provision of a "Green Pass" for Renewable Energy Projects

The foregoing demonstrates that there is no "green pass" under either the spirit or letter of the ESA that would permit renewable energy projects to possess a blanket exemption from the take prohibition. Implementing provisions whereby the Service could determine if a project developer satisfies criteria for such a pass, and then grant one, would preclude many of the difficulties expounded in this article. These criteria would need to be explicit and clearly define what constitutes a green pass project.[143] Rather than pour time and money into assuring that siting, agency consultations, and mitigation plans accord with the ESA, developers could initially focus on formulating projects sufficiently deserving of a green pass and develop securely thereafter. This innovation would likely open the statutory floodgates to widespread, low-cost renewable energy development immune to liability under the ESA.

2. Discourage Citizen Suits for Renewable Projects

Amending the ESA to prohibit citizen suits against renewable energy projects would effectively protect such projects from ESA enforcement. This amendment would retain the Service's prosecutorial discretion, and allow litigation against renewable energy developers to proceed at a pace and in a direction determined by the executive branch, rather than by the judiciary. As with a green pass amendment, the statute would need to state explicitly exactly what constitutes a renewable energy project deserving of insulation from a suit. Ideally, the developer would apply for and receive that designation at the initial stages of application.

VII. Conclusion

The ESA clearly inhibits the country's ability to achieve its goal of implementing a renewable energy infrastructure and escaping the bondage of fossil fuels. While the Services and project developers have made strides towards that infrastructure in recent years, the nation's long-standing focus on protection of listed species, embodied by an act that prohibits takes across the board, continues to hamper progress towards this vital ambition.

Federal agencies have been creative in their means of expediting renewable energy project development, notwithstanding the likelihood that such projects will regularly take endangered and threatened species. Large-scale innovations like programmatic Section 7 consultations and RHCPs are promising, but they, along with every other measure so far employed, are not bringing the nation a new energy landscape with necessary speed.

Stringent, bright-line amendments to the ESA would provide a highly effective means of boosting the renewable transition, but legislative reform of this nature is likely not practical at present. Administrative efforts and technological progress that push projects through the ESA more expeditiously will hopefully suffice until the day for reform comes—if it ever comes.

Endnotes

1. The Intergovernmental Panel on Climate Change (IPCC) has long held that global warming must not exceed 2°C from preindustrial levels to stave off catastrophic climate change. *See Climate Change 2014: Mitigation of Climate Change*, Intergovernmental Panel on Climate Change (2014), *available at* http://www.ipcc.ch/report/ar5/wg3/. Nations pledged to work toward this goal at the 2009 United Nations Framework on Climate Change Summit in Copenhagen. *See Report of the Conference of the Parties on its fifteenth session*, U.N.F.C.C. (Dec. 2009), *available at* http://maindb.unfccc.int/library/view_pdf.pl?url=http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf. An 80% reduction in greenhouse gas pollution by 2050 is generally agreed upon by scientists as the target necessary to reduce significant impacts from climate change; approaching this target would require a deep restructuring of the fossil fuel economy. *See U.S. Can Cut Greenhouse Gas Emissions*

80 Percent By 2050, Study Says, Yale Environment 360 (Nov. 21, 2014), http://e360.yale.edu/digest/us_can_cut_greenhouse_gas_emissions_80_percent_by_2050_study_says/4305.

2. *See infra* Part II.B.

3. *See Lacey Act*, U.S. Fish and Wildlife Service, http://www.fws.gov/international/laws-treaties-agreements/us-conservation-laws/lacey-act.html (last accessed Apr. 28, 2015).

4. 16 U.S.C.A. § 3372 (2014).

5. *Id.* § 3373.

6. *See, e.g.*, the Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668d, passed in 1940, which prohibits "taking" bald eagles without a permit.

7. 16 U.S.C.A. 1361–1407 (2014).

8. *See Marine Mammals*, U.S. Fish and Wildlife Service, http://www.fws.gov/habitatconservation/marine_mammals.html (last updated Sep. 22, 2014).

9. *See Endangered Species Act,* U.S. Fish and Wildlife Service, http://www.fws.gov/endangered/laws-policies/esa-history.html (last updated Jul. 15, 2013).

10. 16 U.S.C.A. § 1531(c)(1) (2014).

11. An endangered species is "any species which is in danger of extinction throughout all or a significant portion of its range…" *Id.* § 1532(6).

12. A threatened species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range…" *Id.* § 1532(20).

13. *Id.* § 1531(b).

14. *Id.* § 1533.

15. Exec. Order No. 13,212, 66 Fed. Reg. 28,357 (May 18, 2001).

16. Energy Policy Act of 2005, 42 U.S.C.A. §§ 15801–16538 (2014).

17. *See Press Release*, Department of Interior (Oct. 9, 2012), http://www.doi.gov/news/pressreleases/Salazar-Authorizes-Landmark-Wyoming-Wind-Project-Site-Reaches-Presidents-Goal-of-Authorizing-10000-Megawatts-of-Renewable-Energy.cfm. Note, however, that approval of this much energy is very different from actual installation. The latter process is still in early stages of development.

18. For an infographic of DOE ARRA funded projects, *see Recovery Act*, Department of Energy, http://www.energy.gov/recovery-act (last accessed Apr. 8, 2015).

19. 2009 American Recovery and Reinvestment Act, Pub L. No. 111-5, 123 Stat. 115.

20. *2008 Wind Technologies Market Report,* U.S. Department of Energy 44–45 (July 2009), *available at* http://www.nrel.gov/docs/fy09osti/46026.pdf.

21. *See Renewable Portfolio Standards,* NREL, http://www.nrel.gov/tech_deployment/state_local_governments/basics_portfolio_standards.html (last updated Sep. 8, 2014).

22. *See Renewable Portfolio Standards*, U.S. EPA, http://www.epa.gov/agstar/tools/funding/renewable.html (last accessed Apr. 28, 2015).

23. California, *e.g.*, is much higher than most RPSs, and mandates 33% renewable energy sourcing by 2020. Cal. Pub. Util. Code §§ 399.11–.20 (West 2015).

24. *See, e.g.*, *Climate Change,* The White House, https://www.whitehouse.gov/energy/climate-change (last accessed Apr. 25, 2015).

25. *Securing American Energy,* The White House, https://www.whitehouse.gov/energy/securing-american-energy (last accessed Apr. 25, 2015).

26. Exec. Order No. 13,604 (2012), 77 Fed. Reg. 18,887 (Mar. 22, 2012).

27. The White House, *supra* note 24.

28. J.B. Ruhl, *Harmonizing Commercial Wind Power And The Endangered Species Act Through Administrative Reform*, 65 Vand. L. Rev. 1769, 1774 (2012) (recounting the history of major infrastructural development in the United States).

29. Kalyani Robbins, *Responsible, Renewable, And Redesigned: How The Renewable Energy Movement Can Make Peace With The Endangered Species Act*, 15 Minn. J. L. Sci. & Tech. 555, 560-61 (2014) ("Climate change mitigation and adaptation were not foremost in the minds of the legislators who drafted the statute."); *id.* at 584 n.19 (noting that the author found nothing in legislative history of the ESA about climate change).

30. *See infra* Part III.

31. *See* Brian Scheid, *Wind Became Leading Source of New US Generating Capacity in 2012: DOE*, Platts: McGraw Hill Financial (Aug. 6, 2013, 11:35 AM), http://www.platts.com/latest-news/electric-power/washington/wind-became-leading-source-of-new-us-generating-21381199.

32. Robbins, *supra* note 29, at 569.

33. *Wind Energy Basics*, Department of the Interior, http://windeis.anl.gov/guide/basics/ (last accessed Apr. 25, 2015).

34. *How a Wind Turbine Works,* Department of Energy (June 20, 2014, 9:09 AM), http://energy.gov/articles/how-wind-turbine-works.

35. *Id.*

36. *See generally* Congressional Research Service, Wind Power in the United States: Technology, Economic, and Policy Issues (2008), *available at* http://fas.org/sgp/crs/misc/RL34546.pdf.

37. It is difficult to accurately estimate the number of birds and bats killed by turbines annually. Estimates generally range in the hundreds of thousands. *See* Rose Eveleth, *How Many Birds Do Wind Turbines Really Kill?*, Smithsonian.com (Dec. 16, 2013), http://www.smithsonianmag.com/smart-news/how-many-birds-do-wind-turbines-really-kill-180948154/?no-ist.

38. Brian Handwerk, *Wind Turbines Give Bats the "Bends," Study Finds*, National Geographic News (Aug. 25, 2008), http://news.nationalgeographic.com/news/2008/08/080825-bat-bends.html.

39. Alexandra B. Klass, *Energy and Animals: A History of Conflict*, 3 San Diego J. Climate & Energy L. 159, 184 (2011–12).

40. Defenders of Wildlife, Making Renewable Energy Wildlife Friendly 1, *available at* http://www.defenders.org/publication/making-renewable-energy-wildlife-friendly (last accessed Apr. 25, 2015).

41. *Id.* at 8.

42. *Indiana Bat (Myotis Sodalis)*, *Endangered Species*, U.S. Fish & Wildlife Service, http://www.fws.gov/midwest/endangered/mammals/inba/inbafctsht.html (last updated Apr. 14, 2015).

43. *See Indiana Bat Fatalities at Wind Energy Facilities*, U.S. Fish and Wildlife Service, http://www.fws.gov/midwest/wind/wildlifeimpacts/inbafatalities.html (last updated Dec. 2014).

44. *Offshore Wind Research and Development*, Department of Energy, http://energy.gov/eere/wind/offshore-wind-research-and-development (last accessed Apr. 26, 2015).

45. *Id.*

46. *Id.*

47. *Id.*

48. *New study calls for continuing need to assess impacts of offshore wind farms on marine species*, Chesapeake Biological Laboratory (Oct. 16, 2014), http://www.umces.edu/cbl/release/2014/oct/13/assess-impacts-offshore-wind-farms-marine-specie.

49. *Solar Energy,* National Geographic, http://environment.nationalgeographic.com/environment/global-warming/solar-power-profile/ (last accessed Apr. 24, 2015).

50. *See Environmental Impacts of Solar Power,* Union of Concerned Scientists, http://www.ucsusa.org/clean_energy/our-energy-

choices/renewable-energy/environmental-impacts-solar-power.html#.VULHSGbfhz0 (last updated Mar. 5, 2013).

51. *Id.*

52. *See Solar Energy Prices See Double-digit Declines in 2013; Trend Expected to Continue*, NREL (Oct. 20, 2014), http://www.nrel.gov/news/press/2014/15405.html.

53. The other category of solar energy is "passive," in which the sun heats stationary objects that retain the heat for discrete applications.

54. *Solar Photovoltaic Technology Basics*, NREL, http://www.nrel.gov/learning/re_photovoltaics.html (last updated Jul 25, 2014).

55. *Concentrating Solar Power (CSP) Technologies*, SOLAR PEIS, http://solareis.anl.gov/guide/solar/csp/ (last accessed Apr. 25, 2014).

56. *CSP Technology Overview,* DEPARTMENT OF ENERGY, http://solareis.anl.gov/documents/docs/NREL_CSP_1.pdf (last accessed Apr. 25, 2014).

57. John Upton, *Solar Farms Threaten Birds*, SCIENTIFIC AMERICAN (Aug. 27, 2014), *available at* http://www.scientificamerican.com/article/solar-farms-threaten-birds/.

58. *Mojave Desert Tortoise,* U.S. FISH AND WILDLIFE SERVICE, http://www.fws.gov/nevada/desert_tortoise/dt/dt_threats.html (last updated Apr. 16, 2014).

59. *Id.*

60. DEFENDERS OF WILDLIFE, *supra* note 40, at 7.

61. 16 U.S.C.A. § 1533 (2014).

62. *Id.* § 1533(a).

63. "(i) the specific areas within the geographical area occupied by the species…(I) essential to the conservation of the species and; (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in…" *Id.* § 1532(5)(a).

64. *Id.* § 1533(a)(3).

65. *Id.* § 1533(f)(1).

66. "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(6).

67. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995) (interpreting harm in this manner).

68. A federal nexus is present when the project is being undertaken by a federal "action" agency, or when a private developer's project is significantly connected to a federal resource.

69. 16 U.S.C.A. § 1536(a)(2) (2014).

70. *Id.*

71. *See S7 Process Flow Chart,* U.S. FISH AND WILDLIFE SERVICE, http://www.fws.gov/midwest/endangered/section7/s7process/s7stepxstep.html (last updated Apr. 14, 2015).

72. 16 U.S.C.A. § 1536(b)(1)(A) (2014).

73. *Id.* § 1536(a)(3)(A).

74. *Id.* § 1536(g).

75. *Glossary,* U.S. FISH AND WILDLIFE SERVICE, http://www.fws.gov/midwest/endangered/glossary/index.html (last updated Apr. 14, 2015).

76. *Id.*

77. 16 U.S.C.A. § 1539(a)(2)(A) (2014).

78. *Id.*

79. *Id.* § 1539(a)(2)(B).

80. "The permit shall contain such terms and conditions as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph…" *Id.*

81. *Id.* § 1540(g).

82. J.B. Ruhl, *Harmonizing Distributed Energy And The Endangered Species Act*, 4 San Diego J. Climate & Energy L. 121, 131 (2012–13) ("Outside the context of illegal trade and transport of protected species, virtually all ESA enforcement is through this citizen suit mechanism.").

83. Animal Welfare Institute v. Beech Ridge Energy LLC, 675 F.Supp.2d 540 (D. Md. 2009).

84. *Id.* at 561.

85. *Id.* at 563.

86. *Id.* at 580.

87. Ruhl, *supra* note 28, at 1786.

88. Beech Ridge, 675 F.Supp.2d at 581 ("The two vital federal policies at issue in this case are not necessarily in conflict. Indeed, the tragedy of this case is that Defendants disregarded not only repeated advice from the FWS but also failed to take advantage of a specific mechanism, the ITP process, established by federal law to allow their project to proceed in harmony with the goal of avoidance of harm to endangered species.").

89. *Id.* at 580–81 ("The Court sees little need to preclude the completion of construction of those forty turbines already under construction, but…any construction of additional turbines should not be commenced unless and until an ITP has been obtained.").

90. *Id.* at 581.

91. A subsequent, site-specific consultation under Section 7(a)(2) may be required. However, it would benefit from the programmatic consultation underlying the broader federal project, and would presumably be quicker and cheaper to accomplish than it would be without the programmatic consultation. *See Endangered Species Act—Section 7 Compliance,* BLM SOLAR ENERGY PROGRAM, http://blmsolar.anl.gov/program/laws/esa/ (last updated Aug. 14, 2013).

92. National Environmental Policy Act, 42 U.S.C.A. §§ 4321–4347 (2014).

93. As applicable to the Solar Energy Program, utility-scale projects are those with capacities of 20 megawatts (MW) or greater that generate electricity that is delivered into the transmission grid.

94. Arizona, California, Colorado, Nevada, New Mexico, and Utah.

95. BLM, *supra* note 91.

96. *Id.*

97. *Id.*

98. RECORD OF DECISION FOR SOLAR ENERGY DEVELOPMENT IN SIX SOUTHWESTERN STATES, BLM SOLAR ENERGY PROGRAM 1 (Oct. 2012), *available at* solareis.anl.gov/documents/docs/Solar_PEIS_ROD.pdf.

