

# The New York Environmental Lawyer

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

## A Message from the Outgoing Chair



Diligent readers of this column may have noted my interest in how we can use the tools of our trade as environmental lawyers to confront the global environmental issues that preoccupy us as citizens. More specifically, how we can use existing domestic environmental law (e.g., to control carbon dioxide (CO<sub>2</sub>) emissions in the

face of our national failure to ratify the Kyoto Protocol), how we can apply our skills in evaluating significant environmental risks as counselors to our clients with international issues, and how we simply join in the public debate on environmental issues. Besides the moral or, as Kant would have said, categorical imperative behind acting on these issues, these are the places where our activities as environmental lawyers serve our ever-deepening and more traditional lawyerly functions.

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## A Message from the Incoming Chair

I am honored to begin my term as Chair of the Environmental Law Section. I thank my fellow officers, Miriam Villani, Walter Mugdan, Lou Alexander and Joan Leary Matthews, for their collegiality over the past four years and for their many contributions to the welfare of the Section. I very much look forward to working with the members of the Section during the year ahead.

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### Thank You, Jim Periconi

Jim, on behalf of the Section's members, Executive Committee and officers, I express heartfelt thanks for your tireless dedication to fulfilling the Section's mission during the five years you served as an officer, and especially this past year as Chair. You worked with the

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## A Message from the Outgoing Chair

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For example, I noted in the Fall 2003 issue of this publication that ten years ago, a task force of the Section (on which I was an active member) developed a set of recommendations and proposed changes in state and local energy and development law so as to reduce greenhouse gas (GHG) emissions responsible for the relatively new concern about global climate change. (Kevin Healy still leads the charge for the Section on this issue.) Many wondered then what an individual state could do—but we were not daunted. And in the Summer 2003 issue, I lauded the efforts of Governor Pataki to develop a state-led GHG-reduction program involving emissions trading to fill the absence of any federal efforts to accomplish the objective of GHG reductions, and noted how we state bar environmental law sections answered the call to assist in this effort.

The issue has now been joined at the national level with environmental lawyers figuring prominently on whether, in fact, the Clean Air Act (CAA) might not itself already provide sufficient tools to reduce CO<sub>2</sub>, a major GHG, how politics may have subverted the use of existing environmental laws to accomplish such reductions, and whether global climate change might in fact be at least as grave a threat to our national security as that of terrorist attacks. These debates reflect the complexity of environmental law and the creative (and often contentious) spirit of its practitioners and how they participate in the national discussion of the subject. It's worth reviewing these developments because of their impact on the future of our planet, and also because of their illustration of just how interesting and fulfilling our professional lives can be.

There are the biblical (i.e., Clean Air Act) exegetists who find enough support in the Clean Air Act itself to protect us against GHGs, if only the Environmental Protection Agency would breathe life into those provisions. See James J. Kohanek and David C. Batson, *EPA is Abdicating its Responsibility to Control Greenhouse Gases*, Trends [ABA SEER Newsletter], March/April 2004, at 4. These advocates point specifically to CAA § 202's two-part test for regulation of emissions from motor vehicles: first, that the emission be an "air pollutant"; second, that the pollutant cause or contribute to public health- or welfare-endangering air pollution. For the first part of section 202's test, the exegetists note that two pre-Bush EPA general counsels determined that CO<sub>2</sub> is an air pollutant, and that section 103(g) explicitly identifies CO<sub>2</sub> as an air pollutant. Exegetists also point to the Bush administration's own *Climate Action Report* 2002, which concluded that global warming would

increase heat-related deaths, foster disease, and cause numerous environmental harms, as sufficient evidence of the threat to public health and welfare.

On the other hand, there are those who demand a crystal-clear congressional intention that so pervasive (and natural) a gas as CO<sub>2</sub> be included in the CAA's scope of regulation. See Peter Glaser, *EPA Has No Business Regulating CO<sub>2</sub>*, Trends, March/April 2004, at 5. In support of this demand, these literalists point out that Congress and prior administrations have repeatedly and pointedly failed to act on any legislation attempting to limit GHGs, both at the time of the CAA's 1990 amendment and ever since. This, say the literalists, evinces Congress's clear intention that GHGs *not* be regulated under the CAA. Opposing the exegetist's arguments, literalists argue that the CAA's mention of CO<sub>2</sub> in section 103(g) occurred specifically in a nonregulatory context, and that CO<sub>2</sub>'s ubiquitous nature defies regulation under the National Ambient Air Quality Standards program, which of course focuses on state-specific incentives and penalties. (The same has been said about PM 2.5, but we're starting to regulate it nonetheless.)

And this might well turn out to be a significant issue in the presidential election. A recent *New York Times* analysis of the utilities industry's powerful influence in the White House tracked President Bush's campaign promise to continue the Clinton administration's plan to regulate power plant emissions of CO<sub>2</sub>. Christopher Drew and Richard A. Oppel, Jr., *AIR WAR: Remaking Energy Policy—How Power Lobby Won Battle Of Pollution Control at E.P.A.*, N.Y. Times, March 6, 2004, at A1. The coal-fired power companies were troubled by the early declaration, of now-departed EPA Administrator Christie Todd Whitman, that Mr. Bush would carry out his promise. Utility lobbyist Haley Barbour sent a memo on the subject to the former chief executive of Halliburton (an oil and gas company) and Vice President Dick Cheney, who was heading the infamous White House task force conducting a broad review of energy policy. In March 2001, Mr. Bush reversed himself on his campaign promise, taking CO<sub>2</sub> control proposals off the table, declaring he was responding to the "reality" of an energy shortage. (The *Times* charted the convergence of those utilities with the greatest emissions of other important air pollutants—nitrogen and sulfur oxides—and those making the most significant contributions to, mostly, Republican campaign coffers.) Environmental lawyers were in effect the architects and engineers of these debates, initiatives, and reversals.

There's no doubt about the likelihood of the environment facing us front and center as a major campaign issue in this fall's presidential election, and possibly as a national security matter, in which case it would be *the* major campaign issue other than the economy. This seems more likely since the release in late February of a report by two consultants for Andrew W. Marshall, the Pentagon's legendary guru of long-term national security threat assessment. Motivated by his review of the 2002 report from the National Academies of Science that pointed to risks of future climate change, the new report suggests that slow warming of the planet caused by melting ice, flooding the North Atlantic with fresh water, could disrupt the ocean currents that keep Europe and easternmost North America far warmer than they would otherwise be. (This has apparently occurred twice before in the Earth's history, for non-man-made reasons, most recently about 8,200 years ago.) Admittedly extreme in its findings, the Pentagon study (which can be found at [www.ems.org/climate/pentagon-climate-change.pdf](http://www.ems.org/climate/pentagon-climate-change.pdf)) was designed to force military strategists to "imagine the unthinkable," and may force changes in the administration's reluctance so far to regulate GHGs.

The real issue in the public's reading of reports such as the Pentagon study, and weighing their importance in our national debate, is reviewing risk analysis with a critical eye, and not confusing it with prediction—something we practicing environmental lawyers do all the time, and about which we always have to educate our clients. I expect that the debate on the urgency of addressing climate change during this fall's election will help educate the American public on these issues, ultimately influencing public policy. And how it plays out may rest on how we environmental lawyers ply our trade—whether as exegetists or as literalists—or, on the other hand, how we join in the public debate, including the national election, on the nature of GHGs and other threats to our national security. And the discussion may also include the measures, less dramatic

but significant, that Section members continue to develop and promote at the state level to reduce GHG emissions.

Whatever happens, it is clear that we are not just members of some "specialized" bar on the margins of lawyering. Rather, what we do with our skills is what lawyers, acting in a multi-faceted fulfillment of their responsibilities, traditionally did before private practice became business: to intelligently develop ideas in the public fora, to "profess" what the law is, and to inform the national debate about how to solve major societal problems. These activities tend to serve and enhance the public interest. It is our continuing challenge as environmental law practitioners to play this role as well and honestly as we can.

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*"I thank you for having given me this wonderful opportunity of, for one year, leading the environmental bar in this great State where environmental law was born about four decades ago."*

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This is my fifth and last Message as your Chair. I thank you for having given me this wonderful opportunity of, for one year, leading the environmental bar in this great State where environmental law was born about four decades ago. I could not be more pleased than I am about my very able successors, beginning with Ginny Robbins. I look forward to continued active participation in the Section for many years to come. *Ave atque vale!* [jpericoni@periconi.com](mailto:jpericoni@periconi.com)

James J. Periconi

**Catch Us on the Web at**  
**WWW.NYSBA.ORG/ENVIRONMENTAL**



## A Message from the Incoming Chair

(continued from page 1)

Section's officers, committees and task forces to ensure that the important environmental issues of the day were openly debated and that appropriate action was taken.

You fostered cooperation and team spirit at all times. We are indebted to you for your stewardship these past five years, and we urge you to remain active. Already you have volunteered to serve on the NYSBA's Continuing Legal Education Committee. Thank you for all you have done to strengthen the Section during your tenure and for your continued service to the Bar.

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### Climate Change: Separating Science from Science Fiction

Hollywood's eco-disaster movie, *The Day After Tomorrow*, recently opened the summer blockbuster season. The film depicts catastrophic global climate change caused by the buildup of greenhouse gases. In true action-movie style, it shows abrupt climate changes over the course of several days. Moviegoers can return home safely believing that no real climate shift could happen that fast. They will be right about that, but wrong if they believe climate change is nothing to worry about. The threat is real and urgent.