99. *Final General Conservation Plan,* U.S. FISH AND WILDLIFE SERVICE (Oct. 5 2007), *available at* www.fws.gov/policy/m0369.pdf.

100. *Id.*

101. *Id.* at 2.

102. FWS developed these in 1990s for centers of urban land development. Ruhl, *supra* note 28, at 1783.

103. *Id.*

104. *Id.*

105. *Id.*

106. The Whooping Crane, the Piping Plover, the Lesser Prairie-Chicken, and the Interior Least Tern.

107. *Home,* WEWAG (2013), http://www.greatplainswindhcp.org/index-2.html.

108. Acciona-North America, Allete, BP Wind Energy, Competitive Power Ventures Inc., Duke Energy Renewables, EDP Renewables

North America, Element Power, EDF-Renewable Energy, Iberdrola Renewables, Infinity Wind Power, MAP Royalty, NextEra Energy Resources, RES Americas, Trade Wind Energy, and Wind Capital Group.

109. North Dakota, South Dakota, Montana, Colorado, Nebraska, Kansas, New Mexico, Oklahoma, and Texas.

110. *Schedule,* WEWAG (2013), http://www.greatplainswindhcp.org/schedule.html.

111. *Strategic Mitigation for Wind Energy In the Midwest*, The Conservation Fund, http://www.conservationfund.org/projects/wind-energy-in-the-midwest (last accessed Apr. 28, 2015).

112. Indiana, Ohio, Michigan, Iowa, Missouri, Illinois, Wisconsin, and Minnesota.

113. "The DRECP will encompass development of solar thermal, utility-scale solar photovoltaic (PV), wind, and other forms of renewable energy and associated infrastructure such as electric transmission lines necessary for renewable energy development within the Mojave and Colorado desert regions of California." *The Desert Renewable Energy Conservation Plan (DRECP)*, Renewable Energy Action Team, http://www.drecp.org/whatisdrecp/ (last accessed Apr. 28, 2015).

114. "Streamlined permitting of renewable energy projects is critical to meeting the Renewable Portfolio Standard (RPS) established by state law. In addition to the RPS, Senate Bill 2X (Simitian), signed into law by Governor Edmund Brown, Jr. on April 12, 2011, as Public Resources Code § 25740, requires California to meet the 33 percent renewable energy portfolio standard by 2020." *Id.*

115. The U.S. Bureau of Land Management (BLM), U.S. Fish and Wildlife Service (USFWS), California Energy Commission (CEC), and California Department of Fish and Wildlife (CDFW) several other state and federal agencies that manage lands or programs in the desert or that manage or regulate renewable energy development and transmission. Local governments, environmental organizations, renewable energy developers, and utilities are also involved. *The Frequently Asked Questions*, Renewable Energy Action Team, http://www.drecp.org/whatisdrecp/faq.html (last accessed Apr. 28, 2015).

116. *Schedule,* Renewable Energy Action Team, http://www.drecp.org/whatisdrecp/schedule.html (last accessed Apr. 28, 2015).

117. Ruhl, *supra* note 28, at 1784 (citing the Department of Energy).

118. Robbins, *supra* note 29, at 574 (arguing that there is a broad movement toward creating RHCPs to "reduce both risk and delay").

119. Ruhl, *supra* note 28, at 1783–84 (noting that large RHCPs will take years to complete).

120. *See* Renewable Energy Action Team, *supra* note 115 (describing the ITP delegation in that plan).

121. *Id.*

122. 63 Fed. Reg. 8,859 (Feb. 23, 1998).

123. 16 U.S.C.A. § 1536(g) (2014).

124. Agriculture, Army, Interior, Council on Environmental Quality, Environmental Protection Agency, and National Oceanic and Atmospheric Administration. *Id.* at § 1536(e).

125. *Id.* at § 1536(h).

126. *Id.* at § 1536(h)(1)(A)(i)–(iv).

127. *Id.* at § 1536(h)(1)(B).

128. As of 2008, the committee had only met three times.

129. Ruhl, *supra* note 28, at 1778–79; *Land-Based Wind Energy Guidelines,* U.S. Fish and Wildlife Service (Mar. 23, 2012), *available at* http://www.fws.gov/windenergy/docs/WEG_final.pdf.

130. *Id.* at 1. The tiers are: 1. Preliminary site evaluation (landscape-scale screening of possible project sites); 2. Site characterization (broad characterization of one or more potential project sites); 3. Field studies to document site wildlife and habitat and predict project impacts; 4. Post-construction studies to estimate impacts; 5. Other post-construction studies and research.

131. *Id.* at 7.

132. "However, if a violation occurs the Service will consider a developer's documented efforts to communicate with the Service and adhere to the Guidelines." *Id.*

133. Ruhl, *supra* note 82, at 130–31.

134. Robbins, *supra* note 29, at 575 (suggesting that Services "rank" land within RHCPs).

135. *Id.*

136. *Id.*

137. 16 U.S.C.A. §§ 1536(g)(1)–(3) (2014).

138. *Id.* § 1536(h)(1)(A).

139. *See, e.g.,* Portland Audubon Soc. v. Endangered Species Committee, 984 F.2d 1534 (9th Cir.1993) (holding that the "whole record" of the Committee's deliberation had to be made available for judicial review).

140. *See* Ruhl, *supra* note 82, at 134 (suggesting the use of guidance in this fashion).

141. *Id.*

142. *Id.* at 138 n.52 (describing the author's experience with "no take" letters).

143. Vagueness would undermine this provision by exposing it to misappropriation by private developers for whom it was not intended, *e.g.*, hydraulic fracturing companies that attempt to claim they provide "clean energy."

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Siting Renewable and Other Electric Generation Under Article 10 of the New York Public Service Law

By Sam Laniado

Introduction

By now, most electric generation developers of projects 25 megawatts ("MW") or over are familiar with Article 10 of the New York Public Service Law ("NYPSL"). Article 10 is the almost one-stop-shopping proceeding administered by the New York Department of Public Service ("NYDPS") on behalf of the New York State Board on Electric Generation Siting and the Environment ("Siting Board"). If a project triggers the 25 MW threshold, it must proceed under Article 10.[1] The siting procedure is fuel-neutral; there are no exceptions for any technology that produces electricity. That means with New York State's major initiatives to promote carbon-free, renewable generation, such as wind turbines and solar, these proposed projects will require Siting Board certification. In that vein, stand-alone battery storage systems (untethered to the development of new generation facilities) are not considered electricity producers and must proceed instead to obtain state and local approvals from each applicable governmental authority under the State Environmental Quality Review Act (SEQRA) rubric.

The Siting Board's Preemptive Authority

In general, Article 10 authorizes the Siting Board to issue all state and municipal approvals within the Article 10 certificate and preempts the issuance of most state and local permits that would otherwise be applicable.[2] This means that an Article 10 applicant need not adhere to the procedural requirements in these laws, but must show compliance with their respective substantive provisions. That is the so-called one–stop-shopping element to this law. There are exceptions; a major exception is that air, water, and resource recovery permits, typically issued by the New York State Department of Environmental Conservation ("NYSDEC"), are still issued by NYSDEC, but within the Article 10 proceeding and schedule.[3] There are also some local approvals that the Siting Board will not issue such as subdivision approval, overt grant of property rights, or an approval to withdraw water from a municipal system.[4] Importantly, the Siting Board, although reluctant to do so, is empowered to refuse to apply an unreasonably burdensome, local substantive requirement, such as a zoning restriction on height, use, area or noise.[5]

Siting Board Decision Deadlines

Once an applicant has satisfied the pre-application requirements for filing its public involvement plan, its preliminary scoping statement, and the negotiation of the "optional" study stipulations with the parties, and the public participation processes for the latter two have been completed, it may file the Article 10 application.[6] After the Siting Board Chair has determined the application is compliant with the statutory filing requirements, the Article 10 proceeding must be concluded within twelve months, with some provision for extensions, and a six-month proceeding for an eligible repowering.[7] Judicial review is expeditious, centered at the appellate level, and the scope of review is limited.[8]

Public Participation

Together with the preemptive powers granted to the Siting Board, the hallmark of Article 10 is its extensive public participation provisions. The applicant is required to post an "intervenor fund" of up to $650,000, depending upon the size of the proposed project, covering the pre- and post-application review processes.[9] That money will be disbursed to eligible municipalities and local parties by the Presiding Examiner conducting the proceeding in order to fund attorneys and consultants for intervention in the proceeding before the Siting Board.[10] The funds may not be used for judicial review.[11] The applicant is also required to actively seek public participation through public outreach throughout the proceeding. There are many detailed requirements for service, publication, notices, and other means to notify and engage the public about the proposed project.[12]

The balance of this article will not provide a step-by-step guide for preparing and prosecuting an Article 10 application. It instead will zero in on several issues key to the efficient, timely, and successful development of a generation project.

Acquiring Real Property Rights to the Project Site

Whether the project is a wind, solar, new natural-gas, or repowering facility, a client inevitably will ask what property rights are required in order to comply with the filing requirements for an Article 10 application. Remember, the twelve-month Siting Board clock to decide an Article 10 application does not commence with the filing of an application, but at the date it is determined "compliant" with the law's filing requirements.[13]

The Article 10 regulations, 16 NYCRR 1001.13(c), require a demonstration in the application that, for the project site, "…the applicant has obtained title to or a leasehold interest in the facility site, including ingress and egress access to a public street, or is under binding contract or option to obtain such title or leasehold interest, or

can obtain such title or leasehold interest."[14] For interconnections, a statement is required that "the applicant has obtained, or can obtain, such deeds, easements, leases, licenses, or other real property rights or privileges as are necessary for all interconnections for the facility."[15]

It is certainly preferable that all real property rights be in place when the application is filed. There is an exception, however, if all rights have not been obtained. The application can contain a demonstration for the project site, and a statement for the interconnection real property rights, that the applicant "can obtain" the real property rights.[16] The insertion of this wording occurred during the discussions on developing the Article 10 regulations in order, *inter alia*, to deter affected landowners who might seek to block the filing of an application. Note, however, that the interconnection process at the New York Independent System Operator ("NYISO") appears to require a demonstration of "site control" before a system reliability impact study ("SRIS") may be commenced. As explained below, an SRIS is required to be included in an Article 10 application in order to be determined compliant. Query whether the interplay between the Article 10 regulations and the NYISO tariff might create an unintentional issue for a project seeking to avail itself of the aforementioned real property provision in the Article 10 regulation.

As to interconnections such as electric, water, fuel, or steam lines to be placed in public rights of way, Article 10 now explicitly authorizes the Siting Board to refuse to apply unreasonably burdensome local ordinances, laws, or other requirements.[17] Similarly, local approvals such as consents or permits to site interconnections in public rights of way are preempted by Article 10.[18] An Article 10 applicant is still required to demonstrate compliance with the substance of a local requirement in its application or else ask the Siting Board to not apply it, showing that it is unreasonably burdensome.[19] Furthermore, the affected municipality must have received notice of the filing.[20] Importantly, "any municipality entitled to be a party herein and seeking to enforce any local ordinance, law, resolution or other action or regulation otherwise applicable shall present evidence in support thereof or shall be barred from the enforcement thereof."[21]

An Article 10 developer (and Article VII developers seeking to build transmission lines), if it successfully receives Siting Board certification of its proposed project, could very well invoke the power of eminent domain to obtain real property rights required for its certified project. Care must be taken to comply with the requirements of the New York Eminent Domain Procedures Law[22] and New York Transportation Corporations Law[23] in the early stages of preparing the Article 10 application.

The System Reliability Impact Study

The submission of a SRIS is also required in the application for a certificate.[24] The Article 10 regulations further describe the SRIS in relevant part as "performed in accordance with the open access transmission tariff of the New York Independent System Operator, Inc…."[25] In contrast to the requirement in Article VII (pertaining to the siting of major utility transmission facilities), the SRIS submitted with the Article 10 application need not have first been submitted to the Transmission Planning Advisory Subcommittee ("TPAS") for review and recommendation to the NYISO Operating Committee. It is to be expected, however, that NYDPS Staff will want the submission of the TPAS-filed SRIS early in the Article 10 process.

Because the SRIS must be conducted in accordance with the NYISO tariffs, the project developer should start the interconnection process at the NYISO very quickly in the development of an Article 10 project so the study can be included in the Article 10 application. The NYISO, though, conducts, or has conducted on its behalf, many SRIS studies simultaneously. The NYISO engages many consultants to conduct the SRIS studies. Some developers believe, however, that if they engage their own consultant, that might expedite the process. Indeed, there are provisions in the NYISO tariff allowing a developer to contract to have the SRIS done by a consultant it engages.[26] But there have also been concerns about developers slowing the preparation of an SRIS by its consultant because of other project delays, which in turn could affect other processes at the NYISO. Moreover, there is the perception that an SRIS, conducted by a consultant engaged by the NYISO, will carry more credibility with other stakeholders such as the connecting transmission owner, affected transmission systems, and other generation owners. Developers should devote resources to an early, critical step in expediting the preparation of an SRIS: make sure that the equipment data and modeling requirements necessary for the NYISO's consultant to commence the study are complete and validated.

Conclusion

No project has been certified under Article 10 as of yet, although many have been certified under the predecessor statutes, Articles VIII and X. The process is certainly doable and it is this author's belief that the state agencies and, indirectly the NYISO, are dedicated to making the process work, considering the aggressive policies being promulgated in the renewables space, together with the need to repower or replace fossil fueled facilities.

Endnotes

1. N.Y. Pub. Serv. Law § 162.
2. *Id.* § 161.
3. *Id.* § 172.
4. *Id.* § 168.
5. *Id.* § 164.
6. *Id.* § 163.
7. N.Y. Pub. Serv. Law § 165.

8. *Id.* § 170.
9. *See id.* § 164(6)(a).
10. *Id.*
11. *Id.*
12. *See generally id.* §§ 163, 164, 166.
13. N.Y. Pub. Serv. Law § 165.
14. 16 NYCRR 1001.13(c).
15. 16 NYCRR 1001.13(d).
16. *See id.* §§ 1001.13(c), (d).
17. N.Y. Pub. Serv. Law § 172.
18. *Id.*
19. *Id.* § 169.
20. *Id.* § 172.
21. *Id.* § 166(j).
22. N.Y. Em. Dom. Proc. Law § 402.
23. N.Y. Transp. Law § Corp § 11.
24. *Id.* § 164(1)(b)(viii).
25. 16 NYCRR 1001.5(a).
26. NYISO, NYISO Tariffs, OATT, Attachment X (Standard Large Facility Interconnection Procedures), § 30.13.4.

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SMPIL Comments on the Long Island Nitrogen Action Plan

By Frank Piccininni, J.D., M.S. and Kristin A. Perret, Ph.D

The New York State Department of Environmental Conservation, in conjunction with the Long Island Regional Planning Council, recently released the Conceptual Draft Scope for the Long Island Nitrogen Action Plan ("LINAP").[1] LINAP was drafted in order to address the long-recognized issue of nitrogen pollution impacting Long Island's waters.[2] Eutrophication due to excessive nitrogen loading leads to harmful algae blooms, oxygen depletion, and fish kills.[3]

LINAP provides an excellent summary of the efforts that will be undertaken to reduce nitrogen loads and, ultimately, to help restore the quality of our ground and surface waters. The primary focus of the plan is water quality, although it is unfortunate that there is little emphasis placed on upland health. The scientific consensus is clear that the health of Long Island's waters is directly tied to the health of its surrounding uplands.[4] The efforts being undertaken to improve the wastewater treatment infrastructure and the Suffolk County plan to replace septic systems with sewers are critical. Yet, we believe that the Draft LINAP was not broad enough in scope or specific enough in implementation to measure and mitigate the impacts of human land use on water quality as it is intended to do.

The deleterious impacts of human land use on the natural system include increased runoff of nutrients and pollutants into fresh and salt water, reduced quality and quantity of groundwater, the destruction of critical wildlife habitat, a reduction in the flood buffering capacity, and a substantial decrease of carbon sequestration. Fortunately, nature is resilient and good science can inform effective lawmaking. The maintenance and protection of a healthy upland environment can help to buffer storm waters, reduce overland flow, and act as a mechanical filter to trap pollutants and particulate matter, including nitrogen.[5] Accordingly, reduction of non-point nitrogen loading is a critical piece of any water quality management planning effort conducted pursuant to Section 208 of the Clean Water Act.[6]

LINAP makes imprecise and unclear references to "open space preservation and restoration," "green infrastructure," and "density and land use planning." Furthermore, the Draft LINAP does not provide any metrics for monitoring the success of these endeavors, nor does it provide any details regarding how it will build local capacity to achieve sustainable land use. Thus, please accept the following comments and suggestions, submitted on behalf of SMPIL Consulting, Ltd., that may help planners further develop and implement the LINAP:

Upland Indicators

The Draft LINAP divides the potential monitoring metrics into primary and secondary indicators. Primary indicators include readily measurable water quality variables. Secondary indicators include variables that are "narrative or numeric, difficult, expensive, or time intensive to measure." None of the potential indicators listed include any biometrics for upland health. The inclusion of objective and measurable upland biometrics would not only improve the efficacy of the plan, but also will ensure the future effectiveness of the program by allowing it to be adjusted according to the biometric data (i.e., adaptive management).

Non-point biometrics to measure the health of upland habitats include:

- Diversity and abundance of herpetofauna;[7]
- Ground cover of upland, facultative, and wetland herbaceous plants;[8]
- Ground cover of wetland, facultative, and upland shrubs;[9]
- Ground cover of wetland, facultative, and upland trees;[10]
- Ground cover of impermeable surfaces;
- Ground cover of built structures; and
- Nitrogen content of soils.

Modeling

The LINAP provides that "a single groundwater model will be used to determine effects on public drinking water supplies." The proposed development of a groundwater model using MODFLOW is an important first step in understanding the interaction between groundwater and surface waters. This model can utilize extensions, such as the riparian evapotranspiration package,[11] to garner insights into which types of land cover reduce the anthropogenic input of nitrogen into the aquifers and surface waters.

Although MODFLOW is an elegant model, it is imprudent to rely upon a "single groundwater model" as the basis for implementing the LINAP. Any model, irrespective of how well developed it is, has underlying assumptions that may reduce the precision and accuracy of its model output. MODFLOW is a raster-based application, which limits the ability of the analysis to consider continuous gradients of variation; scientists must make critical assumptions about the scale of response when deciding the spatial resolution of modeling efforts.

For example, due to the raster-based nature of MODFLOW, a river reach (i.e., an uninterrupted stretch of river) is assigned to a single cell.[12] This discretization between river reaches does not allow for a transitional zone, which restricts the verity of the model with unrealistic assumptions. One might argue that the spatial scale of the individual model cells can be adjusted to account for this, but that accommodation is not without its own limitations.[13] Similarly, the horizontal width of the river is also discretized into a single cell.[14] According to MODFLOW, any given cell is either "river" or "not river." Thus, in regional models, discretization makes it difficult to analyze the continuous

spatial and temporal variability of hyporheic exchange, faunal or floral communities, and nutrient cycling.[15]

The LINAP correctly recognizes the need for the MODFLOW model to be coupled with a watershed model that is "able to provide loadings at the tax parcel level to account for individual onsite septics...." Such a fine scale effort is important as empirical research strongly suggests that sewage effluent is the predominant source of nutrient loading into Long Island's coastal waterways.[16] Yet, the LINAP does not appear to contemplate a research and modeling protocol to measure and mitigate the impact of upland land use and conservation on nitrogen loading and retention.

A detailed empirical review of 16 watershed models in the Northeastern United States demonstrated that prediction errors in nitrogen export models are strongly related to land use and runoff.[17] Specifically, processes such as vegetative uptake of nitrogen, nitrogen fixation, and anthropogenic input of nitrogen are rarely incorporated into the modeling regime, leading to model mis-specification and inaccurate and imprecise predictions.[18] This is an especially important consideration in the more developed portions of Long Island, as watershed models tend to underpredict nitrogen loading in localities where runoff is high.[19]

Although fine grain data and modeling is necessary to characterize and mitigate nitrogen loading, planners face a tradeoff between spatial extent of the model and model grid size. As articulated by the LINAP, "[m]ore complex models are not always better, and typically cost more money and take longer to complete." Fortunately, vector-based spatial analyses, such as spatial interpolation, can be utilized to demonstrate fine scale patterns of spatial autocorrelation between land use patterns and nitrogen loading, without the drawbacks of extended work time and cost.

One modeling technique of particular promise for fine-grained research and modeling is Inverse Distance Weighting.[20] This exact and deterministic vector-based modeling technique only assumes that points close together are more similar than those that are far away, an assumption that mimics fine-scale ecosystem dynamics.[21] Inverse Distance Weighting can be used to clarify the fine-scale ecosystem factors related to upland nitrogen uptake and retention. In turn, planners can use this information to inform site-specific Best Management Practices. Further, vector-based models will help scientists to better understand the biogeochemical scale of response and train the MODFLOW algorithm. Accordingly, fine-scale research and modeling protocols can be critical to the successful implementation of LINAP.

Climate Change

Notably, the LINAP does not contemplate short- and long-term planning efforts to deal with the inevitability of climate change. Unfortunately, even if we adopt and enforce the most stringent climate mitigation measures, the structure and function of Long Island's ecosystem, including nitrogen loading, will be adversely impacted by the changing global climate.[22]

The New York State Department of Environmental Conservation has found that the impacts of climate change on New York have already begun and include increased coastal flooding due to the rise of sea level and more frequent and intense precipitation events.[23] In turn, precipitation and coastal flooding lead to increased eutrophication of Long Island's water due to stormwater runoff and inundation of upland habitats.[24] Furthermore, rising global temperatures will intensify symptoms of eutrophication by supporting optimal temperature regimes for the growth of harmful algae blooms. Accordingly, the long-term effectiveness of the LINAP hinges on the ability of planners to incorporate climate change adaptation into their planning efforts.[25]

Adaptive Management

Often described as "learning by doing," adaptive management is an iterative approach to natural resource management in which management is treated as a scientific experiment including consideration of hypotheses, methods, and results.[26] Adaptive managers conduct an experimental manipulation (e.g., planting trees), monitor the results of the manipulation, and explicitly incorporate the information garnered into future management regimes.[27]

We recommend that the LINAP utilize adaptive science to achieve nitrogen load reduction. Although the Long Island Sound Study, the South Shore Estuary Reserve Program, and the Peconic Estuary Program have made considerable strides towards understanding the relationship between land use and water quality, considerable uncertainties remain. Adaptive science can be utilized to garner a better understanding of:

- The most effective means to reduce non-point nitrogen loading;
- The scale of response of various ecosystem factors;
- Which native plant species or functional groups absorb the most nitrogen;
- How green infrastructure can reduce both stormwater runoff and the demand on sewage infrastructure;
- Which upland indicators are the most effective and readily measurable metric for assessing upland health; and
- Best management practices for human land use and conservation.

Developing Markets for Upland Conservation and Restoration

As highlighted by the LINAP, "planning is good, but without implementation it will not be very effective." As mentioned by numerous commenters at the scoping meeting of February 3, 2016, effective nitrogen-load reduction will likely require an enforcement mechanism. Although we support protective federal, state, and municipal environmental law, SMPIL recognizes the need to develop incentive-based markets for the maintenance and protection of healthy upland habitats.[28] Such an approach will reduce administrative burdens, decrease litigation costs associated with command and control regulation, and, perhaps most

importantly, promote an overall sense of environmental awareness and stewardship.

Conclusion

We applaud the efforts undertaken thus far to maintain and protect Long Island's waters by developing the Long Island Nitrogen Action Plan. As set forth above, we believe that the efficacy of these efforts will be greatly increased through research and modeling protocols that explicitly incorporate upland health, adaptive management, and fine-scale analyses. Garnering an understanding of fine-scale biogeochemical processes may, in turn, lead to a greater sense of environmental awareness—a critical component of any conservation and management effort.

Endnotes

1. N.Y State Dep't of Envtl. Conservation, *Long Island Nitrogen Action Plan* (Feb. 23, 2015, 6:48 P.M), http://www.dec.ny.gov/lands/103654.html.
2. *Id.*
3. *See generally* Erin L Kinney & Ivan Vallela, *Nitrogen Loading to Great South Bay: Land Use, Sources, Retention, and Transport from Land to Bay,* 27 J. of Coastal Research 672 (2011) (studying the relationship between land use and nitrogen loading into the Great South Bay, Long Island, New York); *see also* Robert W. Howarth, *Coastal Nitrogen Pollutions: A Review of Sources and Trends Globally and Regionally*, 8 Harmful Algae 14, 14-16 (2008) (discussing the impact of nitrogen loading on coastal ecosystems).
4. *See* M.K. Jha et al., *Targeting Land-use Change for Nitrate-nitrogen Load Reductions in an Agricultural Watershed*, 64 J. of Soil and Water Conservation 342 (2010) (using the "SWAT" model to provide guidance on sustainable land use and conservation practices to reduce nutrient pollution); *see also* Christopher P. Tran et al., *Land-use proximity as a basis for assessing stream water quality in New York State (USA)*. 10 Ecological Indicators 727, 729-730 (2010) (finding upland health to be closely related to water quality).
5. *See* Frank Piccininni, *Adaptation to Climate Change and the Everglades Ecosystem*, 26 Envtl. Claims J. 63, 80-82 (2014) (discussing the anticipated impact of restoring upland health in the everglades ecosystem).
6. *See* 40 CFR 130.6(c)(4) (requiring a non-point source management and control plan).
7. *See* Robert D. Davic & Hartwell H. Welsh, Jr., *On the Ecological Role of Salamanders*, 35 Annual Rev. of Ecology, Evolution, and Systematics 405 (2004) (finding that due to their permeable skin and complex habitat requirements, amphibians are excellent ecoindicators); Frank Piccininni, The Habitat Selection of the Marbled Salamander (*Ambystoma opacum*): A Site Specific Approach (May 7, 2008) (unpublished M.S. thesis, Marshall University) (using a combination of multivariate and spatial analyses to demonstrate that upland habitat health is a critical component to amphibian population survivorship).
8. *See* Yi Chen, et al., *Simulating the Impact of Watershed Management for Surface Water Quality Protection: A Case Study on Reducing Inorganic Nitrogen Load at a Watershed Scale*, 62 Ecological Engineering 61 (2014) (demonstrating the effectiveness of vegetative buffer strips on nitrogen load reduction).
9. *Id.*
10. *Id.*
11. Thomas Maddock III et al., *RIP-ET: A Riparian Evapotranspiration Package for MODFLOW-2005: U.S. Geological Survey Techniques and Methods* (Feb. 23, 2015, (9:27 pm), http://pubs.usgs.gov/tm/tm6a39/.
12. Philip Brunner, et al., Modeling Surface Water-Groundwater Interaction with MODFLOW: Some Considerations, 48 Groundwater 174, 175 (2010).
13. *Id.*
14. *Id.*
15. *C.f.* Robert J. Naiman & Henri Décamps, *The Ecology of Interfaces: Riparian Zones*, 28 Annual Review of Ecology and Systematics 621-658 (discussing the site- and species-specific nature of interface biogeochemistry).
16. *See* Erin L. Kinney, et al., *supra*, note 3.
17. *See* Richard B. Alexander, et al., *A Comparison of Models for Estimating the Riverine Export of Nitrogen from Large Watershed,* 295, 321 (2002).
18. *Id.*
19. *Id.*
20. *See* Frank Piccininni, *supra*, note 7 (detailing a fine-scaled upland research and modeling protocol).
21. *Id.*
22. *Cf.* Antoun El-Khoury et al., *Combined Impacts of Future Climate and Land Use Changes on Discharge, Nitrogen and Phosphorus Loads for a Canadian River Basin*, 151 J. of Envtl. Mgmt. 76 (2015) (modeling the impact of various land use and climate scenarios on nutrient loading); *see also* John Handley et al., *Adapting Cities for Climate Change: The Role of the Green Infrastructure*, 33 Built Env't 115 (2007) (finding that anthropogenic impacts on the environment will be amplified by climate change); *see also* Frank Piccininni, *The Evolving "Nature" of Environmental Risk*: *A Responsible Approach for Residential and Commercial Real Estate*, 26 Envtl. Claims J. 308,313 (discussing the impacts of climate change on environmental risk).
23. N.Y State Dep't of ENVTL. Conservation, *Impacts of Climate Change in New York*, (Feb. 23, 2015, 6:48 P.M), http://www.dec.ny.gov/energy/94702.html (finding that it is "already happening but not too late").
24. *Id.*
25. *See* Robin Kundis Craig, "Stationarity *is Dead"—Long Live Transformation: Five Principles for Climate Change Adaptation Law,* 34 Harv. Envt'l. L. Rev. 9, 11–44 (2010); *see also* Vicki Arroyo & Terri Cruce, *State And Local Adaptation*, *in* The Law Of Adaptation To Climate Change, 569, 569 (Michael B Gerrard & Katrina F. Kuh, eds., 2012).
26. *See* Carl J. Walters & C.S. Holling. *Large-Scale Management Experiments and Learning by Doing*. 71 Ecology 2060 (1990); *see also* Int'l Inst. for Applied sys. Analysis, Adaptive Environmental Assessment and Management 1 (C.S. Holling ed., 1978); Eric Biber, *Adaptive Management and the Future of Environmental Law,* 46 AKRON L. REV. 934 (2013); Robin Kundis Craig & J.B. Ruhl. *Designing Administrative Law for Adaptive Management*. 67 Vand. L. Rev. 1, 16-38 (2014).
27. Mary Jane Angelo, *Stumbling toward success: A story of adaptive law and ecological resilience,* 87 Nebraska L. Rev. 950 (2008).
28. *See e.g.,* Frank Piccininni, *Small Parcels, Island Biogeography, and the Conservation Easement Tax Expenditure*, 8 ABA Smart Growth and Green Buildings Newsletter 1 (2015) (encouraging a market for fine-scale adaptive management planning through voluntary land-use agreements).