The general public has difficulty sorting scientific fact from fantasy when it comes to the topic of greenhouse gases and their potential impact on global climate, and perhaps for that reason most people give it little concern. Although the topic has been in the news frequently over the past ten years, my local paper reports that according to a Gallup Poll a year ago, the American public found the topic "a bit of a yawn," and another last month found "the public is practically dozing." However, evidence has continued to accumulate, and despite some dissenters, there is now nearly universal scientific consensus that global warming has begun, that it will continue and accelerate, and that it is at least partly the result of human activity. There is lots of disagreement about the magnitude and consequences of the change, but little about the fact of global warming itself. Moreover, there is strong evidence that drastic climate change could occur more rapidly than we imagine: not in days, as Hollywood portrays, but in years, or certainly decades, which puts a premium on deciding how quickly we should act to address this threat to our economy, security, and health.

The data show that the melting of the northern polar ice cap and Greenland ice sheet caused by global warming has decreased the salinity of water in the

North Atlantic, which in turn could disrupt, if not totally suppress, the Gulf Stream "conveyor belt" that carries warm water on the surface from the Tropics to the North Atlantic where it cools and sinks and returns south via deep back circulation. This system moderates the climates of western Europe and the northeastern United States. When the ocean water decreases in salinity, it no longer sinks, so the entire circulation system is affected. There is ample evidence from ice cores and sediments to show that suppression of the Gulf Stream has occurred abruptly in the past, and serious scientific models show that dramatic climate changes might occur in mere decades that would severely affect our health, agriculture and the incidence of severe weather.

The environmental challenge is how to make public policy based on science that has provided strong evidence, if not proof, of a process that will likely have serious impacts on our climate in the coming decades, but that cannot predict with certainty the kind of impacts or their severity. How do we decide what the appropriate level of response is given the uncertainties of the situation? We are like a surgeon who must decide whether to perform an operation in the absence of a diagnostic test that provides certainty regarding a patient's condition. If she acts too quickly, she may expose her patient to needless harm, but there are also serious risks in not acting. The surgeon will have to reach a decision using less than conclusive information and weighing the costs and benefits of the possible options in light of the best evidence. However, unlike the surgeon who can wheel her patient into the surgery room on a moment's notice, we are dealing with a problem that will require years of lead time to address.

How long can we wait before acting to achieve significant decreases in greenhouse gas emissions? Restructuring our economy and developing new technology will take time. And even if we succeed in reducing greenhouse gas emissions, the elevated levels of carbon dioxide in the atmosphere will remain elevated for a long time, since carbon dioxide is absorbed slowly by the oceans and there will still be contributions of these gases from human activity.

One would hope that such an important decision would be based on the relevant scientific evidence and a careful cost-benefit analysis of the kind that is performed regularly under the regulations implementing our environmental laws. Is our democratic political process that arrives at an outcome based on the competition among powerful interest groups adequate for this type of decision-making? Such policy might be better



made in a technocratic mode, but our only option is the political route and there is reason for pessimism. It is difficult to mobilize public opinion to demand action to deal with uncertain future problems, especially when there are real costs of doing so. Indeed, the political process has difficulty responding to threats where there is no uncertainty, for example, the inevitable impact that the baby boomers will have on the Social Security system in the next seven to ten years. That problem is certain and near-term, and yet it is not being addressed.

Little progress in reducing emissions of carbon dioxide nationwide is being made at the federal level. In New York, the administration of Governor George Pataki has made efforts to address greenhouse gas emissions. In 2001, Governor Pataki issued Executive Order 111, which directed state agencies to seek to achieve a reduction in energy consumption in their buildings, to design and construct only "green buildings," to increase their use of renewable energy, and to purchase clean fuel vehicles. Also, the Public Service Commission was requested to commence a proceeding to consider whether to adopt a "renewable portfolio standard" (RPS), requiring that at least 25% of the power sold in the state be from renewable sources. That proceeding resulted in a June 3, 2004 recommended decision by Administrative Law Judge Eleanor Stein, who recommended that the Commission adopt a policy statement commencing an RPS for New York.

Governor Pataki also formed the New York State Greenhouse Gas Task Force to recommend policies to reduce the state's greenhouse gas emissions. In 2003, the Task Force, among other things, recommended a regional initiative. In response, New York led the effort to create the Regional Greenhouse Gas Initiative (RGGI), which now has nine northeastern state members from Delaware to Maine, and observers that include Maryland, the District of Columbia, Pennsylvania, and eastern Canadian provinces. Kevin Healy, who co-chairs with Antonia Bryson the Section's Committee on Global Climate Change, participated on the Governor's Task Force that recommended the regional initiative.

RGGI is a cooperative effort to reduce carbon dioxide emissions through the implementation of a mandatory multi-state cap-and-trade program with a market-based emissions trading system focused on electric power generators. The goal is to have a program designed by April 2005. New York has requested stakeholder participation in RGGI and held the first stakeholder meeting on May 18, 2004. While the Section is not currently a stakeholder, the Committee on Global Climate Change has volunteered the Section's expertise to assist the Department of Environmental Conservation in the RGGI process.

Since power production is a significant source of greenhouse gases, the RGGI initiative is an admirable start, but it is obviously only a start given the national and global scale of the problem and the multitude of other sources for greenhouse gases. The real challenge of global climate change is unlikely to be addressed through a patchwork of state and regional cooperative efforts. The issue begs for strong federal-level leadership and international cooperation. Regional mechanisms alone will be inadequate in scope to address this national security risk.

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The need for an international commitment by the United States to greenhouse gas reductions is discussed in an informative article that Kevin Healy recently co-authored on the current status of the regulatory programs around the world aimed at controlling greenhouse gases, which was published in the *Columbia Journal of Environmental Law*, Vol. 29, No. 1 (2004), entitled *Climate Change: It's Not Just a Policy Issue for Corporate Counsel—It's a Legal Problem*.

The members of the environmental bar have some understanding of the science that forms the basis of the various standards established under the health, safety and environmental laws. We consult regularly with experts in scientific fields to understand the impacts to human health and the environment of past, present and planned human activity. We also have expertise in the legislative and administrative process. Thus, the members of the environmental bar would seem to have a civic duty to educate the public and governmental officials about the threats posed by global warming and to ensure that the debate about possible responses to this threat is carried on in the most informed way possible. I hope that the membership of the New York State environmental bar will take an active role individually and as a group in promoting public education, strong debate and timely action on what may be the most serious environmental issue we have ever confronted.

Virginia C. Robbins

# From the Editor

I want to take this opportunity to recognize outgoing Chair Jim Periconi and incoming Chair Ginny Robbins. Both Section leaders have been extraordinarily active in initiating Section activities over the past several years. One only needs to read their present columns to appreciate the caliber of these fine attorneys.



This column is being prepared after a very successful January Meeting in conjunction with the New York State Bar Association. Lou Alexander includes a notice of some of the Section Awards given out that day. Somewhat related, Peter Casper submits for the present issue a notice regarding the Section's Minority Fellowships in Environmental Law. Among the speakers at the Annual Meeting was Jeffrey Sachs, who is the Director of The Earth Institute at Columbia University. Professor Sachs explained the composition and purpose of the Institute, which seeks to objectively evaluate future environmental trends, develop valid scientific tools for addressing problems, and to bring science into the public discussion of environmental policy. Its location in New York City and its affiliation with Columbia is especially fortunate, in that the Institute is part of a consortium of numerous organizations and institutions, ranging from various New York City-based museums to conservation trusts to the numerous academic schools and departments at Columbia, each providing unique and perhaps even conflicting perspectives, and many contributing valuable resources, including skilled professionals. The goal is high-caliber brainstorming contributing to effective strategies rather than ineffective posturing.

Professor Sachs suggested carbon sequestration as an example of an economically viable strategy worthy of technological development to use certain fossil fuels while mitigating some of their increasingly acknowledged environmental detriments; the car industry seems interested in utilizing its considerable technological resources in this strategy to address global warming. Professor Sachs provided a day-in-the-life narrative of some of his daily activities. This was really a device to demonstrate the interconnectedness of many organizations and many problems. Various trends and problems are environmental by conventional definition. Others, conventionally defined in terms of public health, economics or politics, realistically are conjoined in that they arise from the manner in which society has interacted with the natural world over the millennia. His speech is transcribed in the present issue.

It has long been my own view that "environmental" is often accorded an unduly narrow, legalistic, definition. Yet public health, the beneficial and even exploitative use of economic resources, and the behemoth just over the next hill that we term global climate change, are all, at a fundamental level, environmental in origin and in effects. They are also intrinsically economic and social. The range of economic and political responses should be informed by environmental factors, as well as by a sound understanding of history. The more useful history for these purposes you usually don't find in conventional texts. Yet, if we want to understand the larger social disruptions that may await us just over the horizon, I would suggest that examining the historical record for past instances of environmental change makes for compelling reading. If the past is prologue, it provides illustrations of how societies have fragmented and have been extinguished, with a degree of human misery and turmoil that dry texts usually cannot adequately convey, when environmental degradation or dramatic climate changes tipped the ecological balance. This evidence can be useful for the development of analytical tools to help address, or perhaps even forestall, future crises.

Some admittedly bleak historical factors illustrate the point. We tend to forget in these hygienic days that plagues of various kinds have routinely eviscerated societies; but plague was not something that just happened. We have documentation that through the past two millennia, plague originated when climatic oscillations or environmental instability modified or disrupted rodent populations, new disease vectors exploited the chaos, rodents and pathogens moved into new ecological niches and unprepared, densely habitating, human populations were exposed to lethal microbes. Other evidence also demonstrates the close connection between the environment and the viability of human societies. Archeology and geological data demonstrate that robust civilizations crashed within a period of a few generations as their economic and political systems could not respond effectively to the environmental stresses originating in the very success of those societies: fields became saline as water resources were depleted; as wild flora and fauna were obliterated by expanding settlements, food resources became restricted to non-nutritious staples, with consequential detriments to individual health and community stability; new diseases, often devastating at their inception, depleted population groups as societies, probing deeper into wilderness areas, were exposed to new pathogens; increased population density and contaminated food and water supplies often allowed cholera and other diseases to flourish, and many pathogens species-jumped from their traditional host organisms to human hosts,

giving us measles, a variety of poxes and any number of other viral scourges. Environmental stresses that impacted on food supplies and other resources were causative factors in numerous catastrophic wars as competing societies literally fought to the death in order to monopolize nature's declining bounty.