Frank Piccininni, J.D., M.S. and Kristin A. Perret, PhD co-founded SMPIL Consulting, Ltd. SMPIL stands for the Society for the Maintenance and Protection of Innocent Life. SMPIL strives to achieve this end through securing and administering grants and providing data solutions for non-profit, public, and private organizations. Frank Piccininni is an Associate Attorney for SterlingRisk Environmental Services, and he is a co-chair of the NYSBA Environmental Law Section's Committee on Membership. Kristin A. Perret is an Attending Psychologist at Montefiore Medical Center and a Licensed Clinical Psychologist in Private Practice.

The Third Department Gives Some Teeth to the Statutory Protections Afforded to Conservation Easements under the Environmental Conservation Law

By Phillip Oswald

The Third Department issued an important decision recently that broadened the protections available to conservation easements. The decision in *Argyle Farm & Properties, LLC v. Watershed Agricultural Council of the N.Y. City Watersheds, Inc.* involved a dispute between the holder of a conservation easement and the owner of the encumbered property.[1] The easement was held by the Watershed Agricultural Council of the New York City Watersheds (the "WAC"), which acquires conservation easements on upstate properties in order to protect the water supply for New York City (the "City").[2] In addition to acquiring conservation easements, the WAC also administers voluntary land-use programs that ensure that only "best [agricultural] management practices" occur on the properties.[3] Since the City is restricted from directly regulating these properties by the Agriculture and Markets Law, it relies on these voluntary agreements with landowners to ensure that contaminants do not enter the streams and reservoirs that supply its water.[4]

The plaintiff owned the subject property, which consisted of 475 acres in the Pepacton Basin.[5] Six years after purchasing the property, the plaintiff sold a conservation easement on the property to the WAC.[6] Prior to closing on the easement, however, the plaintiff began converting a barn on the property into a residence, which required the installation of a septic system.[7] After the easement was conveyed, a dispute arose with respect to the location of the septic system because it was located in an area that was outside of the designated building area on the property.[8]

The WAC nevertheless negotiated with the plaintiff in an attempt to maintain the easement, even with the septic system being located in a prohibited area.[9] The WAC even offered to grant the plaintiff an exception to the building restrictions, or to modify the terms of the easement as necessary to bring the septic system into compliance with those terms at no cost to the plaintiff.[10] The plaintiff refused the offer because it apparently still was concerned about the effect of the easement on its ability to use and market its title in the future.[11] As a result, the plaintiff commenced a lawsuit against the WAC, *inter alia*, seeking to rescind the easement, or, alternatively, seeking a judicial declaration that interpreted the easement in a manner that permitted the location of the septic system.[12]

The WAC filed a motion to dismiss the complaint, which was granted by the trial court.[13] The main grounds for the WAC's motion were lack of standing, expiration of the statute of limitations, and failure to join a necessary party.[14] The statutory protections that are afforded to conservation easements under Article 49 of the Environmental Conservation Law (the "ECL") were not the primary defenses raised by the WAC, but, instead, were ancillary to the defenses discussed above.[15] In fact, the ECL protections constituted only about a page and a half of the trial court's 16-page decision.[16]

When the case came before the Third Department Appellate Division, however, the court seemingly brushed aside the primary grounds for the WAC's motion. The court issued a 6-page decision that upheld the dismissal, largely on the basis of the protections under the ECL.[17] The Third Department's decision is groundbreaking in New York because it executes and gives effect to the important conservation policies of the state. Specifically, the decision substantially expands the protections that are afforded to conservation easements under the ECL, and strictly limits declaratory-judgment actions that seek an interpretation of these easements.

1. Section 49-0305 of the ECL Is Given an Expansive Interpretation to Protect Conservation Easements From Defenses to Enforcement That Are Not Specified in the Text of That Statute

The first important point from the Third Department's decision in *Argyle Farm & Properties, LLC* is that the protections under section 49-0305 of the ECL were expanded beyond the text of that statute. The first five causes of action in the plaintiff's complaint were based on common-law defenses to contract formation and enforcement, including mutual mistake, misrepresentation, and frustration of contract.[18] Basically, the plaintiff claimed that the parties were mistaken as to whether a farming plan was in place for the property as necessary for a WAC-held easement, that the WAC misled the plaintiff with respect to the WAC's procedures, and that the parties' intent in entering the easement was frustrated due to the lack of a farming plan.[19] In light of these allegations, the plaintiff asserted that it was entitled to rescind the conservation easement.[20]

At the outset, the plaintiff's reliance on these defenses was not misplaced because they are not eliminated as defenses to conservation easements by section 49-0305, which abolishes several traditional defenses to ordinary easements by making those defenses inapplicable to conservation easements.[21] These traditional defenses include, *inter alia*, a lack of appurtenance, a failure to touch and concern, the defense against negative burdens, a lack of privitiy, and adverse possession.[22] Thus, the plaintiff's

attempt to raise these common-law contractual defenses was a plausible theory for rescission because an instrument that conveys an easement essentially is treated as a contract[23] and these contractual defenses were omitted from the text of section 49-0305,[24] thereby arguably signaling a legislative intent not to protect conservation easements from them.[25] This may explain why the protections under section 49-0305 were not the primary, secondary, or even tertiary arguments raised by the WAC on its motion or in response on appeal.[26]

Nevertheless, the Third Department held that section 49-0305 applies broadly to encompass all "defenses that exist at common law," including the defenses to contract formation and enforcement that the plaintiff raised in its complaint.[27] The omission of these common-law contractual defenses from the statutory text of section 49-0305 did not preclude the Third Department from applying that statute to those defenses.[28] The Third Department reasoned that "[c]onservation easements are of a character *wholly distinct* from the easements traditionally recognized at common law and are excepted from many of the defenses that would defeat a common-law easement."[29] The Third Department cited the Bill Jacket for section 49-0305 and further reasoned that this statute manifested an intentional legislative acknowledgement of this distinction, thereby compelling courts to provide differential treatment to conservation easements.[30]

Thus, the Third Department reasoned that the omission of these common-law contractual defenses from the list of defenses in section 49-0305 was not an intentional omission by the legislature.[31] Instead, the legislative history "made clear" that protecting conservation easements from these defenses is consistent with the legislative policy of protecting these easements from the generic, common-law grounds that can be used to defeat a traditional easement.[32] In fact, this decision can be read to hold that a conservation easement will be unenforceable only under the limited grounds for amendment or termination[33] that are provided for in section 49-0307 of the ECL.[34] This broad interpretation of the legislative intent behind section 49-0305 is supported by the statutory codification of the important public policies that conservation easements serve.[35] Essentially, this interpretation of section 49-0305 constitutes a significant advance in protecting conservation easements and the policies that they affect by ensuring that enforcement of these easements will survive all but a very limited set of challenges.

2. Landowners Cannot Seek to Reform the Terms of a Conservation Easement by Artfully Pleading a Declaratory Judgment Action That Seeks an "Interpretation" of Those Terms

The second important point from the Third Department's decision in *Argyle Farm & Properties, LLC* is that a landowner cannot obtain a judicial amendment of a conservation easement by artfully pleading a declaratory judgment action. In addition to the contractual claims asserted in plaintiff's complaint, the plaintiff also sought an "interpretation" of the terms of the easement under Article 15 of the Real Property Actions and Proceedings Law (the "RPAPL").[36] In other words, the plaintiff sought a declaratory judgment stating that construction of the septic system was permitted under the terms of the easement.[37] The Third Department, however, was not fooled by the plaintiff's attempt to use a declaratory-judgment action to obtain a judicially compelled amendment of the easement. In addressing these claims, the court reasoned that the "[p]laintiff *effectively* is seeking to *reform* the easement, and it is readily apparent that the *'interpretation'* advanced by plaintiff in this regard would result in either the termination of the easement itself or a material *amendment* thereto."[38]

Accordingly, the Third Department reasoned that in order for the plaintiff to succeed in obtaining a declaratory judgment, which effectively amended or terminated the easement, the plaintiff would need to establish that one of the grounds in section 49-0307 of the ECL applies.[39] The plaintiff had to satisfy section 49-0307 because section 49-0305 provided that a conservation easement can be amended or terminated only in accordance with the grounds that are provided for in section 49-0307.[40] Under section 49-0307, the "exclusive means" for the amendment or termination of a conservation easement are: (1) in accordance with the terms of the easement; (2) in a proceeding under section 1951 of the RPAPL; or (3) by eminent domain.[41] The Third Department determined that the action was "not in the nature of an RPAPL 1951 proceeding or an eminent domain proceeding."[42] Thus, the only ground available to the plaintiff was the first—the terms of the easement.[43]

The terms at issue, however, permitted for amendment or termination of the easement only upon mutual consent, with termination also requiring changed conditions, which prevent the continued accomplishment of the conservation easement's purpose.[44] Since neither consent nor changed conditions were present, the court held that the amendment or termination that the plaintiff sought was unavailable.[45] Therefore, the Third Department upheld the dismissal of the plaintiff's claims seeking a declaratory judgment interpreting the easement, because that proposed interpretation would have essentially amended the easement, and none of the "statutorily recognized grounds" for amendment were applicable.[46]

Thus, the Third Department's decision effectively held that landowners cannot circumvent the restrictions under a conservation easement by seeking an "interpretation" of that easement in a manner that would effectively abrogate one or several of those restrictions.[47] The Third Department even put the term "interpretation" in quotations in its decision when referring to the relief that the plaintiff was demanding, thereby signaling the court's

skepticism of the plaintiff's artful characterization of its claims in this respect.[48] In sum, landowners cannot reform the terms of a conservation easement through a declaratory judgment action. Instead, consistent with the legislative treatment of conservation easements, the amendment or termination of these easements is strictly limited to the exclusive means provided for in section 49-0307 of the ECL.[49]

3. Conclusion

The Third Department's decision in *Argyle Farm & Properties, LLC* constitutes a significant victory for the conservation community by acknowledging the importance of conservation policies and giving practical effect to those policies. This includes affording greater protections to conservation easements, which are an important land-use tool in effectuating conservation policies. Under this decision, a landowner cannot violate a conservation easement—including the act of building first, and asking for permission later—and subsequently seek judicial ratification of this conduct via a judicial "declaration" or "interpretation" of the terms of the easement. While other New York courts have cursorily passed upon the important policies underlying conservation easements,[50] the Third Department went further by giving practical effect to these policies.

Additionally, the decision is a manifestation of judicial willingness to consider conservation policies in the decision-making process. The attention which the court gave to these ECL protections in its decision, especially when the protections were not a central issue in the lower court's decision, cannot be understated.[51] This is an important indication that the judiciary will stand behind the legislative policies on this issue. In sum, this decision is a valuable shield that will protect conservation easements against challenges that likely will increase as many conservation properties transition into second-generation ownership.

Endnotes

1. 2016 N.Y. App. Div. LEXIS 562 at *1-*5, 2016 NY Slip Op. 00559, 1-2 (3d Dep't Jan. 28, 2016).
2. *Id*. at *1-*3.
3. *Id*. at *2.
4. *See id*. at *1-*2; *see also Argyle Farm & Props., LLC v. Watershed Agric. Council of the N.Y. City Watersheds, Inc.*, Index No. 2013-1270 at 4 (N.Y. Sup. Ct. Delaware Cnty. Oct. 17, 2014) (the trial court's decision); N.Y. Agric. & Mkts. Law § 305-a (McKinney 2016) (precluding local governments from "unreasonably" regulating agricultural operations).
5. *Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *2.
6. *Id*. at *2, *3.
7. *Id*. at *3-*4.
8. *Id*.
9. *Id*. at *4.
10. *Id*.; *Argyle Farm & Props.*, Index No. 2013-1270 at 10.
11. *Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *4-*5; *Argyle Farm & Props.*, Index No. 2013-1270 at 10.
12. *Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *5.
13. *Id*. The City and the New York City Department of Environmental Protection also were defendants and also moved to dismiss the complaint. *Id*.
14. *Id*.
15. *Id*.
16. *See generally Argyle Farm & Props.*, Index No. 2013-1270 at 13-15.
17. *See Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *5-*7 (the Third Department assumed the standing, timeliness, and joinder issues in favor of the plaintiff and proceeded to uphold the dismissal of the complaint on the ECL provisions that are specific to conservation easements).
18. *Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *7.
19. Compl., *Argyle Farm & Props., LLC v. Watershed Agric. Council of the N.Y. City Watersheds, Inc.*, Index No. 2013-1270 (Dec. 31, 2013) ¶¶ 180-82, 193-94, 208-12, 231-33, 249-50.
20. *Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *7.
21. N.Y. Envtl. Conserv. Law § 49-0305(5) (McKinney 2016).
22. *Id*.
23. *See Somers v. Shatz*, 22 A.D.3d 565, 567, 802 N.Y.S.2d 245, 246 (2d Dep't 2005) (applying traditional rules of contract interpretation to interpret the grant of an easement); *Route 22 Assocs. v. Cipes*, 204 A.D.2d 705, 706, 613 N.Y.S.2d 33, 33 (2d Dep't 1994) (same).
24. *Id*.
25. *See Jewish Home & Infirmary v. Comm'r of N.Y. State Dep't of Health*, 84 N.Y.2d 252, 262, 640 N.E.2d 125, 129, 616 N.Y.S.2d 458, 462 (1994) (in the context of statutory interpretation, the maxim *expressio unius est exclusio alterius* imposes the judicial presumption that the legislature intended to omit a proviso from the ambit or effect of a statute when that proviso is omitted from a statute that includes a list of other provisos).
26. *Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *5; *Argyle Farm & Props.*, Index No. 2013-1270 at 13-15.
27. *Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *7.
28. *Id*.
29. *Id*. at *6-*7 (emphasis added) (quoting *Stonegate Family Holdings, Inc. v. Revolutionary Trails, Inc., Boy Scouts of Am.*, 73 A.D.3d 1257, 1261, 900 N.Y.S.2d 494, 499 (3d Dep't 2010), *lv. denied*, 15 N.Y.3d 715, 939 N.E.2d 809, 913 N.Y.S.2d 643 (2010); *Friends of Shawangunks, Inc. v. Knowlton*, 64 N.Y.2d 387, 393, 476 N.E.2d 988, 991, 487 N.Y.S.2d 543, 546 (1985)).
30. *Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *7 (citing N.Y. Envtl. Conserv. Law § 49-0305 and Mem. of Support, Bill Jacket, 1983 N.Y. Laws ch. 1020 (1983)).
31. *Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *7.
32. *Id*. (citing N.Y. Envtl. Conserv. Law § 49-0305 and Mem. of Support, Bill Jacket, 1983 N.Y. Laws ch. 1020 (1983)).
33. Out of convenience for the reader, the terms "amendment" and "termination" will be used for the purposes of this article, since the Third Department uses these terms interchangeably with the terms "modification" and "extinguishment" in its decision. The text of section 49-0307, however, is limited to the terms "modification" and "extinguishment." N.Y. Envtl. Conserv. Law § 49-0307(1).
34. *See Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *7 (implying that only the grounds that are identified in section 49-0307 of the ECL can be relied upon to avoid the enforcement of conservation easements because one of the grounds for upholding the dismissal of the contractual-defense causes of action was that those defenses are not set forth in section 49-0307).

35. N.Y. Envtl. Conserv. Law § 49-0301 (codifying "the state policy of conserving, preserving and protecting its environmental assets and natural and man-made resources").
36. *Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *7; *Argyle Farm & Props.*, Index No. 2013-1270 at 6.
37. *Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *7-*8.
38. *Id*. at *7 (emphasis added).
39. *Id*. at *6-*8.
40. *Id*. at *6; N.Y. Envtl. Conserv. Law § 49-0305(2).
41. *Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *6; N.Y. Envtl. Conserv. Law § 49-0307(1).
42. *Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *6.
43. *Id*. at *6-*7, *7-*8.
44. *Id*. at *6-*7.
45. *Id*. at *7-*8.
46. *Id*.
47. *Id*.
48. *Id.*
49. *Id*. at *6, *7-*8.
50. *See generally Smith v. Town of Mendon*, 4 N.Y.3d 1, 14, 822 N.E.2d 1214, 1221, 789 N.Y.S.2d 696, 703 (2004); *Friends of Shawangunks, Inc. v. Knowlton*, 64 N.Y.2d 387, 393, 476 N.E.2d 988, 991, 487 N.Y.S.2d 543, 546 (1985); *Stonegate Family Holdings, Inc. v. Revolutionary Trails, Inc., Boy Scouts of Am.*, 73 A.D.3d 1257, 1261, 900 N.Y.S.2d 494, 499 (3d Dep't 2010), *lv. denied*, 15 N.Y.3d 715, 939 N.E.2d 809, 913 N.Y.S.2d 643 (2010).
51. *See Argyle Farm & Props.*, 2016 N.Y. App. Div. LEXIS 562 at *5-*6 (again, the three grounds that were the foci of the appellate arguments by the defendants were standing, the statute of limitations, and non-joinder); *Argyle Farm & Props.*, Index No. 2013-1270 at 13-15 (same).

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Glow-in-the-Dark Watch Dials, the First Toxic Tort Litigation, and the Birth of the Occupational Safety Movement

By Walter Mugdan

It is hard to imagine that something as innocuous as a glow-in-the-dark watch dial could be the cause of terrible human tragedies, and be the source of a bitter environmental legacy that has been difficult, disruptive, and expensive to address.

The story begins in 1917 when the U.S. Radium Corporation opened a factory in the town of Orange, New Jersey. Its business there was to extract radium from ore to produce a paint that was luminous—that is, it would glow in the dark. In fact, the brand name of the paint was "Undark." As the United States prepared to enter the First World War, it contracted with U.S. Radium to produce glow-in-the-dark watch dials for American soldiers.[1]

Radium is the highly radioactive element identified in 1898 by Marie Curie—the first woman to win a Nobel Prize, and the first person (and the only woman) to win one twice. In the early part of the twentieth century many quack medical claims were made about radium, asserting that it could cure a variety of ills. In fact, it is extremely dangerous, causing cancer and other diseases. Its "daughter" decay product, radon gas (which occurs widely in nature), is second only to tobacco as a leading cause of lung cancer, causing some 21,000 deaths annually in the U.S. alone.[2]

U.S. Radium hired young women to paint the watch dials. Younger people tended to have the steadier hands needed for the fine work of painting the dials. Many young men were heading off to military service and, in any event, it was believed that women were better at this sort of task than men. The women used delicate, camel hair paintbrushes in their work. They would bend close over the watch dials as they applied the paint. Worse yet, in order to bring the paintbrushes to the fine point needed for this work, they would repeatedly lick the brush, ingesting radium paint as they did so. Some of the women also used the paint on their fingernails for a novel, glow-in-the-dark polish.

Within just a few years, many of the women began to suffer terrible diseases. Among the most painful and disfiguring consequences was "radium jaw," or necrosis of the jawbones, which received some of the highest doses of radioactivity as the women pointed their brushes with their lips. It is not known how many of the 80 to 100 women employed by U.S. Radium died, but the number is probably high.

The gruesome story becomes even worse: it turns out the U.S. Radium company was keenly aware of the dangers of exposure the radioactivity. Managers and chemists who worked for the company routinely used shielding and protective clothing when handling the material; but the women painting the dials were assured their work was safe, and were even encouraged to point the brushes in their mouths. Worst of all, the company engaged in a reprehensible campaign of disinformation, suggesting that the women's ailments were attributable to syphilis, a sexually transmitted disease.

In 1925, the Essex County Medical Examiner issued a bombshell report officially linking the deaths of the U.S. Radium workers to their occupational radium exposures. In 1926, the company ceased its operations in Orange.

One severely ill former employee, Grace Fryer, decided to sue U.S. Radium. It took her nearly two years to find a lawyer willing to represent her. Eventually, four other former employees joined the lawsuit. When the case finally reached court in 1928, all five women were so sick they could not even raise their hands to take the oath. Before the case reached the jury the company settled with the five women, agreeing to pay each $10,000 (about $138,000 today), plus a $6,000 annual payment as long as they remained alive. The company also agreed to pay all their medical and legal expenses.

This legal action by the Radium Girls, as they came to be known, has a strong claim to be considered history's first example of what we now know as a "toxic tort" lawsuit—that is, a personal injury claim based on exposure to a toxic chemical.

The notorious case and the publicity surrounding it were also important factors in the development of occupational health and safety standards and laws.[3] (Radium paint continued to be used for watch dials into the 1960s, but the workers were properly trained and provided with protective equipment.)

However, the unfortunate story of the U.S. Radium Corporation does not end there. During its ten years of operation the company processed many thousands of tons of ore to extract the radium. The leftover waste—still dangerously radioactive—was simply dumped on the factory property and remained there for decades. But it gets even worse: much of the waste ore was given away to be used as backfill for residential construction projects, for use as aggregate to make concrete for sidewalks and foundations, and to fill in and re-grade low-lying areas in the surrounding communities of West Orange, Montclair, and Glen Ridge.

Many hundreds of residential properties were contaminated with radioactive materials, of which the homeowners knew absolutely nothing until the early 1980s. By

the middle of the previous decade Americans had finally begun to wake up to the deeply disturbing environmental legacy of our industrial past. Infamous sites like Love Canal near Niagara Falls in New York State spurred Congress to pass, in 1980, the Superfund law[4] giving the U.S. Environmental Protection Agency (EPA) the responsibility to identify and clean up the worst of these sites.

The U.S. Radium factory site itself, and the contaminated properties in Montclair and Glen Ridge, were among the first generation of sites to be placed on the Superfund National Priority List, in 1983 and 1985, respectively.[5] By that time, however, the company was out of business, so the cleanup work had to be paid by federal and state governments.

The work has been hugely expensive, in addition to being disruptive to the affected residents and communities. Contaminated soil had to be excavated from hundreds of properties, while the residents were relocated to temporary living quarters. Some homes had so much radioactive waste material underneath that the only solution was for EPA to purchase the house, and demolish it to get at the wastes below. Tens of thousands of tons of these dangerously radioactive wastes had to be carefully handled by workers in cumbersome protective gear, containerized for shipment, and sent across the continent for disposal at specially constructed and permitted facilities.

The cleanup work has cost over $206 million in public funds. We will never know how many residents suffered health effects from their exposure, sometimes over many decades, to the radioactive wastes on which they were living. What we do know is that we owe a deep debt of gratitude to the unfortunate but brave Radium Girls, who used their last energies to expose the unforgiveable actions of a callous employer, and lay the groundwork for safer conditions for workers.

Endnotes

1. There are quite a few sources available online that tell the story of U.S. Radium, its luminous paint for watch dials, the "Radium Girls" and their bitter fate and extraordinary legacy. Unlike most articles in a scholarly journal, this one will not be extensively footnoted. Instead, the author suggests that those interested in further details start with the entry for "Radium Girls" in Wikipedia—https://en.wikipedia.org/wiki/Radium_Girls; and then, if interested, look further at some of the articles cited in the Wikipedia entry. For example: Alan Bellow, *Undark and the Radium Girls*, http://www.damninteresting.com/undark-and-the-radium-girls/; *Radium Women*, Time, 8/11/1930, http://content.time.com/time/magazine/article/0,9171,740056,00.html; and *A Glow in the Dark*, NY Times, 11/25/2009, http://www.nytimes.com/1998/10/06/science/a-glow-in-the-dark-and-a-lesson-in-scientific-peril.html?pagewanted=all. The story is also well told in *The Poisoner's Handbook* by Deborah Blum, Penguin Books, 2010. (That book is a fascinating history of the development of forensic toxicology.).
2. http://www.epa.gov/radon/health-risk-radon.
3. There was no dearth of workplace horrors and tragedies to motivate the development of occupational safety and health legislation as the Industrial Revolution unfolded. Once again, Wikipedia provides a good first glance at the history of such legislation, the earliest forms of which started in Europe in the 19th century. See: https://en.wikipedia.org/wiki/Occupational_safety_and_health#History and follow the citations at the end for more details. The terrible story of the Radium Girls was, alas, one among many. But because of the successful lawsuit, and perhaps because the victims were young women, their story resonated especially strongly.
4. The Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 *et seq.*
5. For a complete list of NPL sites and links to EPA's fact sheets and related information for those sites, see: http://www.epa.gov/superfund/search-superfund-sites-where-you-live#basic.

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Administrative Decisions Update

By Robert A. Stout Jr.

In the Matter of the Applications for Modification of the Part 360 and Title V Permits, and for a Part 663 Freshwater Wetlands Permit, for a Municipal Solid Waste Landfill on Routes 5 & 20 in the Town of Seneca, Ontario County, New York by Ontario County, Applicant.

Decision of the Acting Commissioner and SEQRA Findings Statement

November 19, 2015

Summary of the Decision

Ontario County filed permit applications[1] for a proposed expansion of the Ontario County Landfill. Finger Lakes Zero Waste Coalition ("FLZWC") petitioned for and was granted party status. The parties stipulated to adjudicate noise issues. FLZWC challenged certain issue rulings, including the ALJ's determination that an adjudicable issue was not raised with respect to the County's comprehensive recycling analysis ("CRA") and the ALJ's conclusion that the Applicant's proposal was in compliance with all applicable laws and regulations related to noise.

The Acting Commissioner found that the Applicant failed to demonstrate that a substantive and significant issue was raised with respect to the CRA and that the Applicant's proposed expansion complies with Department statutes and regulations. The Acting Commissioner certified that the requirements of SEQRA had been met and that the proposed landfill expansion is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable.

Background

In challenging the County's CRA, FLZWC raised a number of issues related to the County's Local Solid Waste Management Plan ("LSWMP"). FLZWC alleged that the Part 360 application lacked a CRA, which, if properly included, would likely affect the size of the proposed expansion. The ALJ ruled that FLZWC failed to raise an adjudicable issue related to the CRA, noting that a CRA was part of the County's approved LSWMP and that the Department had already concluded that the LSWMP contained an appropriate CRA. The ALJ observed that FLZWC viewed the CRA and, therefore, the LSWMP as inadequate but found that the current proceeding was not the proper forum to challenge the LSWMP (which time to challenge had expired). The ALJ also found that the DEC Commissioner's Interim Decision in *Matter of Foster Wheeler-Broome County, Inc.*[2] was not controlling.

With respect to noise, FLZWC argued that landfill flares and the on-site gas to energy plant ("GTE Plant") are part of the "facility"[3] and should have been considered in the noise assessment. The ALJ agreed with respect to the flares. A Flare Report was submitted by the County, which concluded in part that flare noise levels would be below sound level limits. The GTE Plant,[4] located on a contiguous parcel owned and operated by a company not affiliated with the landfill owner or operator, was found to not be part of the "facility" and thus not subject to Part 360 noise requirements.

Decision of the Acting Commissioner

With respect to issues related to the comprehensive recycling analysis, the Acting Commissioner found that no substantive and significant issues had been raised. He distinguished the *Foster Wheeler* decision as one that addressed incineration and the potential of an oversize solid waste incinerator with associated waste fuel demands to divert waste from recycling efforts. He found that the LSWMP addressed recycling efforts and that FLZWC failed to show that the proposed expansion would impair or reduce such efforts.

Regarding alleged LSWMP deficiencies, the Acting Commissioner found that a collateral attack on the previously approved Plan (a process in which FLZWC had participated) was not appropriate.

With respect to noise issues, the Acting Commissioner found that the Applicant demonstrated that the use of flares would not result in a violation of Part 360 noise levels and that the noise generated by the GTE plant is not part of the Part 360 noise assessment. The Acting Commissioner also ordered that the permit include several noise related conditions, including (i) maintenance of a noise complaint log; (ii) an obligation to provide a copy of noise complaints to the DEC Regional Materials Management Engineer; (iii) immediate notification of Part 360 noise exceedances to the DEC Regional Materials Management Engineer; and (iv) an ability for the Department to require relocation or addition of noise monitoring points and/or increased monitoring upon review of monitoring information or noise complaints. The Acting Commissioner also required that the County implement two of five proposed additional measures to control noise contained in the County's Operating Noise Impact Assessment. These measures relate to maintaining speed limits and reviewing sound level limits in bidding and purchase documents.

Based on the record of the permit challenge, the Final Environmental Impact Statement and the Findings Statement adopted by the County Board of Supervisors, the Acting Commissioner found, on behalf of DEC acting as an involved agency, that SEQRA requirements had been met.

Endnotes

1. The County sought (i) modification of its existing solid waste management facility permit; (ii) modification of an existing Title V air permit; (iii) a freshwater wetlands permit and (iv) a five acre waiver approval under the SPDES Multi-Sector General Permit.
2. September 19, 1990.
3. Defined in 6 NYCRR Part 360.
4. The Acting Commissioner noted that the GTE plant purchases landfill gas to generate electricity which is sold on the open market.

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Recent Decisions and Legislation in Environmental Law

Recent Decisions

Am. Farm Bureau Fed'n v. United States EPA, 792 F.3d 281 (3d Cir. 2015)

Facts

The Environmental Protection Agency (EPA) has a long history of struggling with water quality challenges that affect the Bay. In this case, pursuant to the Clean Water Act (Act),[1] the EPA established a total maximum daily load (TMDL) in 2010 for nitrogen, phosphorous, and sediment being released into the Chesapeake Bay (Bay).[2] Various trade organizations sued, alleging the TMDL regulation exceeds the scope of the EPA's authority.[3] The Act does not provide for an exact TMDL, but rather sets target water quality standards that are promulgated by each state.[4] A TMDL is established for waterbodies that fail to meet their designated water quality standards.[5] When a state fails to establish a TMDL on its own, the EPA will set the TMDL. In this case, the EPA set a TMDL for the Chesapeake Bay, which must be met by each state with waterbodies feeding into the Bay.[6]

Procedural History

It is important to note TMDLs have continuously been subject to litigation by both commercial and environmental interests.[7] In 2011, Appellees sued under the Clean Water Act and APA, claiming appellant "exceeded [its] statutory authority by including deadlines and allocations in the TMDL," and the requirement of reasonable assurances.[8] The District Court granted summary judgment, and the EPA appealed.[9]

Issue

The primary issue is the meaning of TMDLs within the Clean Water Act, and what authority the EPA has in interpreting terms within the Act if terms are ambiguous.[10]

Rationale

Applying the two-part deference test laid out in *Chevron, U.S.A., Inc. v. NRDC, Inc.*,[11] the Court concluded that the phrase "total maximum daily load" is ambiguous, allowing the EPA to interpret the challenged elements. The Court noted the Act's goal of a working and "cooperative framework…for states and the federal Government to work together."[12] Step two of the analysis focused on legislative history, and whether the EPA made "a reasonable policy choice in its interpretation."[13] The court looked at the various provisions of the Act and determined "[it] was a less-than-clear statute," and the EPA acted in a reasonable and legitimate manner.[14] From a policy standpoint, the Court noted there are both winners and losers with any environmental regulation; however, the EPA has the power to allocate "benefits and burdens of lowering pollution [in the Bay]."[15]

Conclusion

The Court affirmed the District Court's holding, finding that the states and EPA could work together to allocate the benefits and burdens of reducing pollution.[16] The EPA acted within its authority and has reasonably carried out Congress's directives in administering the TMDL section of the Clean Water Act.[17]

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Endnotes

1. *See* 33 U.S.C. § 1311 (2015).
2. *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 287 (3d Cir. 2015).
3. *Id.*
4. *Id.* at 289.
5. *Am. Farm Bureau Fed'n*, 792 F.3d at 289.
6. *Id.* at 292.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 290.
11. *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984) (explaining the applicable two-part test).
12. *Id.* at 307.
13. *Id.*
14. *Id.* at 309.
15. *Id.* at 310.
16. *Id.*
17. *Id.* at 309.