Modern skeptics, discussing global warming, assert the cyclical nature of climate change, and there is some truth to that. It matters historically that climate has never been static, and that meteorological oscillations over the millenia have profoundly shaped human societies: three hundred years ago, people crossed the Hudson River on foot as the world froze during the "little ice age." Half a millennium before that, for a period of a few hundred years, warming trends increased, but also confined, populations in erstwhile harsh climates as sea levels rose in northern Europe. The combination of factors set in motion massive migrations of people careening around the face of the then-known world.

These events are not just historical artifacts. They have resonance to our future as populations burgeon beyond regional carrying capacities; as settlers enter previously unpopulated rainforest, exposing them to ebola, numerous simian viruses, and other exotic, rapidly mutating, viruses within traveling distance of regional highways and global flyways; and as regional drought and famine stress increasingly dense populations in an increasingly armed and dangerous world beset by lethal ideologies. And let's not forget about rising sea levels in places like Bangladesh.

However, the modern world also has access to unparalleled educational and technological resources to meet the challenges. Sustainable development is becoming more than just a catchy, though ambiguous, term. Modern engineering, often the bane of environmentalists, is also capable of transforming the built environment in environmentally benevolent directions. Amidst the chaos of the 20th century, medicine stands out as an exemplar of what is also wondrously good about modernity, and one gets the sense that current medical knowledge and techniques are at the threshold of possibilities unprecedented in history. Increasingly, we can sort out the respective genetic and environmental triggers for numerous dreaded diseases. The "dismal science" of 20th century economics is, appropriately so, front and center of public debates. Increasingly, economics has become a fine-tuned and sophisticated art that seeks an understanding of how the resources, commodities, and events of the world are interconnected. Its lesson that scarce resources must be preserved and wisely invested translates well into environmental principles. Environmental science, a field almost unheard of a half-century ago, is rapidly helping us understand not only the complexity and nuances of an often unseen

world, but also the interconnectedness of flora and fauna, microbes and geophysics, and human health and welfare as part of that world.

If we have environmental challenges, we also have the intellectual and technological tools to draw upon. The difficulty, as noted in the columns by both Chairs, is how to focus a perennially shortsighted public and chronically distracted political leaders on the challenges in a way that effectively helps them make the intellectual connections between causes and effects, and the past and the future.

So, to return to Professor Sachs' presentation in January, it's nice to know that within the distance of a subway ride, we have the skills and resources to identify the problems and to work on solutions.

In this issue, Suzanne Avena submits an article on a novel, but increasingly dynamic, field of insurance—recovery for mold. The article examines past standard general liability policies and their exclusions, looks at developing jurisprudence and issues that arise in litigation, and offers suggestions. David Freeman and Larry Schnapf submit an article, originally published in BNA's *Environment Reporter*, on New York's Superfund program. This is an area where the authors have developed considerable experience and their views will undoubtedly be useful for those engaged in hazardous waste site cleanups.

Let me draw members' attention to a notice appearing elsewhere in this journal regarding the Section's Fall Meeting at West Point. The meeting will be held at the historic Thayer Hotel. Attendees will be treated to West Point courtesy and traditions, and over the course of the weekend will be steeped in the history and the environment of the Hudson River. Friday evening's guest speaker will discuss the American Revolution in the Hudson Valley, an important if often overlooked period of our history, and, appropriately enough, will talk about West Point. The Saturday program will discuss remediation activities involving the Hudson River and SEQRA, with a backward glance at the seminal *Scenic Hudson* litigation. Remediation activity in or near the Hudson is not only topical, but is geographically appropriate to the meeting. Side trips and field trips abound, including, for those able to secure tickets, a West Point football game. As one who has been fortunate enough to go to a couple of West Point games, I can assure you that, excepting Notre Dame, it is college football at its best (and the Army might dispute my opinion about Notre Dame). I encourage all and sundry to take advantage of what will likely be a beautiful and interesting fall weekend by joining us.

**Kevin Anthony Reilly**



# Analytical Deliberation on Sustainable Development

Remarks by Jeffrey D. Sachs, Director, The Earth Institute at Columbia University

New York State Bar Association Environmental Law Section Annual Meeting  
New York Marriott Marquis—January 30, 2004

There is a very warm glow at the dais, I can tell you, sitting between the champions of new legislation, Republican and Democrat, Senate and House. It's extremely exciting. I was also quite taken with the coincidence that I share with Assemblyman DiNapoli: We both let our parents down, I guess, in not quite making it to law, but we ended up at the dais anyway. For me, being here is really a special honor and privilege and brings personal gratification. My father, who passed away a couple of years ago, was president of the labor law section of the Michigan Bar Association and a long-time constitutional lawyer and labor lawyer in Michigan. He taught me a lot about the role of law in our society and in the public service. Public service is exactly what you do; you make our physical environment and our social environment livable and I'm really grateful to be a part of your event today.



I wanted to introduce you to the Earth Institute at Columbia University so that we can become even more closely aligned as colleagues and as joint activists for a sustainable environment for New York and for the world. I've already seen that there is tremendous expertise and engagement here, and I'm delighted that many people are working not only on issues of the city and state, but also on all sorts of international issues. This is the unparalleled model of engagement in New York City and New York State. As a new arrival to this city after 30 years in Boston, I find the energy, commitment, activism and engagement is simply beyond compare and it's fabulous to be part of it.

The Earth Institute is a special initiative of Columbia University. We are working on an extraordinary range of issues and taking on some easy problems (like trying to end global poverty in the next 15 years) and some harder ones (like New York City waste disposal, which I've been warned is impossible!). I do think we can make a major dent in global poverty, and the way we want to do it resonates with Senator Marcellino and Assemblyman DiNapoli's lessons about consensus and balance, both of which are extremely critical to the way

that we at the Earth Institute want to approach problems with you. The issues at the interface of our economy, our society and the physical environment are fundamental, extraordinary, diverse, bewildering, and amazing. As I was thinking about sharing some of the aspects of the Earth Institute with you, I thought that maybe going through today's activities could give you a sense of the range of issues that one has to grapple with in thinking about global sustainable development.

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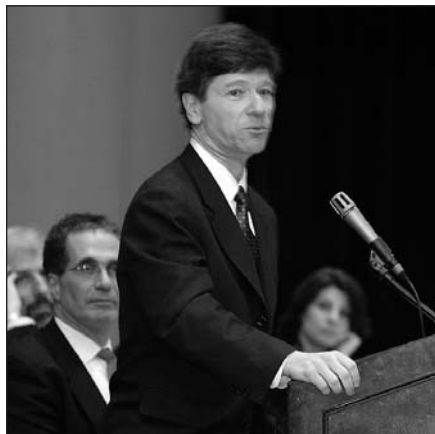
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The day began with a conference call of our U.N. colleagues to discuss the problems of rural African agriculture. We are preparing for a trip to examine the international system's failure to relieve the plight of hundreds of millions of impoverished African households. These are farming families that are chronically hungry and dying of disease due to inadequate nutrition and the resulting immuno-suppression. Meanwhile, they are trying to grow crops on soils that are depleted of nutrients, and to live off ecosystems that don't function, like forests that have been cut down, rivers that are no longer running, and underground aquifers that are becoming depleted. Obviously this is an environmental challenge that is not one of convenience, but one of life and death.

The next meeting this morning was with a major American auto company and our scientists working on the issues of long-term climate change, which, of course, many of you are engaged in. As I'll discuss in a moment, we're trying to find ways to achieve consensus and balance between an economy that depends fundamentally on energy, and a climate that is being fundamentally deranged by our current energy system. This is not an issue that is just going to go away, and it cannot just be written off, as the *Wall Street Journal* edi-



torial page tries to when it labels it a “pseudo-science.” We have, I think, the world’s leading scientists on this issue at the Earth Institute at Columbia University, from the Goddard Institute of Space Studies at Broadway and 113th—NASA’s only urban-based research center—to the Lamont-Doherty Earth Observatory. My colleague, Professor Wally Broecker, who is a globally renowned earth scientist, tells us every day that we are “poking the beast.” The climate is an unpredictable system, and we’re pushing on it right now with fossil fuel emissions. We’re pretending that this problem will just



go away or that any effects will be gradual enough to handle. And yet, the chance of extreme disruptions, Professor Broecker tells us, is not only real but absolutely evident in the historical record—a record that he, perhaps

more than any other scientist, has helped to uncover. This week’s *Science Magazine* looked at the question of last summer’s European heat wave and said that there are basically two views about it. The first is that it was just a very unlucky, random weather event, which they calculated would happen about once every 9,000 years. The second view argues that this presages the kind of changes that are underway right now, and by the climate model, this view is a more likely correct. The fact that we had a major auto industry company in the room this morning actually shows, despite the attempts of our government and some editorial writers to look the other way, that there are realities that the leading companies are facing and that will certainly confront all of us in constructing a legal environment which can address this reality.