* * *

Remet Corp v. Estate of Pyne, 112 A.D. 3d 1313 (2015)

Facts

Decedent Pyne was the founder and sole stockholder of Remet Corporation ("Remet").[1] In March 1999, Pyne sold all of Remet's stocks, facilities, and real property to Burmah Castrol Holding, Inc.[2] One parcel of real property was connected to the Erie Canal in Utica, which was listed as an "Inactive Hazardous Waste Site."[3] Pyne and Burmah's sales agreement contained an indemnification provision in which Pyne was responsible for "Environmental Losses."[4] This indemnification process was to remain in effect for ten years.[5] Based upon the indemnification provision, Pyne deposited $2.7 million into an escrow account for any losses for which he would be responsible.[6]

Remet received a letter from the Department of Environmental Conservation (DEC) in 2002, which stated that

Remet was partially responsible for releasing "hazardous substances" and the presence of "hazardous wastes" into the Erie Canal, and that it would be responsible for costs.[7] Remet informed Pyne that it was making an indemnification claim pursuant to their sales agreement.[8] In 2003, Pyne died, forcing Remet to file notices of claim against Pyne's estate seeking the costs it already incurred.[9] The estate objected to the release of the funds held in escrow, and Remet brought this suit, asserting both contractual and common-law indemnification.[10]

Procedural History

Remet moved for summary judgment in the amount of $550,388.60 and future costs that could arise from the remediation of the site.[11] The Supreme Court granted summary judgment.[12] Pyne's estate appealed and the Appellate Division reversed and granted summary judgment to the estate.[13]

Issue

Does a letter from the DEC, which notifies plaintiff Remet that it was a potentially responsible party for environmental contamination, require Remet to act within the meaning of a contractual indemnification clause?[14]

Holding

The particular language of the letter the DEC sent to Remet threatened imminent legal consequences and was coercive enough as to "require" action under the indemnification clause that the plaintiff and defendant agreed upon.[15]

Reasoning

The Court found that the contractual indemnification provision contained plain language.[16] When compared with the DEC's letter and the circumstances surrounding the letter, Remet was entitled to indemnification.[17] The DEC's letter began a legal process against Remet in which it would be held liable for any costs expended in remediating the Erie Canal site.[18]

The Court further found Pyne's deposit of $2.7 million into escrow covered at least a portion of potential legal expenses.[19] Furthermore, Pyne's attorneys cooperated with Remet as soon as they were informed of the DEC's letter.[20] The Court found that both of these actions indicated that Pyne intended to be legally bound to the indemnification provision in the sales agreement.[21]

Conclusion

The decision of the Appellate Court was reversed.[22] The Court of Appeals found that Remet was entitled to contractual indemnification for past and future environmental losses as a result of the DEC's investigation.[23] The Court of Appeals found that the Supreme Court properly granted summary judgment to the plaintiff.[24]

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Endnotes

1. *Remet Corp. v. Estate of Pyne*, 26 N.Y.3d 58, 61 (2015).
2. *Id* at 61.
3. *Id*.
4. *Id*.
5. *Id*. at 62.
6. *Id*.
7. *Id*.
8. *Id*.
9. *Id*. at 62–3.
10. *Id*. at 63.
11. *Id*.
12. *Id*.
13. *Id*.
14. *Id*. at 61.
15. *Id*.
16. *Id*. at 63.
17. *Id*.
18. *Id*. at 63–4.
19. *Id*. at 64.
20. *Id*.
21. *Id*.
22. *Id*. at 65.
23. *Remet Corp. v Estate of Pyne* 2015 NY Slip Op. 07575 (Oct. 20, 2015).
24. *Id*.

* * *

Matter of Sierra Club v. Village of Painted Post, 2015 NY Slip Op. 09707 (App. Div.)

Facts

Petitioners brought a CPLR article 78 proceeding to annul the determination of the Village of Painted Post (Village) allowing respondent Painted Post Development, LLC (PPD) to lease land for the construction and operation of a transloading facility and permitting the Village to sell water from its water supply to a private entity.[1]

Procedural History

This case is an appeal of a judgment by the Supreme Court, Steuben County in a proceeding pursuant to CPLR article 78 and is on remittitur from the Court of Appeals.[2] Originally, this case was dismissed due to a lack of standing for both parties.[3] However, the Court of Appeals saw this appeal as an opportunity to "elucidate and further address the special injury requirement of standing" and so the Court of Appeals reversed the Fourth Department and remitted "the matter for consideration of issues raised but not determined on appeal to this court."[4]

Issues

The issues are (1) whether this case was barred because of laches; (2) whether this case was barred because of mootness; and (3) whether the Village's determination that

the Water Agreement was a Type II action and not subject to SEQRA review was arbitrary and capricious.

Rationale

Despite potential triable issues of fact regarding the plaintiff's delay in pursuing the case, the court found no evidence that relief for the plaintiffs would result in injury or prejudice to the respondents.[5] Therefore, any claim that injury or prejudice to the respondents would occur was unfounded, and so laches was inapplicable in this case.[6]

Respondents also argued that the relief sought by petitioner was impossible to grant, and that this case was barred by mootness.[7] While the Court agreed that the transloading facility's construction was nearly complete when petitioner brought this action, the Court asserted that petitioners were not challenging the construction of the transloading facility itself.[8] Instead, the Court found that petitioners were challenging the underlying project.[9] Therefore, the relief requested could be granted, and was not rendered moot.[10] The Court also added that respondents failed to raise a triable issue fact concerning any suffered injury or prejudice to themselves because WCOR, a non-appealing respondent, was the party responsible for the transloading facility's construction.[11]

In determining whether the Village's act was arbitrary and capricious, the Court first addressed whether the "withdrawal and sale of surplus water from a municipal water supply is [or is not] an 'action' for SEQRA purposes."[12] Respondent argued that the withdrawal of the water was a type II action because the water was surplus government property.[13] Respondent argued this because Type II actions are not governed by SEQRA review.[14] The Court rejected respondent's argument that the surplus of water was a Type II action involving the purchase and sale of surplus government property because water is not property, but is instead a natural resource.[15] The Court then asked if this could be understood as a Type I action.[16] The Court conceded that the Water Agreement did not call for '"ground or surface water in excess of [two million gpd]" and as a result was not a Type I action in that sense.[17] However, the Court found that because Type I actions can include any "action [] that exceeds 25 percent of any threshold," and in light of the DEC setting a threshold whereby use of a natural resource becomes a Type I action, it would be "reasonable to assume that the DEC has 'implicitly determined that an annexation of less than [that threshold] is an [U]nlisted action.'"[18] Therefore, the Water Agreement was an Unlisted Action.[19] Also, the Court found that because the facility "may be substantially contiguous to a publicly owned park," and because "the Water Agreement calls for the use of surface water in the amount of one million gpd, i.e., 50%," the Water Agreement could also be understood as a Type I action.[20] Therefore, the Village's determination was arbitrary and capricious.[21]

As a general rule, segmentation of SEQRA reviews is disfavored, so the Court required a "consolidated SEQRA review of both agreements…."[22] The Court rejected the contention that the Susquehanna River Basin Compact has a preemptive effect under SEQRA because SEQRA and the Compact did not conflict.[23] The Court also found that, even if SEQRA and the Compact did conflict, the "Commission recognized that its approval of the water from the Corning aquifer did not preempt state or local agency approval."[24]

Conclusion

The Court held that laches was inapplicable in this case, the relief requested was not moot, and the Village's determination was arbitrary and capricious.

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Endnotes

1. *Matter of Sierra Club v. Vill. of Painted Post*, 2015 NY Slip Op. 09707 (App. Div.).
2. *Id.* at 1.
3. *Id.* at 2.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 2, 3.
14. *Id.*
15. *Id.* at 3.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*

* * *

Watervale Marine Co., Ltd. v. U.S. Dept. of Homeland Sec., 807 F.3d 325 (D.C. Cir. 2015)

Facts

In 2011, the United States Coast Guard received whistleblower complaints that the owners and operators of certain vessels were intentionally manipulating on-board anti-pollution equipment and discharging oil waste into the waterways. Complaints indicated that oily water was discharged into the ocean instead of being treated, and that the oil records book was falsified to hide the discharges. In

response, the Coast Guard held four foreign-flagged merchant vessels for investigation of criminal violations until the owners and operators ("Plaintiffs") posted a bond and executed a security agreement that contained conditions allowing later prosecution (if merited). Plaintiffs filed suit against the Coast Guard and the United States Department of Homeland Security (DHS) under the Administrative Procedure Act (APA) challenging defendants' authority to impose nonfinancial conditions prior to release of their vessels. Both sides moved for summary judgment.[1] The district court ruled that the Coast Guard's authority to require a "bond or other surety" from vessel owners did not limit the discretion of the Coast Guard on matters of conditional vessel clearance.

The Act to Prevent Pollution from Ships ("the Act") was adopted by Congress to implement various environmental obligations that the United States assumed under the International Convention for the Prevention of Pollution from Ships.[2] The goal of the treaty and the Act is to eliminate the intentional pollution of the oceans by oil and other harmful substances, as well as minimize accidental discharge of such substances. Under the Act, it is unlawful to act in violation of the Convention or the regulations issued thereunder.[3] Knowingly violating the law may give rise to both criminal and civil liability. General authority to grant departure clearance to foreign-flagged ships is in the Customs Service.[4] But a specific provision of the Act deals with the enforcement of the Convention.[5]

Here, the appellants challenged the district court's holding on several grounds. First, they insisted that the case is reviewable and that there are judicially acceptable standards to apply. Secondly, proceeding to the merits, appellants asserted that only Customs, not the Coast Guard, has authority to withhold a ship's clearance. And although the Coast Guard can require a bond (or other surety), it may not demand any nonfinancial conditions as part of the bond.[6]

Procedural History

The district court concluded that 33 U.S.C.S. § 1908(e) gives the Coast Guard the requisite authority to impose nonfinancial conditions. The D.C. Circuit Court of Appeals now reviews the determination made by the district court.[7]

Issue

This case presents the question of whether the DHS, acting through the Coast Guard, may impose nonfinancial conditions for the release of ships suspected of violating the Act to Prevent Pollution from Ships.[8]

Holding

The decision of the district court is affirmed. The Coast Guard may impose nonfinancial conditions.[9]

Rationale

The authority of the Coast Guard to impose nonfinancial conditions is evident in the first sentence of section 1908(e), which states, "[i]f any ship subject to the [Convention]…is liable for a fine or civil penalty…or if reasonable cause exists to believe that the ship…may be subject to a fine or civil penalty [Customs]…upon request of the Secretary [the Coast Guard]…shall refuse…clearance."[10] This section provides authority to the Coast Guard to simply hold any ship in port until legal proceedings are completed. According to the D.C. Circuit Court of Appeals, the nonfinancial conditions can be thought of as simply the quid pro quo for allowing ships to depart. It is not necessary to consider whether those conditions are legitimately a part of "a bond or other surety" because they could be required independently. Although the Act authorizes the DHS to request clearance of a ship if a bond is satisfactory, the Coast Guard is not required to accept a bond. The D.C. Circuit Court of Appeals concluded that a financial bond, given its limited use, is ordinarily not satisfactory, so the Coast Guard need not accept bonds without accompanying nonfinancial conditions.[11]

Accordingly, the D.C. Circuit Court of Appeals determined that holding the ships and crew pending the outcome of a civil or criminal proceeding was reasonable. Because the Coast Guard is authorized hold the ship for such a purpose, it follows that the Coast Guard can agree to notify Customs to release the ship only upon condition that a civil or criminal proceeding would not be jeopardized.[12]

Conclusion

The D.C. Circuit Court of Appeals, for the aforementioned reasons, affirmed the holding of the District Court.

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Endnotes

1. *Watervale Marine Co., Ltd. v. U.S. Dept. of Homeland Sec.*, 807 F.3d 325 (2015).
2. 33 U.S.C.S. § 1901(a)(4) (2015).
3. 33 U.S.C.S. § 1907(a) (2015).
4. 46 U.S.C.S. § 60105(b) (2015).
5. *Watervale Marine Co. Ltd.*, 807 F.3d at 327.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*

* * *

XP Vehicles, Inc. v. Department of Energy, Civil Action No. 13-CV-0037 (D.D.C. 2015)

Facts

Congress authorized the Department of Energy (DOE) to provide direct financial support to the manufacturers of clean energy vehicles and related components.[1] The DOE administers various loan programs, two of which are the Advanced Technology Vehicle Manufacturing (ATVM) Loan Program and the Loan Guarantee (LG) Program. Plaintiff, XP Vehicles, Inc. (XPV), the applicant for an ATVM loan, is now a dissolved California corporation.[2] Co-plaintiff Limnia, Inc., (Limnia) also applied to the DOE for both an ATVM loan and an LG loan guarantee.[3] The DOE denied both XPV and Limnia's loan requests. In response, plaintiffs filed a seven-count complaint against the DOE and several officials in both their official and individual capacities.[4] The complaint seeks relief under the Administrative Procedures Act (APA) and alleges that the DOE violated the plaintiffs' rights to due process and equal protection. Currently before the Court were two motions to dismiss.[5]

Procedural History

Plaintiffs filed their initial complaint on January 10, 2013.[6] Subsequently, they amended the complaint in August 2013.[7] The seven claims against the defendants included two Fifth Amendment Due Process claims; two Fifth Amendment Equal Protection claims; and three APA claims.[8] Plaintiffs argued that the official capacity defendants did not act without bias in denying XPV and Limnia's loan applications and Limnia's LG Program application. On September 18, 2013, defendants filed motions to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).[9] The Court held oral arguments on defendants' motions to dismiss on April 3, 2014.[10]

Issues

(1) Whether there is a constitutional basis for the plaintiffs' claims against the official capacity and individual capacity defendants and a jurisdictional basis by which to seek and grant relief.

(2) Whether there is a valid claim for relief under the APA with regard to Limnia's denial of its loan application and LG Program application.