The next meeting (there are a lot of them because there are a lot of problems!) was about the Amazon basin. I had been asked by one of the leading foundations in the United States working on the Amazon to look at a problem of one of the last two major, still-contiguous rainforest environments in the world, a vast, unique, completely irreplaceable treasure of biodiversity and climate stabilization, but one that’s being challenged by what’s called the “arc of deforestation”—a massive wave of cattle ranching, soybean growing, illegal logging and squatter settlements. That moving boundary has taken an estimated 16% of the rainforest so far, but at an accelerating rate, especially with a

booming Asian economy that will demand more soybeans for human and cattle consumption.

Then we moved on to the question of malaria in Africa, again an environmental issue as much as a public health issue. The so-called “septic fringe” of African cities—areas without proper waste management or rivershed management to keep waters flowing—provides breeding sites for *anopheles* mosquitoes. Together with the tragic breakdown of the public health systems and rising drug resistance, there has been a resurgence of this long-time killer, and we’re probably up to one billion malaria cases per year now in Africa—one billion! These one billion clinical episodes, resulting in probably 3 million deaths per year, are of a disease that is preventable and treatable. However, we’re not doing anything to help, and the international community’s neglect is leading to the mass death of children in impoverished countries. When traveling with my wife, a pediatrician, we see children in hospitals dying of easily treatable conditions, but where drugs aren’t available or there isn’t a road for parents to bring children to the district hospital, so the parents have to walk a day or two days, and by that time the child is in a coma. This is another one of these environmental, poverty, economy, and public health challenges that is huge, unmatched, and growing.

Later today, I will go to a meeting with the President of Iceland at the Explorer’s Club, to talk about the dramatic changes in the polar climate and the ideas that some of my colleagues have to focus international scientific attention on the massive changes that are likely coming from man-made long-term climate change. Of course, we are very cognizant of being Columbia University in the city of New York, and we take that extremely seriously. That’s why we are committed to being your partners in understanding the local challenges, like asthma in the city and its public health consequences, or how the Hudson River is changing (and we’re proud to be a part of Governor Pataki’s initiative on the Hudson River), as one of the leading research centers on how climate change will affect the New York City region. Cynthia Rosenzweig of the Earth Institute’s Goddard Institute of Space Studies is probably the world’s leading researcher in downscaling global projections so that we can get a sense of what they might mean for us in the next 25 or 50 years. Meanwhile, Wally Broecker keeps telling us that we don’t know if change will come in 25 years or in 50 years, and we don’t know if it will be gradual or if it’s going to be abrupt, and we’d better be doing something about it.

Now how are we proposing to do something about it? There really are two parts to our strategy and why it’s so important for us to work together with you.

First, our special role as a university is to mobilize science so that we can understand these issues in depth, without bias or special interests. These are issues where the science doesn't lie in one narrow field, but is instead a complex mix of environment, earth science, economy, public health, ecology, etc. The university did something quite extraordinary before my arrival, from which I am benefiting enormously as the new Director of the Earth Institute. Columbia made a major commitment, which universities typically do not do, to pull across many different faculties and invest in bringing together disparate parts of the university to work on the challenge of sustainable development. We bring together the earth sciences, the climate sciences (ocean and atmospheric sciences), the basic earth processes sciences, the environmental engineers (including hydrologists, civil engineers, and energy scientists working on ingenious solutions to a lot of these issues, including the carbon issue), the ecologists and environmental biologists (in partnership with remarkable institutions of New York City: The New York Botanical Gardens, the Wildlife Conservation Society, the American Natural

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*"I believe that if reasonable people of goodwill, even if they have very different interests, can deliberate on the basis of knowledge and rationality, then we can find our way through . . . enormous challenges."*

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History Museum, and the Wildlife Trust, in a consortium that we call the Center for Environmental Research and Conservation, of which Jim Periconi has been a very active associate and wonderful friend). Finally, we include public health and health sciences because every one of these issues is a matter of health as well as environment and economics, and both the College of Physicians and Surgeons and the Mailman School of Public Health are actively engaged in helping to figure out how to bring some basic health care to the millions of people that are dying every year. We estimate that 22,000 will die today of diseases that are completely preventable or treatable: AIDS, tuberculosis, malaria, diarrhea, respiratory infection. Yet the lack of a health system allows for mass suffering, and we're trying to address that very practical problem. Finally, we bring in the public policy schools: the Law School, the Business School, and the School of International and Public Affairs.

That's quite a package, and what's remarkable is the phenomenal outpouring of student interest in studying the world. The idea of sustainable develop-

ment is not some abstract notion; it is the challenge that we are going to have to face to figure out how we can live peacefully, prosperously, and sustainably with a population growing past 8 billion, in a changing climate, with ecosystems under tremendous stress, and with changes that we can't even properly anticipate.

So the first part is to get the science mobilized and to work together to understand that the traditional boundaries of academic disciplines don't apply to the challenges we face. The second part of our strategy is to bring science into public discussion in a serious way. I believe that if reasonable people of goodwill, even if they have very different interests, can deliberate on the basis of knowledge and rationality, then we can find our way through this. It's not easy. It takes the skills of great politicians to make this happen. There is a process that I truly love and I want to champion at the Earth Institute and which *Science Magazine* recently called "analytical deliberation." The idea is to get people from across sides of the table who don't like each other very much or don't talk to each other very often, engaged in a rational, science-based ongoing discussion so that we can find our way through these problems. I am hopeful because I've seen this kind of fact-based analytical deliberation work in the past. If we're serious about it, it can help us find a way through enormous challenges. In the area of climate change, for example, we really do have a hard problem at hand. We're changing the climate dramatically and unpredictably, and we in the United States are doing about 25% of the change. Even worse, the carbon doesn't just sit over us; it mixes uniformly in the global atmosphere and changes the whole planet, and while it will have big effects on us, it will have even bigger effects on the poorest people in the world. The tropical regions, the places depending on rainfall to survive, may find themselves in prolonged droughts and facing massive death. Nothing short of that.

There have been a couple of approaches: One is to ignore this issue and claim it is too hard to handle. Unfortunately, this country's leading business newspaper has taken that view on its editorial page and I think it's extremely dangerous for our society that we're pretending this great challenge doesn't even exist. When President Bush came to office (no doubt he's an avid reader of the *Wall Street Journal*), the first thing he did was to ask the National Academy of Sciences to dismiss that junk that was coming from the U.N. Intergovernmental Panel on Climate Change and to tell us how that politicized, overwrought, hyperbolic set of third-world ecologists is misleading and trying to wreck our economy. Of course, the National Academy came back in six weeks and said, "Mr. President, the IPCC is absolutely right." That was the last we heard of it, though. The fact is that we have a real problem. My view is that if peo-

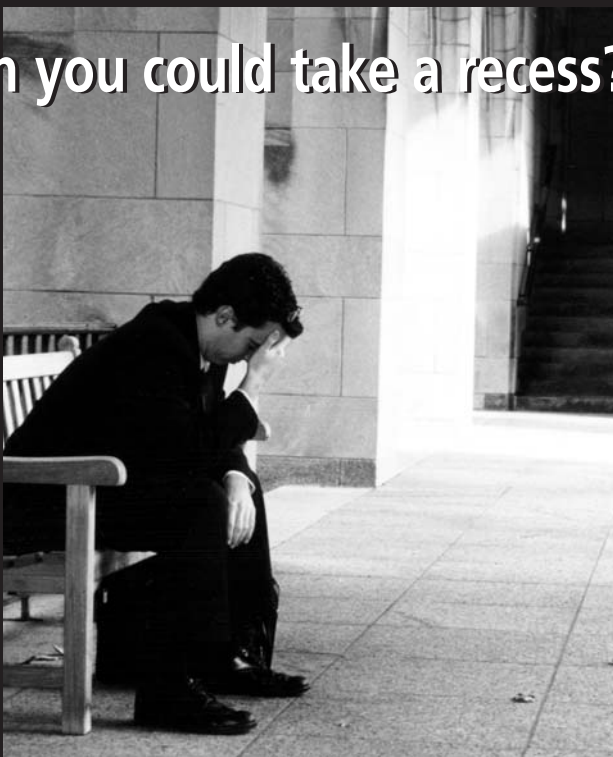
ple better understood the challenges and options that we face, we wouldn't be having what seems to many as a head-on conflict between those who say we need to put the sackcloth on now and wreck our economies and those who say we should do nothing. Our scientists are trying to show how science and technology, if invested in thoughtfully and properly, can actually provide solutions not just for us, but also for the world's poor at reasonable cost and at enormous prudence for our investment.

The climate change discussion that I was in this morning was with our leading energy engineer and physicist, Professor Klaus Lackner, a man who has taught me that the whole world can be understood, if you look at it the right way, through the second law of thermodynamics. Over the past ten years, Klaus has championed an increasingly recognized idea allowing us to meet future energy needs with fossil fuels, since they are the cheapest and most easily available. His idea allows us to do it without threatening the environment by capturing the carbon that is emitted in fossil fuel burning. It's called "carbon sequestration" and he developed it with colleagues, first at Los Alamos Research Laboratories and now at Columbia University, using various ingenious technological solutions including what's called "geological" or "chemical capture" of

the carbon and "chemical sequestration" of the carbon. The point is when he laid out the main ideas this morning to one of the auto companies' senior executive teams, they sat back and said, "Wow! If this can work, it is really, of course, one of the most important things that we need to do." Making this work means investing in this using public science and public engineering, and working together with our Chinese and Indian colleagues, not just to pretend, but from a point of view of analytical deliberation. Instead of having Washington politicians running from the problem to cater to West Virginia, they should realize that with carbon sequestration, coal can become one of the great clean fuels of the 21st century.

I want to close by saying that we want to be your partners in thinking about these issues. We will be engaging in many different ways in an active process of analytical deliberation. I think New York City is the unique place in the world where we can have this conversation, and where through the United Nations we can engage the whole world. By engaging our leaders in industry, politics, media, and science, we can really make a difference. The Earth Institute would love to work with the Environmental Law Section of the New York State Bar in making that difference.

## Wish you could take a recess?



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# New York State Enacts Comprehensive Brownfields Law

By David J. Freeman and Larry Schnapf

On October 9, 2003, Governor George Pataki signed into law a bill that comprehensively amends the state's 1979 Superfund law and creates a statutory brownfields program (the "Brownfield Act"). The bill was passed by the State Assembly on June 19th and the State Senate on September 16th.

The legislation will have an impact on the cleanup of contaminated properties in New York State in at least six major respects:

- It establishes a statutory Brownfield Cleanup Program ("BCP") for hazardous waste- and petroleum-contaminated sites, with prescribed procedures and timetables and a release of liability at the conclusion of the cleanup.
- It expressly authorizes cleanups that do not achieve "pre-release" (i.e., background) levels of contamination by providing for different levels of cleanup geared to site conditions and current or reasonably anticipated future site use.
- It imports into state law a variety of exemptions and defenses available under federal Superfund law.
- It requires a rigorous program of monitoring and enforcement of engineering and land use controls imposed as a condition of allowing hazardous materials to remain in place.
- It mandates an extensive program of public involvement and participation in decisions on hazardous waste cleanups.
- It provides for grants, tax credits, and other forms of financial assistance to encourage the cleanup of contaminated properties.

In addition to liability reforms, the Brownfield Act infuses the depleted state Superfund with \$120 million, authorizes the New York Department of Environmental Conservation ("NYSDEC") to establish cleanup standards based on the current or anticipated land use and provides brownfield funding for municipalities and community groups.<sup>1</sup> Fifteen million dollars is also available for Technical Assistance Grants ("TAGs"), Brownfield Opportunity Area ("BOA") grants and state oversight of the Brownfield Cleanup Program. The DEC is planning to promulgate a series of regulations over the next year to implement the program.

Even though this measure has now become law, technical amendments will be required to correct errors

in the text of the law when the legislature reconvenes in January. This article will review the key features of the legislation and highlight issues that may require further legislative or administrative clarification.

## I. Overview of New York Remedial Programs

NYSDEC is responsible for administering the following four remedial programs: the State Superfund Program for hazardous wastes ("SSF")<sup>2</sup>, the Spill Response Program for petroleum contamination, the Environmental Restoration Program for municipal brownfields ("ERP") and the Voluntary Cleanup Program ("VCP").<sup>3</sup> The Department of Health ("DOH") and state Attorney General also have a role for ensuring the cleanup of inactive hazardous waste disposal sites across the state.

Traditionally, NYSDEC staff for each of the various programs has adopted its own procedures and standards for investigating and remediating sites under its jurisdiction. Moreover, the nine NYSDEC regional offices often have used different cleanup standards and procedures for sites within their jurisdiction. In an attempt to establish better uniformity across its remedial programs, NYSDEC's Division of Environmental Remediation ("DER") developed a draft *Technical Guidance for Site Investigation and Remediation* ("DER-10") in December 2002. DER-10 establishes the minimum steps that must be followed in each remedial program. These steps include Site Characterization, Remedial Investigation, Remedy Selection, Remedial Design/Remedial Action, and Operation, Maintenance and Monitoring ("OM&M").<sup>4</sup>

NYSDEC has not promulgated regulations for remediating contaminated sites. Instead, the agency has issued a series of guidance documents that establish cleanup goals and objectives. The principal guidance for determining soil cleanup objectives and cleanup levels for VOCs, SVOCs, heavy metals, pesticides and PCBs is Technical and Administrative Memorandum ("TAGM") 4046. The recommended soil cleanup objectives apply to in-situ (non-excavated) soil and excavated soil that will be placed back into the original excavation or consolidated elsewhere on a site. Since December 2000, TAGM 4046 has also been used to develop soil cleanup objectives for gasoline- and fuel-oil-contaminated soils that will be remediated in-situ.

The Spill Technology and Remediation Series ("STARS") Memo #1 provides guidance on the handling, disposal and/or reuse of ex-situ (excavated) non-hazardous petroleum-contaminated soil. STARS Memo

#1 also provides guidance on sampling soil from tank pits and stockpiles. Excavated petroleum-contaminated soil must meet the guidance values listed in STARS Memo #1 before it can be reused off-site. The principal guidance document for establishing groundwater cleanup goals is the Technical and Operational Guidance Series ("TOGS") # 1.1.1.

Prior to the passage of the Brownfield Act, NYSDEC had established an administrative VCP to allow landowners, prospective purchasers and other volunteers to investigate and/or remediate sites that are contaminated with hazardous substances and petroleum. The work has been performed under the oversight of NYSDEC and DOH, and the volunteer pays the State's oversight costs. When the volunteer completes work, it receives a release from liability from NYSDEC.

The VCP has evolved considerably since it was established in 1994. Initially, individual VCP agreements ("VCAs") were negotiated on an individual basis. Now, NYSDEC uses a standardized VCA that is essentially non-negotiable. While NYSDEC has not promulgated regulations governing the VCP, DER prepared a *"Voluntary Cleanup Program Guide"* in May 2002 that details the program requirements.<sup>5</sup>

The Administrator of the state Environmental Protection and Spill Compensation Fund (the "Oil Spill Fund") and the Attorney General also have authority over petroleum spills. Since a VCP liability release is binding only on NYSDEC, volunteers have had to request that the Attorney General also execute a release document, especially when the volunteer is not required to remediate off-site petroleum contamination. Otherwise, the Oil Spill Fund Administrator would not be precluded from seeking reimbursement from volunteers for off-site petroleum migration.

NYSDEC did a commendable job cobbling together a program that had no statutory authorization. However, the VCP was only modestly successful, with approximately 500 sites enrolled in the program since its inception in 1994. In comparison, several thousand sites in New Jersey and Pennsylvania were approved under those states' voluntary cleanup programs during this same time period.

## II. Statutory Brownfield Program

The Brownfield Act replaces the VCP with the Brownfield Cleanup Program ("BCP") for cleanups of hazardous waste and petroleum-contaminated sites. Once a BCP application for a brownfield site has been made, that site will not be listed in any spill report or on the state Superfund list, which is known as the Inactive Hazardous Waste Disposal Site Registry ("Registry"), so long as the applicant is acting in good faith and remains in the BCP.<sup>6</sup>

### A. Transitioning from VCP to BCP

The majority of the VCP projects are in various phases of investigation and/or cleanup. One issue of concern has been what happens to the existing volunteers. In some cases, it may be more beneficial to remain in the VCP because of the broader reopeners (discussed below) and other enhanced enforcement rights that NYSDEC has under the BCP. The NYSDEC has announced that it will not accept VCP applications after October 31, 2003 and will phase out the VCP over a period of time. All volunteers who have already submitted VCP applications, or have approved VCP applications but have not yet executed VCAs, have until March 31, 2004 to transition into the BCP. Volunteers who do not choose to transition to the BCP will be required to complete their projects under the current VCP. If a volunteer does transition to the BCP, it will not be required to resubmit documents or repeat work that was approved under the VCP but that may not meet the requirements of the BCP. However, all future work will have to comply with the BCP.

### B. Eligible Parties

Two kinds of applicants are eligible to apply for the BCP. Applicants will have different obligations under the BCP depending on their classification.

The first category of eligible applicant is a "volunteer." This is any person not responsible for the contamination at the time of the BCP application, or who is considered a potentially responsible party ("PRP") solely on the basis of its ownership of site that was contaminated prior to the time the applicant acquired title to the property.<sup>7</sup> A volunteer must investigate and clean up contamination at the site but is not required to "chase the plume" or remediate contamination migrating off the site. However, if contamination is migrating off a site, a volunteer will be required to perform a qualitative exposure assessment to assess the risk to public health and the environment of the off-site contamination.<sup>8</sup> According to conversations with senior NYSDEC representatives, the obligation to perform an exposure assessment could involve sampling where potential receptors are located to determine if the receptors are being exposed to contaminants. However, the volunteer will not be required to characterize the extent of the exposure. If the volunteer is the owner of the site, it must also use "appropriate care" in dealing with the contamination to remain eligible as a "volunteer" under the BCP.<sup>9</sup> A volunteer who fails to exercise "appropriate care" by not taking reasonable steps will be treated as a "participant." When a volunteer is remediating a site, NYSDEC will be responsible for either remediating the off-site contamination or having PRPs address such contamination.<sup>10</sup>

The second category of eligible applicant is a “participant.” This category includes any applicant that does not qualify as a volunteer, such as a PRP.<sup>11</sup> A “participant” must investigate and characterize the nature and extent of contamination both on-site and emanating from the brownfield site. In addition, a participant may also be required to remediate contamination migrating off-site.<sup>12</sup>

### C. Eligible Sites

Sites contaminated with hazardous wastes and petroleum are eligible for the BCP unless they have been classified as a Class 1 or 2 site on the Registry, are on the National Priorities List (“NPL”),<sup>13</sup> are permitted RCRA sites,<sup>14</sup> are subject to an enforcement action or are subject to a cleanup order under Article 12 of the Navigation Law.<sup>15</sup> An application can also be rejected if the applicant has engaged in certain prohibited or illegal acts, or for “public interest” reasons.

Under the state Superfund program, NYSDEC may place inactive hazardous waste sites that have “consequential” amounts of hazardous waste on the Registry.<sup>16</sup> The Brownfield Act does have amnesty provisions that allow “volunteers” that own Class 1 or 2 sites to enroll their sites into the BCP prior to July 1, 2005. After that date, those parties will be subject to the traditional Superfund enforcement process.<sup>17</sup> Participants that own Class 1 or 2 sites are not eligible for the amnesty process.