Rationale

With regard to XPV's five claims, because XPV is a now a dissolved corporation, the court found no basis to sue the official capacity defendants for injunctive relief and no basis under which monetary damages could be recovered from the individual capacity defendants. XPV brought the injunctive relief claim for the sole purpose of restarting its business, not as a part of winding up its business.[11] XPV also has no valid basis under which to bring its constitutional claims because the constitutional violations that plaintiffs allege do not provide sufficient basis for the recovery of monetary damages. These claims were dismissed as a matter of law.[12]

With regard to Limnia's claims, the constitutional claims must be dismissed because Limnia has no property interest with which to sue in the ATVM loan for a violation of due process and equal protection.[13] Furthermore, there was a rational basis for the DOE to deny Limnia's ATVM loan application.[14]

However, the Court found that Limnia's claim under the APA could proceed.[15] Under the APA, a litigant can "challenge arbitrary and capricious agency decisions" and any agency decision "that is contrary to a constitutional right, power, privilege or immunity."[16] The APA also "contains generous review provisions that serve a broad remedial purpose."[17] The APA "does not create substantive rights."[18] Substantive rights come out of the Energy Independence and Security Act (EISA) and relevant regulations; by combining the APA and EISA, plaintiffs are able to seek relief of any alleged unconstitutional action taken by defendants in the course of running the ATVM Loan Program.[19] Limnia's loan application, it was asserted, was just as meritorious as other applications that were approved by the defendants.[20] The Court thus found it sufficient to establish Limnia as being "similarly situated to other ATVM applicants."[21] "Plaintiffs' complaint adequately alleges the sort of arbitrary and capricious agency action that justifies judicial review under the APA," because an agency "acts arbitrarily and capriciously if it fails to treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so."[22] Accordingly, the Court found the plaintiffs' allegations were sufficiently pled to state a claim for violation of the APA.

Conclusions

The motion to dismiss by defendants was granted in part and denied in part with regard to the official capacity defendants and granted in full with regard to the individual capacity defendants.[23] Further, "all of the claims brought by XPV and most of the claims brought by Limnia must be dismissed."[24] The only claims that can proceed are Limnia's "plausible APA claims arising out of the denial of Limnia's ATVM loan application and LG Program application."[25] The Court found that it has jurisdiction to hear the case on its merits.

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Endnotes

1. *XP Vehicles, Inc. v. DOE*, Civil Action No. 13-CV-0037 (D.D.C. 2015) at 1-2.
2. *Id*. at 2.
3. *Id*.
4. *Id*. at 2-3.
5. *Id*.
6. *Id*. at 27.

7. *Id*. at 28.
8. *Id*.
9. *Id*.
10. *Id*. at 32.
11. *Id*. at 61.
12. *Id*. at 77.
13. *Id*. at 78.
14. *Id*.
15. *Id*.
16. *Id*. at 69.
17. *Id*.
18. *Id*. at 69-70.
19. *Id*. at 70.
20. *Id*. at 87.
21. *Id*.
22. *Id*. at 94-95.
23. *Id*. at 100.
24. *Id*.
25. *Id*. at 101.

* * *

Recent Legislation

Abandoned Mine Reclamation Safety Act, H.R. 4323

Mr. Grijalva, representing Arizona's Third District, introduced the Abandoned Mine Reclamation Safety Act (the "Act") in the House of Representatives on January 6, 2016, where it was subsequently referred to the House Committee on Energy and Mineral Resources.[1]

The goal of the Act is the promulgation of regulations by the Secretary of the Interior, which will ensure abandoned mines, both coal and noncoal, are being reopened safely and responsibly.[2] The sole purpose for reopening these mines is for cleanup and remediation of conditions.[3] Regulations must include provisions that ensure the mines are being reopened in a manner that is safe for both the workers involved and the surrounding environment.[4] For example, emergency notification and response plans must be in place before reopening any mine that has the potential of releasing water into the environment,[5] and engineers must approve any and all plans before a mine can be reopened.[6]

Before publishing regulations, the Secretary of the Interior may conduct a study in conjunction with the National Academies of Sciences, Engineering, and Medicine in order to identify "best practices" with regard to reopenings.[7] Any such study must be completed within 2 years of the enactment of the Act,[8] with publication of regulations occurring no more than 6 months after its completion.[9] If the study is not conducted, then the Secretary must publish the Department's proposed regulations no later than 18 months after the Act's enactment.[10]

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Endnotes

1. *Actions Overview: H.R. 4323*, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/house-bill/4323/actions?q=%7B%22search%22%3A%5B%22%5C%22hr4323%5C%22%22%5D%7D&resultIndex=1.
2. H.R. 4323, 114th Congress § 2(a) (2016).
3. *Id.*
4. *Id*. § 2(a)(2)(B)(i)–(ii).
5. *Id*. § 2(a)(2)(C).
6. *Id*. § 2(a)(2)(E).
7. *Id*. § 2(b)(1).
8. *Id*. § 2(b)(2).
9. *Id*. § 2(a)(3).
10. *Id*.

* * *

Act to Amend the Environmental Conservation Law, A.08472

On October 9, 2015, Bill A08472 (the "bill") was introduced by Assemblyman Felix Ortiz to combat global warming emissions.[1] The bill was referred to the Committee on Environmental Conservation on January 1, 2016, and is co-sponsored by Assembly members Charles Lavine, Michelle Schimel, David McDonough, Sandra Galef, Keith Wright, James Brennan, Nick Perry, Ellen Jaffee, Barbara Clark, Barbara Lifton, Linda Rosenthal, Donna Lupardo, William Colton, Margaret Markey, and Michele Titus.[2]

The bill would amend the environmental conservation law by adding a new section, 19-0316, which would seek a statewide reduction in global warming emissions by setting permanent caps on levels of global warming emissions.[3] Further, the bill would "direct the commissioner of environmental conservation to establish rules and regulations to reduce significantly high levels of global warming emissions; set stages for such reductions; and establish a mandatory reporting system to track and monitor such levels."[4] The bill would authorize the promulgation of reporting and monitoring plan, as well as regulations that would apply to New York State businesses.[5] The bill proposes a 15% reduction by 2019, a 20% reduction by 2021, a 25% reduction by 2026, and an 80% reduction by 2056.

Global warming threatens New York State's environmental and economic security through an increase in temperature, precipitation, and sea levels, leaving vulnerable New York's natural ecosystems, agriculture, forestry, fishing, and tourism. The bill seeks a commitment from New York State to join the fight against global warming and prepare for its detrimental impact on public health, the environment, and the economy.[6]

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Endnotes

1. The N.Y. State Assembly, A.08472: "An act to amend the environmental conservation law, in relation to reducing global warming emissions levels," http://assembly.state.ny.us/leg/?default_fld=&bn=A08472&term=2015&Summary=Y&Actions=Y&Text=Y&Votes=Y.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

* * *

An Act to Amend the Environmental Conservation Law, in Relation to Drug Management and Collection Programs, A.00710

A bill, A.00710, currently under consideration in the New York Assembly, would require manufacturers of both prescription and over–the–counter drugs to establish take back programs in order to control the disposal of drugs.[1] This bill, sponsored by Assemblyman Steve Englebright, would require every drug manufacturer to establish and conduct a collection program for unused and expired drugs.[2] Each manufacturer would be responsible for all costs of its program.[3] The bill would allow for contractual delegation of the take back program mandate to third parties; however, the drug manufacturers would still be fully responsible for all costs.[4] Drug manufacturers would be required to conduct these take back collections at least once a year in every county of the state.[5] The bill also makes it unlawful for any person to "dispose of any drug as mixed solid waste in a landfill."[6] All consumers must dispose of their unused or expired drugs at collection programs without charge.[7]

In order to implement these changes, the bill would amend Title 27 of the environmental conservation law.[8] This bill has been referred to the Committee on Environmental Conservation.[9] Co-sponsors of the bill include Assemblyman William Colton, and Assemblywomen Ellen Jaffee, Barbara Lifton, and Michelle Schimel.

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Endnotes

1. The N.Y. Assembly, Bill A.00710, 239th N.Y. Leg Sess. (2015).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

* * *

An Act to Amend the Environmental Conservation Law, in Relation to Establishing a Refundable Deposit on Wine and Liquor Containers; and to Amend the Environmental Conservation Law and the State Finance Law, in Relation to the Deposit of Unredeemed Deposits Thereon into the Environmental Protection Fund and the State Park Infrastructure Fund, A.485

This bill, A.485, was introduced in the New York State Assembly on January 6, 2016, by sponsor Assembly member Steven Englebright (D-4), co-sponsor Assembly members Richard N. Gottfried, Jeffrey Dinowitz, and Earlene Hooper, and multi-sponsor Assembly members Deborah J. Glick and Fred W. Thiele, Jr.[1] It has since been referred to the Committee on Environmental Conservation and, if passed, is due to take effect on January 1, 2017.[2]

This two-pronged legislation seeks to jointly affect the Environmental Conservation Law (ECL) and State Finance Law as a means to a beneficial environmental end.[3] This bill would amend sections 27-1003 and 27-1012 of the ECL to create a deposit on wine and liquor containers, similar to those deposits already redeemable on soda and beer containers, thus increasing the amount of revenue made by the deposit system.[4] This bill would also amend subdivision 3 of 92-s of the State Finance Law to mandate that all unclaimed deposits on these containers be distributed equally between the Environmental Protection Fund and the State Park Infrastructure Fund, as both have fallen victim to budget cuts in recent years.[5] The intended effect of these two actions, and the bill as a whole, is not only to create financial gains for both of these depleted funds, but also to have direct environmental impacts by taking wine and liquor containers out of New York's solid waste stream.[6]

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Endnotes

1. A.485, 238th N.Y. Leg. Sess., http://assembly.state.ny.us/leg/?default_fld=&bn=A00485&term=2015&Summary=Y.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

* * *

An Act to Amend the Environmental Conservation Law, Requiring High School Physical Education Courses to Disseminate Information Relating to Hunting, Fishing, and Outdoor Education, S.4368

Senate Bill 4368 (the "bill") was introduced by Senator John J. Bonacic and has had a tumultuous history since being first referred to the Environmental Conservation Committee on March 17, 2015.[1] The bill originally passed the Senate on April 22, 2015 and was delivered to the Assembly on the same date; however, the bill died in the assembly on January 6, 2016.[2] No action has been taken since January 6, 2016, when the bill was returned to the Senate and referred to the Environmental Conservation committee.[3] Currently there are no votes on the bill.[4]

The bill seeks to amend N.Y. Envtl. Conserv. Law § 3-0301 section 1 subdivision 1 by adding a new paragraph that would require high school physical education courses to disseminate information relating to hunting, fishing, and outdoor education and to promote school instruction in theses areas for grades nine through twelve.[5] High schools would also be required to provide the affected students with information on various hunting and fishing seasons,[6] species that can be sought,[7] the necessary materials for obtaining hunting and fishing licenses,[8] outdoor opportunities for recreation and exercise,[9] and the history and benefits hunting and fishing played in New York's development.[10]

The bill could take effect as early as July 1, 2016; however, any addition, amendment, and/or repeal of any rule or regulation necessary for the implementation of the bill on the effective date could be completed at any time on or before the bill's effective date.[11]

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Endnotes

1. The N.Y. Senate, S.4368-2015: "An Act to Amend the Environmental Conservation Law, in Relation to Hunting, Fishing and Outdoor Education in High School Physical Education Courses," OPEN, http://assembly.state.ny.us/leg/?default_fld=&bn=S04368&term=2015&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at § aa.
6. *Id.* at § (aa)(1).
7. *Id.* at § (aa)(2).
8. *Id.* at § (aa)(3).
9. *Id.* at § (aa)(4).
10. *Id.* at § (aa)(5).
11. *Id.* at § 2.

* * *

An Act to Direct the Administrator of the Environmental Protection Agency to change the Spill Prevention, Control, and Countermeasure Rule with Respect to Certain Farms, H.R. 3129

On July 21, 2015, Representative Eric "Rick" A. Crawford of Arkansas introduced House of Representatives Bill 3129 (H.R.3129), which was referred to the House Committee on Transportation and Infrastructure, and was thereafter referred to the Subcommittee on Water Resources and Environment on July 22, 2015.[1] The purpose of the Farmers Undertake Environmental Land Stewardship Act ("FUELS Act") is to "[d]irect the Administrator of the Environmental Protection Agency to change the Spill Prevention, Control, and Countermeasure rule with respect to certain farms."[2] The Spill Prevention, Control, and Countermeasure rule (SPCC "Rule") regulates the discharge of oil into navigable waters throughout the United States.[3]

The main focus of the FUELS Act is to prevent and reduce the possibility of oil spills into the waters of the United States by requiring farmers with certain specified stored amounts of oil to develop an oil spill prevention plan that complies with the Spill Prevention, Control, and Countermeasure rule (SPCC rule), and is certified as complying with such rule by a professional engineer or the owner or operator of the farm.[4] Compliance will depend on the storage capacity of the farm's individual and aggregate above-ground oil storage and the farm's history of previous spills.[5] According to the FUELS Act, compliance will be required to be certified by a professional engineer "for a farm with an individual tank with an aboveground storage capacity greater than ten thousand gallons, an aggregate aboveground storage capacity of at least forty-two thousand gallons, or a history that includes a spill, as determined by the Administrator."[6] Compliance is also required for "the owner or operator of the farm (via self-certification) for a farm with an aggregate aboveground storage capacity greater than ten thousand gallons but less than forty-two thousand gallons and no history of spills."[7] Farms "with an aggregate aboveground storage capacity less than or equal to ten thousand gallons" and no history of spills are exempt from compliance with the SPCC rule.[8]

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Endnotes

1. Farmers Undertake Environmental Land Stewardship Act, H.R. 3129, 114th Cong. (2015) (*Thomas*).
2. *Id.*
3. *H.R. 311, Farmers Undertake Environmental Land Stewardship Act*, Congressional Budget Office (Nov. 6, 2013), https://www.cbo.gov/publication/44719.
4. *Id.*
5. H.R.3129.
6. *Id.*
7. *Id.*
8. *Id.*

* * *

Climate Protection and Justice Act of 2015, S.2399

The Climate Protection and Justice Act of 2015 (the "Act") was introduced in the Senate by Mr. Sanders on December 10, 2015, and was referred to the Committee on Finance.[1] In recognition of the substantial accumulation of greenhouse gases and human intervention in climate changes, the Act seeks a reduction in the United States' production of carbon pollution beyond the United States' proportional share to ensure global average temperatures do not increase over two degrees Celsius.[2] The Act assists low-income communities and their residents in combatting the detrimental effects associated with carbon pollution emissions—recognizing that such impacts may be disproportionately felt in disadvantaged regions.[3] Through this Act, the U.S. will attempt to become a world leader by identifying the imperativeness of converting to a sustainable energy source.[4]

Title I of the Act establishes a policy that U.S. greenhouse gas emissions in totality should not surpass 5,800,000,000 tons in 2020; 3,700,000,000 tons in 2030; 2,500,000,000 tons in 2040; and 260,000,000 tons in 2050.[5] Under this provision, the U.S. will impose charges upon all producers, manufacturers, and importers of carbon polluting constituents.[6] These fees are generally calculated per ton of carbon dioxide and have certain limitations as to its dissemination.[7] The Act will create the "Interagency Climate Council," commencing in 2020 and convening every three years thereafter, to be responsible for assessing federal, state, and local actions with the objective of reaching national greenhouse emission-reduction goals.[8] This Council would maintain the authority to modify or implement regulations in the event that the national emission-reduction targets are not achieved.[9] The Act will also develop the "Office of Climate Dividend" within the Department of the Treasury, which would be responsible for administering carbon fee refunds from the "Carbon Fee Rebate Fund" that will be established in the Treasury.[10]

Title II of the Act addresses how minority-dominated communities are disproportionately affected by health, environmental, and economic risks associated with climate change.[11] Under this provision, the "Climate Justice Resiliency Council" will be established within the Environmental Protection Agency (EPA) in specified areas, maintaining the objective of advocating climate justice resiliency projects for these underprivileged communities.[12] Title III of the Act establishes that every individual importing a significant carbon pollutant into the U.S. will be responsible for paying the appropriate share of a calculated, imposed fee.[13] Title IV recognizes the importance of protecting and improving agricultural developments by implementing programs within the Natural Resources Conservation Service, intending to promote soil conservation and progression of cultivation education.[14] Finally, Title V looks at the sellers and buyers of electric utility services, and examines how these resources could be modified in order to accomplish the overall objective of reducing the effects of climate change.[15]

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Endnotes

1. S.2399 114th Cong. § 1 (2015).
2. *Id.* at § 2(b)(1).
3. *Id.* at § 2(b)(3).
4. *Id.* at § 4(5).
5. *Id.* at § 195.
6. *Id.* at § 196(a).
7. *Id.* at §§ 196(b)(1), (d).
8. *Id.* at § 197(c)(1).
9. *Id.* at § 197(d).
10. *Id.* at § 102(b), (c)(1).
11. *See id.* at §§ 201, 202(1)(A).
12. *Id.* at § 204(a).
13. *Id.* at § 301(a).
14. *Id.* at § 1238H (a)(1), (4).
15. *See id.* at §§ 501, 502.