The NYSDEC is also required to establish a public database for each brownfields site, containing a significant amount of information that will generally be available for public review.<sup>18</sup> Moreover, each county must undertake a survey to inventory hazardous waste sites in its jurisdiction.<sup>19</sup>

### D. Application Process

A site owner or other entity willing to undertake a cleanup must submit an application for a Brownfield Cleanup Agreement (“BCA”) to NYSDEC to determine if the person is eligible for the program and to identify the reasonably anticipated reuse of the site. NYSDEC must notify the potential applicant within ten (10) days if the information is complete and, if not, specify what additional information is needed. NYSDEC must also contact the Oil Spill Fund Administrator to determine if the potential applicant is known to be responsible to the Oil Spill Fund for cleanup and removal costs incurred to respond to petroleum discharges. The Oil Spill Fund administrator must respond to NYSDEC within 30 days. NYSDEC is required to use best efforts to approve or reject a BCA application within 45 days of receipt of the application.<sup>20</sup>

The Brownfield Act contains specific requirements for the BCA. Each BCA will include payment of state

costs, dispute resolution, commitments to investigate and (if necessary) remediate the site, requirements for citizen participation, and implementation and enforcement of any land use and engineering controls required by NYSDEC.<sup>21</sup>

The BCP calls for some degree of public participation in at least seven different stages of the application and cleanup process: when an original application is filed, before finalizing a remedial investigation workplan, before NYSDEC approves a proposed remedial investigation report, before the agency finalizes a remedial workplan, before the applicant commences construction at a brownfields site, before NYSDEC approves a final engineering report, and within ten days of issuance of a certificate of completion. The legislature created these numerous opportunities for public comment even though the public has rarely provided any comments for cleanups under the VCP. The multiplicity of public comment periods will likely lead to further delays in the cleanup process and add to transaction costs.<sup>22</sup>

The Brownfield Act provides that once the BCA is executed and a workplan is prepared, a 30-day comment period begins. NYSDEC is required to publish notice of the BCA in the Environmental Notice Bulletin (“ENB”) and a local newspaper of general circulation. NYSDEC will also notify the chief executive officer and zoning board of each county, city, town, and village in which the site is located, as well as site residents and other affected persons.<sup>23</sup>

Once an investigation is completed, the applicant will submit a final investigation report to NYSDEC. There will be a comment period (variously described as 30 and 45 days), and NYSDEC will determine the completeness of the investigation within 60 days.<sup>24</sup>

Within 20 days of the completion of the final investigation work plan report, the NYSDEC must determine if the site poses a “significant threat.” If the agency concludes that the release of hazardous wastes at the site poses a “significant threat,”<sup>25</sup> NYSDEC may defer placing the site on the Registry if the “volunteer” has executed a VCA and agrees to address the significant threat or the agency is in ongoing “good faith” negotiations.

Where the significant threat is migrating off-site and the applicant is a “volunteer,” NYSDEC is responsible for the remediation of the off-site plume. NYSDEC is required to identify potentially responsible parties (“PRPs”) for the site and bring an enforcement action within six (6) months to compel the PRPs to address the off-site contamination. If NYSDEC cannot identify PRPs within six months or is otherwise unable to bring such an enforcement action, it is required to use its best efforts to commence remediation of off-site contamination within one year of the completion of such enforce-



ment action or completion of the volunteer's remediation, whichever is later.<sup>26</sup> The NYDEC has indicated that it does not intend to list a site on the Registry in such circumstances because the agency has sufficient enforcement authority and funding sources under the Brownfield Act to address the off-site contamination.

If remediation is required, the applicant must submit a proposed remedial action workplan to NYSDEC. The workplan will be subject to a 45-day public comment period and, under certain circumstances, a public hearing. NYSDEC is required to use its best efforts to approve, modify, or reject a proposed work plan within 45 days of receipt or within 15 days after the close of the comment period, whichever is later.<sup>27</sup>

## E. Cleanup Standards

As discussed earlier, NYSDEC has not promulgated cleanup standards for its remedial programs. This absence of cleanup standards has not only made it difficult for developers of brownfield sites to estimate their costs, but has also required property owners to expend significant legal and engineering resources negotiating site-specific cleanup standards. In recent years, NYSDEC has taken land use into account when developing a cleanup under the VCP, but its official policy has been not to consider land use when developing cleanup standards under its other remedial programs.

The Brownfield Act establishes four tracks for cleanup. NYSDEC is required to develop regulations establishing three generic tables of cleanup standards: Unrestricted Use (e.g., residential), Commercial Use and Industrial use. The tables must be updated every five years.<sup>28</sup>

A Track 1 cleanup is designed to permit any unrestricted use without reliance on institutional engineering controls for soil contamination. For groundwater, there is a "carve out" allowing a volunteer to qualify for Track 1 if it has reduced the quantity of groundwater contamination to "asymptotic levels" and proposes to implement long-term engineering or institutional controls to restrict groundwater use.<sup>29</sup>

Track 2 cleanups will need to achieve the cleanup levels set forth in the NYSDEC look-up tables for the reasonably anticipated use without reliance on institutional controls for soil. However, institutional controls may be used to satisfy groundwater cleanup standards.<sup>30</sup>

Track 3 cleanups will use the same formula/process that was used to develop the cleanup numbers for Tracks 1 or 2. However, parties will be permitted to use site-specific characteristics (e.g., depth to groundwater) instead of the lookup tables to establish the cleanup levels.<sup>31</sup>

Track 4 cleanups will be similar to the existing process used for determining soil cleanup numbers. Institutional or engineering controls can be used. For remedies where a specific contaminant's exposure exceeds  $10^{-6}$ , the NYSDEC can allow such contamination to remain without reliance upon institutional or engineering controls when the Commissioner determines that the proposed remedy will be protective of public health and the environment. Additionally, the top two feet of soil for residential uses and top one foot of soil for non-residential uses must comply with the Track 2 tables.<sup>32</sup>

To meet the requirements of the four tracks, applicants may propose a remedy from a list of presumptive remedial strategies that may be developed by the NYSDEC. These remedies may be developed for specific site types (e.g., manufactured gas plant sites) or specific contaminants (e.g., trichloroethylene).<sup>33</sup>

In addition, if an applicant proposes to adopt a cleanup track other than Track 1, the applicant must examine at least two remedial alternatives, including one that would satisfy Track 1. If the site does not pose a significant threat, NYSDEC could require the applicant to evaluate a Track 2 option as one of the remedial alternatives and could require the applicant to implement the Track 2 alternative.<sup>34</sup> While this alternatives analysis is not as onerous as the CERCLA Remedial Investigation/Feasibility Study approach, it is still more burdensome than other state brownfield programs and creates a disincentive for brownfield redevelopment. In our opinion, requiring applicants to engage in remedial alternatives analysis will result in unnecessarily increased transactional costs and project delays.

While the use of cleanup tracks suggests that property owners will have some flexibility in developing a remedial plan for a development, the legislation provides that the remedial action objectives should have a "target risk" that does not exceed an excess cancer risk of one in one million (" $1 \times 10^{-6}$ ") for carcinogenic end points and a hazard index of one ("1 Hazard Index") for non-cancer end points. In addition, NYSDEC is required to consider 25 factors when developing these look-up tables.<sup>35</sup>

NYDEC is authorized to exceed the "target risks" if the rural background levels exceed that risk level.<sup>36</sup> However, if the goal of the legislation is to provide incentives for brownfield redevelopment, this requirement does not make any sense. Most brownfield sites are located in urban areas having ubiquitous contaminants such as fill material that are not present in rural areas. Requiring applicants to remediate contaminated fill material does not even the playing field for brownfield sites and will encourage developers to locate their projects in undeveloped areas.

The Brownfield Act requires all applicants to address sources of soil contamination using the following hierarchy:

- **Removal and/or treatment**—This is the most preferred approach. It involves removal and/or treatment of all free product, concentrated solid or semi-solid hazardous substances, dense non-aqueous phase liquid, light non-aqueous phase liquid in soil and/or grossly contaminated soil “to the greatest extent feasible.”<sup>37</sup>
- **Containment**—Any source remaining following source removal and/or treatment is to be contained. If full containment is not possible, it must be contained to the greatest extent feasible.<sup>38</sup>
- **Elimination of Exposure**—Exposure to any source remaining after removal, treatment and/or containment is required to be eliminated to the greatest extent feasible through additional measures such as alternative water supplies or methods to eliminate volatilization into buildings.<sup>39</sup>
- **Treatment of Source at Point of Exposure**—Treatment of the source at the point of exposure, including wellhead treatment or management of volatile contamination within buildings, “shall be considered as a measure of last resort.”<sup>40</sup>
- **Plume Stabilization**—This method is to be evaluated for all remedies, and the further migration of contamination from the site must be prevented “to the extent feasible.”<sup>41</sup>

The BCP remedial program must protect groundwater “for its classified use, the highest of which is drinking water.” NYSDEC is required to promulgate regulations that provide that groundwater use in Tracks 1 (*sic*, should probably be 2), 3 or 4 can be either restricted or unrestricted.<sup>42</sup> This approach to groundwater cleanups brings New York much closer to other states in the region that allow cleanups to be based on current groundwater use. Prior to the Brownfield Act, New York had maintained the fiction that all the groundwater in the state should be considered potable when developing groundwater cleanup standards. NYSDEC must use a Geographic Information System (“GIS”) to track remedial program information in conjunction with groundwater location and use, and within three years use the information to develop a short and long-term groundwater remedial strategy. The strategy, once developed, is to govern all groundwater remediation programs.<sup>43</sup>

If institutional and engineering controls are proposed as part of an approved remedial program, the applicant must determine the “long term viability” of the controls as well as the cost to the state to enforce the controls. A licensed P.E. must file annual certifications

that the controls are effective, and owners must certify every five years that the assumptions made in the qualitative exposure assessment remain valid and resample groundwater-monitoring wells at site boundaries.<sup>44</sup> Senior NYSDEC representatives have indicated that the agency may provide waivers for the annual certifications and allow biannual certifications depending on site-specific conditions.

In addition, the applicant must create an “Environmental Easement” within 60 days of commencement of a remedial design that uses land use controls.<sup>45</sup> The easement may be enforced in law or equity by the grantor, state or local government against the owner of the burdened property, lessee or any person using the land. The NYSDEC is also required to establish a new database for sites subject to controls.<sup>46</sup>

Where sites are subject to environmental easements, the Brownfield Act prohibits local governments from approving building permits or other applications that affect land use or development without first notifying and receiving approval from DEC.<sup>47</sup> While this requirement was established to ensure that land use controls are adequately maintained and enforced, it does allow NYSDEC to become involved in local land use decisions. Given NYSDEC’s already stretched resources, this requirement has the potential of further delaying redevelopment projects.

## F. Liability Release and Reopeners

When the remediation is completed, the applicant shall submit a final engineering report to the NYSDEC. Upon determination that the remediation requirements have been or will be achieved, the commissioner shall issue a Certificate of Completion (“COC”).<sup>48</sup>

As part of the COC, the applicant will receive a liability release and covenant not to sue (“CNTS”) that will effectively “run with the land.” The covenant not to sue will apply to applicant’s successors and assigns and to persons who develop or occupy brownfield sites provided they use “due care” and in “good faith” adhere to BCA and the COC. The CNTS does not apply to persons responsible under statutory or common law unless they were parties to the BCA and must be recorded within 30 days of issuance of the COC or within 30 days of acquiring title.<sup>49</sup> An applicant will not be liable under statutory or common law arising out of contamination that was present on the effective date of the BCA and that is the subject of the COC. Participants will not be released from liability for natural resource damages under CERCLA.<sup>50</sup>

NYSDEC may modify or revoke a COC for “good cause.”<sup>51</sup> However, this term is undefined. NYSDEC or the legislature should provide further clarification on what constitutes “good cause.”

Unlike the VCP, this release will bind not only the NYSDEC but also all state agencies, including DOH as well as the Attorney General, who shares enforcement power with NYSDEC, and the Comptroller, who has concurrent jurisdiction with NYSDEC over petroleum spills.

The release will also provide contribution protection against third-party claims for matters addressed by the BCA but does not include third-party claims for personal injury or wrongful death arising out of that person's acts or omissions.<sup>52</sup>

One problem with the release is that it does not affect liability for investigation or remediation activities that are not included in the BCP workplan.<sup>53</sup> Under the VCP, the release extends to "Covered Contamination" and is not limited to specific activities. The limited nature of the release would seem to undercut its value.

As is typical under the federal Superfund law and the remedial programs of other states, there are certain circumstances where liability release will not be effective. These reopeners include the following:

- environmental conditions at the site no longer being protective of public health or the environment;<sup>54</sup>
- non-compliance with BCA, workplan or COC;<sup>55</sup>
- fraud in participation in the BCP;<sup>56</sup>
- a change in standards that renders the remedy no longer protective;<sup>57</sup>
- a change in use of the site subsequent to the issuance of a COC;<sup>58</sup> and
- failure to make "substantial progress" toward completion of proposed development within three years, re: unreasonable delay by the applicant.<sup>59</sup>

There are a number of problems with these reopeners. For example, the reopener for the site being no longer protective of human health or the environment should be based on new information, newly discovered conditions or some failure of the remedy. NYSDEC should not have unfettered right to conclude that a previously approved cleanup is no longer satisfactory.

Under the existing VCA, NYSDEC has a reopener for changes in use that would result in a higher use and a more stringent cleanup than that approved under the VCP. The Brownfield Act is confusing because there are two "change in use" provisions. One reference is the "change in use" reopener.<sup>60</sup> Senior NYSDEC officials have indicated to us that the change in use reopener for liability purposes is the same as currently used in the VCP.

The second reference to "change in use" requires applicants to notify the NYSDEC of transfers of the property and erection of any structures or buildings on the site with 60 days advance notice; the NYSDEC then has 45 days to approve changes in use.<sup>61</sup> If NYSDEC determines the change in use is unauthorized, it can exercise this reopener and require additional remediation.<sup>62</sup> This requirement is much broader than the "change in use" reopener. However, senior NYSDEC officials have advised us that this provision is viewed as simply a notice obligation that does not involve the liability reopener. Of course, such notice could result in triggering of enforcement, so it is unclear how much comfort this clarification will provide brownfield developers. Consequently, we believe that either the legislature or NYSDEC needs to clarify that this reopener should only apply for changes in use that could result in a materially greater risk to human health or the environment.

The reopener for failure to make "substantial progress" is also problematic. Since a COC's issuance will be based on the satisfactory completion of a cleanup, there does not appear to be any justification for invoking a reopener based on economic or business developments that may be beyond the applicant's control where the remedy otherwise remains protective of human health and the environment.

### **G. Hazardous Waste Fees**

Parties performing a cleanup usually do not have to pay the hazardous waste generator fee on the volume of waste generated as a result of a remediation. However, it would appear that the Brownfield Act would impose fees on remediation waste that is generated by applicants if the waste exhibits a hazardous waste characteristic.<sup>63</sup> At smaller brownfield sites, these fees could possibly exceed the total cleanup costs. According to senior NYSDEC representatives, the agency is looking into ways to grant fee waivers to applicants who were not responsible for the original hazardous waste at the site.

## **III. Financial Incentives for Brownfield Redevelopment**

The Clean Water/Clean Air Bond Act of 1996 established a \$200 million fund for the ERP to clean up contaminated properties owned by municipal governments.<sup>64</sup> Under the ERP, municipalities could obtain a State Assistance Grant ("SAG") to conduct an ERP investigation or remediation at sites contaminated by releases of hazardous substances and petroleum.

However, the ERP had several disincentives. For example, the SAGs covered only up to 75% of certain eligible costs for municipal-owned sites. This meant that municipalities had to absorb the remaining 25% of



the costs of the ERP. As a result, the ERP was one of those few government programs where only a fraction of the available money has actually been spent. In addition, the local governments were required to share profits (i.e., monies received in excess of the project costs) with the state when brownfield properties were subsequently sold.

New York also has other programs such as Clean Water State Revolving Fund ("CWSRF")<sup>65</sup> that could be used for some brownfield-related activities but have not been specifically targeted for brownfield redevelopment.<sup>66</sup>

#### **A. 1996 Bond Act Brownfield Restoration Program Amendments**

The Brownfield Act modifies the eligibility requirements for the ERP funding and establishes financial incentives for certain qualifying community-based organizations ("CBOs") to undertake studies to facilitate redevelopment of qualifying areas and sites.

It is important to note that ERP remains a distinct program from the Title 14 BCP. However, some of the new requirements of the ERP flow from the BCP. For example, ERP now provides that engineering and institutional controls must be developed and maintained in accordance with the requirements of the BCP.<sup>67</sup> Furthermore, ERP remediation projects are supposed to use the same remediation goals of the SSF.<sup>68</sup>

The legislation expands the definition of municipality to include qualifying CBOs that partner with a local government. A CBO will be eligible for the SAG provided that it is acting in partnership with the municipality where the brownfield is located and has not caused or contributed to a release of hazardous waste or petroleum, and that it did not generate, dispose, or transport such materials to or at the site. The CBO will not be eligible for ERP funds if more than 25% of members, board or officers are or were employed by a person responsible for contamination under the state Superfund law or the Navigation Law. A municipality that generated, transported or disposed of wastes at the site to receive funds is not eligible for such assistance. Private parties are also not eligible for funding.<sup>69</sup>

The SAG payments are increased to 90% for on-site contamination and 100% for off-site contamination.<sup>70</sup> The local government will also be allowed to use other federal or state assistance to satisfy its 10% cost-share obligation. SAG cost-share will be recalculated if the municipality receives any payments from PRPs.<sup>71</sup>

In addition, proceeds from the sale of property that exceed the municipality's costs of property including taxes no longer have to be shared with the state.<sup>72</sup> Instead, the municipality will first recover its costs, the state will then be entitled to its costs (i.e., the amount of

the SAG) and then the local government will be able to keep any remaining proceeds from the sale. The state is required to use reasonable efforts to pursue responsible parties, but not those parties who are responsible parties solely because of ownership, for the full amount of the SAC.<sup>73</sup>

After completing the cleanup, the municipality may use the property for a public purpose or dispose of it. If sold to a PRP, the PRP must pay the amount of the SAC plus interest in addition to any consideration received by the municipality.<sup>74</sup>

An important feature for many upstate county governments is the provision allowing taxing districts that are not foreclosing on a tax lien to be considered titleholders for purposes of receiving ERP investigation SAGs. The taxing authority may petition on 20 days notice for an order granting the taxing district temporary incidents of ownership to conduct an ERP and receive an ERP Investigation SAG. Relief shall be granted unless a party having the right of redemption has redeemed the parcel. The order will stay the foreclosure proceeding until the ERP investigation is completed. The report is to be delivered to the court, which shall then lift its stay of the foreclosure.<sup>75</sup>

A municipality receiving funds pursuant to an SAC, its successor, lender, and lessee not liable under statutory or common law arising out of presence of hazardous substances existing at the time of the SAC, shall each be indemnified by the state provided that they did not generate, transport or dispose of hazardous substances at site.<sup>76</sup> The liability exemption has the following reopeners: (a) failing to implement the approved workplan including land use controls, (b) fraudulently showing cleanup levels were achieved, (c) causing a release, (d) changing the property's use, or (e) using the property in violation of 56-0511.<sup>77</sup>

#### **B. Brownfield Opportunity Areas ("BOAs")**

Urban areas often have sizable areas of contiguous brownfields. State and federal brownfield programs have demonstrated that addressing brownfield sites on an area-wide basis can result in more efficient cleanups and generate redevelopment synergies. Building on this experience, the Brownfield Act establishes a BOA strategy that is distinct from the ERP program. The BOA program will be administered by the NYSDEC and the Department of State ("DOS").