* * *

Discouraging Frivolous Lawsuits Act, H.R. 4149

H.R. 4149, also known as the Discouraging Frivolous Lawsuits Act, revises the Federal Water Pollution Control Act in several important respects.[1] The bill is sponsored by Rep. Hugh Thompson "Tom" Rice, Jr. (R-SC-7).[2] The bill was introduced in the House of Representatives on December 1, 2015, and was subsequently referred to the House Committee on Transportation and Infrastructure and the Subcommittee on Water Resources and Environment.[3]

The bill addresses costs of litigation by amending Section 505(c) of the Federal Water Pollution Control Act.[4] The bill awards the costs of litigation, including reasonable attorney and expert witness fees, to the prevailing party (defined as the party that prevails on over half of the issues in the action).[5] The bill limits the types of compensatory mitigation that the U.S. Army Corps of Engineers might seek in a settlement agreement and prohibits a court from approving a settlement that provides for compensatory mitigation in excess of mitigation allowed in other sections.[6] The bill also repeals authority currently wielded under Section 404(c) to prohibit the discharge of dredged materials where the materials "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas."

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Endnotes

1. H.R. 4149, 114th Congress, http://hdl.loc.gov/loc.uscongress/legislation.114hr4149.
2. *Id.*
3. *Id.*
4. *Id.* at § 2(a).
5. *Id.*
6. *Id.* at § 2(b).

* * *

End EPA Advertising Act, H.R. 4271

H.R. 4271 prohibits the Administrator of the Environmental Protection Agency from awarding contracts for public relations, market research, or other similar activities, which would become effective on or after the date of the enactment of this Act.[1] The bill defines "public relations" as writing services, event planning and management, media relations, radio and television analysis, and press services.[2] The term "market research" is defined as telephone and field interviews, focus testing, and surveys.[3]

The End EPA Advertising Act was introduced on December 16, 2015, by Representative Jason Smith [R-MO-8] and is co-sponsored by Representative Randy K. Weber, Sr. [R-TX-14], Representative Brian Babin [R-TX-36], Representative Mike Bishop [R-MI-8], and Representative Bill Posey [R-FL-8].[4] The bill was referred to the Subcommittee on Water Resources and Environment, and the Committees on Energy and Commerce, Agriculture, Transportation and Infrastructure, and Science, Space, and Technology, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned.[5]

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Endnotes

1. H.R. 4271, 114th Cong. (2015) (Thomas).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*

* * *

Energy and Minerals Reclamation Foundation Establishment Act, H.R. 3844

On October 28, 2015, Representative Jody Hice of Georgia introduced Bill H.R. 3844, the Energy and Minerals Reclamation Foundation Establishment Act, to the House of Representatives of the United States.[1] The bill has no cosponsors and has yet to be passed in the House of Representatives. However, the bill was referred to the Committee on Natural Resources.[2] The bill establishes the Energy and Minerals Reclamation Foundation (the "Foundation") that will "encourage, obtain, and use gifts, devises, and bequests for projects to reclaim abandoned mine lands and orphan oil and gas well sites"; the Foundation will be a charitable and nonprofit corporation domiciled in the District of Columbia.[3]

The Foundation shall have a governing Board of Directors (the "Board") which shall consist of 15 Directors, each of which must be educated or have actual experience in energy or minerals production, reclamation of mine lands or oil and gas fields, or energy and mineral resource financing, law, or research.[4] Within one year after the date of the enactment of the bill, the Secretary of the Interior (the "Secretary") will appoint the initial Directors.[5] Thereafter, the Chairman of the Board will make subsequent appointments with the advice and consent of a majority of the Directors.[6] The bill also contains information regarding appointment and terms for the Board, removal of the Board, and general powers of the Board.[7]

The bill calls for an appropriation of $4,000,000 to the Secretary for startup of the Foundation.[8] To help assist the Foundation in establishing an office and meeting initial administrative, project, and other startup expenses, the Secretary may allocate $2,000,000 for each of fiscal years 2016 and 2017.[9] Within 60 days after the end of each fiscal year, the Foundation must transmit to the Committee on Natural Resources of the House of Representatives and the Committee on Natural Resources of the Senate a summary of its proceedings and activities including complete financial statements, copies of all minutes of Board meetings, a copy of the Foundation bylaws, and a copy of the audit for that fiscal year.[10]

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Endnotes

1. Energy and Minerals Reclamation Foundation Establishment Act of 2015, H.R. 3844, 114th Cong. (2015) (*Thomas*).
2. *Id.*
3. *Id.* at § 3(a).
4. *Id.* at § 4(a)(2).
5. *Id.* at § 4(a)(5).
6. *Id.*
7. *See id.* at § 4(a)(5)–(f).
8. *Id.* at § 10(a).
9. *Id.* at § 6(a).
10. *Id.* at § 7(b).

* * *

Lake Tahoe Restoration Act of 2015, H.R. 3692

The Lake Tahoe Restoration Act of 2015[1] (the "Act") is a bill that would reauthorize the Lake Tahoe Restoration Act, originally enacted in 2000.[2] The Act is sponsored by Representative John Garamendi (CA-3) and co-sponsored by Representatives Jim Costa (CA-16), Sam Farr (CA-20), Michael M. Honda (CA-17), Jared Huffman (CA-2), Alan S. Lowenthal (CA-47), and Mike Thompson (CA-5).[3]

The purpose of the Act is to coordinate various private and public entities in the management of the Lake Tahoe Region by funding and authorizing significant new environmental restoration activities and forest management activities in the Lake Tahoe Basin.[4] This would include federal "support [to] local governments in efforts related to environmental restoration, storm water pollution control, fire risk reduction, and forest management activities."[5] The thrust of the Act is to promote cooperative action and "ensure that agency and science community representatives in the Lake Tahoe Basin work together to develop and implement a plan for integrated monitoring, assessment, and applied research to evaluate the effectiveness of the Environmental Improvement Program; and to provide objective information as a basis for ongoing decisionmaking…relating to resource management in the Lake Tahoe Basin."[6]

The Act would amend current law[7] to include coordination between federal, state and local agencies and organizations, including local fire departments and volunteer groups in the forest management activities in the Lake Tahoe Basin Management Unit, in an effort to "increase efficiencies and maximize the compatibility of management practices across public property boundaries."[8] In addition, the legislation would amend the Santini-Burton Act[9] to permit the consolidation of Federal and State ownerships of land through conveyances of certain specified parcels of land in both California and Nevada.[10]

To carry out the provisions of the bill, the legislation would authorize the allocation of $450 million for a period of ten years[11] including funding for prioritized programming for fire risk reduction and forest management; invasive species management; storm water management, erosion control, and total watershed restoration; and special species management.[12]

The Act was introduced on October 6, 2015, and was referred to the House Committee on Natural Resources, the House Committee on Transportation and Infrastructure, and the House Committee on Agriculture.[13] The Act has subsequently been referred to the House Subcommittee on Federal Lands, the House Subcommittee on Water Resources and Environment, and the House Subcommittee on Conservation and Forestry for committee consideration.[14]

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Endnotes

1. The Lake Tahoe Restoration Act of 2015, H.R. 3692, 114th Cong. (2015) (*Thomas*).
2. The Lake Tahoe Restoration Act of 2000, Pub. L. No.106–506, 114 Stat. 2351.
3. H.R. 3692.
4. *Id.* at § 2.
5. *Id.*
6. *Id.*
7. The Lake Tahoe Restoration Act of 2000, Pub. L. No.106–506, 114 Stat. 2351.
8. H.R. 3692 § 4(2).
9. The Santini-Burton Act, Pub. L. No 96–586 § 3(b), 94 Stat. 3384 (1980).
10. H.R. 3692 § 9.
11. *Id.* at § 10.
12. *Id.* at § 5.
13. H.R. 3692.
14. *Id.*

* * *

Microbead-Free Waters Act, A.5896

On March 5, 2015, Assembly Members Schimel, Englebright, Colton, Jaffee, Titone, Crespo, Gottried, Dinowitz, Rosenthal, Roberts, and Miller introduced Bill 5896 (A.5896), "[a]n act to amend the environmental conservation law, in relation to prohibiting the distribution and sale of personal cosmetic products containing microbeads."[1] This bill has been referred to the Assembly Environmental Conservation Committee.[2] Previously, the bill had passed the Assembly but died in the Senate in 2015, before being returned to the Assembly on January 6, 2016.[3] Another version of the bill was introduced in 2014. If enacted, A.5896 would amend Article 37 of the Environmental Conservation Law by adding a new Title Nine and take immediate effect.[4]

The addition of Title Nine would ban the sale and distribution of personal cosmetic products containing "intentionally-added" microbeads.[5] Microbead is defined within the bill as "any plastic component of a personal cosmetic product measured to be five millimeters or less in size."[6] The purpose of the ban is to prevent future pollution caused by microbeads when disposed down household drains, as the microbeads have been documented to contain harmful pollutants, which negatively impact aquatic organisms.[7] The sale and distribution of such products would result in liability for a civil penalty up to $2,500 for each day the violation continues. A second violation would result in a penalty up to $5,000 for each day in violation.[8]

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Endnotes

1. The N.Y. Assembly, A5896: "Microbead-Free Waters Act," OPEN, http://open.nysenate.gov/legislation/bills/2015/a5896.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

* * *

New York State Environmental Sustainability Education Act, S.1437

The Environmental Sustainability Education Act (the "Act") would require the New York State Education Department to establish a program "to guide the development, implementation, and evaluation of a comprehensive environmental sustainability education program" for public schools, as well as assist schools in developing curricula and training staff to adequately prepare students for participation in building a sustainable future.[1] The program would be jointly developed by the State Education Department and the Department of Environmental Conservation, in order to promote sustainable concepts and improve understanding of environmental issues.[2] The Act provides specific principles to which educational programs would be required to adhere, including ensuring students develop an ethic of personal responsibility for all aspects of the environment. The Act would apply to all age groups covered by the K-12 state curriculum, with the Department of Education reserving the right to tailor program requirements to particular grade levels.[3]

If passed, the Act would become effective immediately.[4] As far as fiscal implications, the bill's sponsor states that the Act would impose "minimal costs" to the State Education Department and the State Department of Environmental Conservation.[5]

The Environmental Sustainability Education Act, sponsored by Sen. Kevin Parker (D-21), was introduced in various forms during previous legislative cycles.[6] Sen. Parker urges in his memorandum of support that sustainability education is needed in that it "will free [children] from the destructive habit of pitting nature against people and of ignoring the ethical precept that everyone has an equal right to a clean and safe environment," further arguing that sustainability education is the "only feasible solution to environmental degradation and economic injustice."[7] As of March 2016, this bill has yet to pass either house of the New York State Legislature, and remains in the Senate's Committee on Environmental Conservation.[8]

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Endnotes

1. New York State Environmental Sustainability Education Act, S. 1437, 238th N.Y. Leg. Sess. (2015), http://www.nysenate.gov/legislation/bills/2015/s1437.
2. S. 1437 at § 4.
3. *Id.*
4. *Id.* at § 5.
5. *Memorandum in Support of S. 1437*, http://www.nysenate.gov/legislation/bills/2015/s1437.
6. *Id.*
7. *Id.*
8. *See real-time bill updates at* http://www.nysenate.gov/legislation/bills/2015/s1437.

* * *

Supreme Court Stay on Clean Power Plan Rule

On February 9, 2016, the Supreme Court issued an order[1] staying enforcement of the U.S. Environmental Protection Agency's Clean Power Plan regulations, which limit carbon emissions in the context of electricity generating power plants.[2] The rule prescribing these stationary source emissions will, therefore, not be implemented until the federal courts resolve the legal challenges brought against the rule.

The rule was published as "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units." The rule authorizes states to develop their own compliance plans for reaching federally mandated emission reductions. It allowed states to file a final plan, or an initial plan with a request for an extension for EPA review by September 6, 2016.[3]

The EPA estimates that the Clean Power Plan will reduce carbon emissions from power plants by 32% below 2005 levels, which the EPA projects will yield public health and climate benefits worth tens of billions of dollars.[4] With carbon-emitting energy sources such as coal and oil declining, renewable energy production such as wind and solar is expected to double by 2030, compared to 2013 levels under the Clean Power Plan.

In order to obtain a stay, a party must show: (1) a "reasonable probability" that the Supreme Court will grant certiorari; (2) a "fair prospect" that the court will reverse the decision; and (3) a "likelihood that irreparable harm [will] result from the denial of a stay."[5] The Court granted the stay pending disposition of the applicants' petitions for review in the United States Court of Appeals for the District of Columbia Circuit.[6] The stay further stated that if "a writ of certiorari is sought and the Court denies the petition, this order shall terminate automatically. If the Court grants the petition for a writ of certiorari, this order shall terminate when the Court enters its judgment."[7] The stay was supported by a 5-4 decision with Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan opposed to freezing the rule's effect.[8]

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Endnotes

1. Order in Pending Case, *Chamber of Commerce v. EPA* (Feb. 9, 2016), *available at* http://www.supremecourt.gov/orders/courtorders/020916zr3_hf5m.pdf.
2. "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64,662 (Oct. 23, 2015).
3. *Id.*
4. *Id.*
5. *Maryland v. King*, 2012 WL 3064878.
6. *Supra* note 1.
7. *Id.*
8. *Supra* note 1.

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