Sites located in BOAs as defined by General Municipal Law Section 970-4 shall receive SAG funding priority and preference over other sites. Municipalities and CBOs may receive up to 90% of the cost of studies that would assist an area being designated as a BOA. In addition, the state will provide up to 90% of the cost of nominating an area for designation as a BOA, including the preparation, creation and development of the infor-

mation to be included in the nomination package. Municipalities and qualifying CBOs can also obtain up to 90% of the cost of conducting site assessments in Enterprise Zones.<sup>78</sup>

### C. Tax Credits

The Brownfield Act amends the Tax Law and the Insurance Law to provide a variety of tax credits to parties who have participated in the BCP and have received a COC. These credits may be used to offset costs associated with real property taxes, site preparation, and property improvements. The NYSDEC estimates that the value of the tax credits will be approximately \$135 million when they become fully effective.

The first category of tax credit is the Brownfield Redevelopment Tax Credit. These credits are available in the taxable year in which the COC is obtained beginning in 2005, though COCs issued in 2004 may be used for the 2005 tax credit. The credits are applicable to costs of remediation, individual site preparation, tangible property and on-site groundwater remediation. The percentage of the tax credit varies depending on whether the party is an individual or corporate taxpayer and whether or not the site is in a BOA. For a site in a BOA, the credits may be up to 22% of these eligible costs. If a site is not in a BOA, the credits drop to 12% for a corporate taxpayer and 10% for a non-corporate taxpayer.<sup>79</sup>

The second category of brownfield tax credits is the Real Property Credits for jobs. Developers of qualified sites may receive credits against eligible real property taxes imposed on the site based on employment numbers and taxes paid and the number of jobs added to a brownfield site.<sup>80</sup> This benefit is currently provided in Empire Zones.

Finally, the Brownfield Act establishes Environmental Remediation Insurance Credits for the lesser of \$30,000 or 50% of the premium paid after the date of a BCA for qualifying brownfield sites.<sup>81</sup>

### D. Technical Assistance Grants

NYSDEC is authorized to provide technical assistance grants of up to \$50,000 to facilitate participation of a citizen group in the cleanup decision-making process for a site. Participants (i.e., responsible parties) can be required by NYSDEC to underwrite the cost of such grants.<sup>82</sup>

## IV. Superfund Reforms

New York was one of first states to adopt a state Superfund program when it enacted the Inactive Hazardous Waste Disposal Site Law in 1979.<sup>83</sup> Because the law predated the federal Comprehensive Environmental Response, Compensation and Liability Act

("CERCLA"),<sup>84</sup> the New York SSF differed in some significant respects from CERCLA.

One limitation was that the state Superfund only applied to releases of hazardous wastes, which is a much narrower category than CERCLA hazardous substances. Under the state Superfund law, NYSDEC can order the owner of the site and/or any other person responsible for the disposal of the hazardous wastes to develop a remedial program acceptable to the NYSDEC and to implement the remedial program when the agency determines that a site poses a "significant threat" to the environment.<sup>85</sup> However, unlike EPA's authority under section 106 of CERCLA,<sup>86</sup> the NYSDEC cannot issue a cleanup order until after the alleged responsible party is provided with a hearing. Moreover, a party who has been issued an order after an administrative hearing can seek judicial review of that decision.<sup>87</sup> NYSDEC's inability to order a PRP to clean up a site without first conducting an administrative hearing substantially limited the usefulness of the state Superfund program.<sup>88</sup> As a result, NYSDEC often relied on CERCLA to force PRPs to remediate sites contaminated with hazardous substances.

The Brownfield Act addresses some of the shortcomings of the SSF. The new legislation expands the definition of "hazardous waste" to include hazardous substances.<sup>89</sup> This will bring an estimated additional 300 sites under the jurisdiction of the state Superfund program. In addition, the legislation adds statutory defenses—Act of God, act of war, third party and innocent purchaser<sup>90</sup>—modeled after those in CERCLA.

The U.S. Congress added the innocent purchaser defense<sup>91</sup> to CERCLA when it became evident that the third party defense<sup>92</sup> was largely unavailable to purchasers, occupiers of property or anyone in the chain of title because a person asserting the third party defense had to show that it was not in a contractual relationship with the party (usually a prior landowner or tenant) who caused the release. However, the innocent purchaser defense is available only to owners who had no reason to know that their property was contaminated. Since sites are brownfields because there is at least the perception of contamination, the innocent purchaser defense will not be available to most brownfield developers. By contrast, the bona fide prospective purchaser defense added to CERCLA in 2002 is available to purchasers who knowingly acquire contaminated property.<sup>93</sup>

Unfortunately, the New York legislature did not include a bona fide prospective purchaser or contiguous property owner defense in the Brownfield Act.<sup>94</sup> The usefulness of the Superfund reforms will be severely limited by the absence of these defenses, and we urge the legislature to reconsider this issue if it enacts chap-

ter amendments at the start of the 2004 legislative session.<sup>95</sup> In the absence of a legislative fix, we suggest that NYSDEC adopt enforcement policies for prospective purchasers and contiguous property owners similar to those adopted by EPA prior to the 2002 amendments to CERCLA.

The Brownfield Act also adds statutory liability exemptions for lenders and fiduciaries that are modeled after the exemptions in CERCLA.<sup>96</sup> Additionally, it creates a liability defense for municipalities that involuntarily acquire ownership or control of a contaminated site and do not “participate in development” of the site provided they did not cause or contribute to the release. Municipalities must provide notice to DEC within 10 days of learning of a release or lose their exemption.<sup>97</sup> This defense can be particularly useful to local governments to help them assemble parcels of smaller brownfield sites into a larger site that has greater development potential. However, it is unclear what “participation in development” means. NYSDEC will need to clarify the scope of this term in its implementing regulations.

## V. Navigation Law

The vast majority of contaminated sites in New York State are impacted by petroleum. The Oil Spill Prevention, Control and Compensation Law<sup>98</sup> (“Navigation Law”) prohibits the unpermitted discharge of petroleum into the waters of the state or onto land from which the petroleum might drain into state waters.<sup>99</sup> Dischargers of petroleum are strictly liable without regard to fault for all cleanup and removal costs as well as direct and indirect damages.<sup>100</sup> Cleanup liability extends to discharges that occurred prior to the 1977 enactment date of the statute.

The Navigation Law does not expressly define who is liable as a “discharger.” The term has been broadly construed to include not only operators of a facility where a release has occurred but also, in some cases, landowners who did not actively operate the source of contamination. In 2001, the New York Court of Appeals ruled in *State v. Green*<sup>101</sup> that while the Navigation Law does not impose liability based solely on ownership of contaminated land, a landowner that can control activities occurring on its property and has reason to believe that petroleum products will be stored there, could be liable as a discharger for the cleanup costs. Moreover, while owners or operators of a “major facility” could assert defenses to liability based on act or omissions solely caused by an act of war, sabotage, or government negligence,<sup>102</sup> owners or operators of smaller facilities could not assert these defenses.

Further complicating the lives of prospective purchasers of petroleum-contaminated sites was the fact that the release under the VCP included a reopener for off-site migration of petroleum, so that the purchaser

might be required to remediate petroleum contamination that migrated from the site.

Many purchasers of petroleum-contaminated sites could not even enroll the VCP because some NYSDEC regions did not want to address petroleum-contaminated sites under the VCP but instead preferred to handle them under the traditional oil spill program. The NYSDEC regional offices often resolve petroleum spills or leaks from USTs by entering into a Stipulation Agreement (“STIP”) where the responsible party or a volunteer agrees to clean up the spill. Senior NYSDEC officials have advised us that the Department considers STIPs to fall within the definition of a cleanup order under the Navigation Law. Because sites contaminated with petroleum that are subject to cleanup order under the Navigation Law are not eligible for the BCP,<sup>103</sup> a volunteer who agreed to remediate a petroleum-contaminated site pursuant to a STIP (as opposed to a VCA) will not be eligible to participate in the BCP.

Another problem with the STIP approach has been that the oil spill program does not ordinarily issue “no further action letters” with covenants not to sue like those used in the VCP. Instead, the regional offices may issue completion letters stating simply that the work has been successfully completed.

The legislature attempted to add a third-party defense similar to that of CERCLA to the Navigation Law.<sup>104</sup> However, the language for this section is very difficult to understand and, in fact, appears to be missing an entire sentence. It appears that the legislature may have tried to add a lender liability exemption to the Navigation Law, but the language is so garbled that it could be interpreted actually to create liability for lenders. The legislature needs to take a careful look at this language when it reconvenes in January.

## VI. Conclusions

The new Brownfield Act is perhaps the most significant piece of environmental legislation enacted in New York State since 1979 and brings the New York Superfund program more in line with those of its neighboring states.

The legislation does provide NYSDEC with enhanced tools to implement an effective brownfield program. The incentives provided both to municipalities (through grants, liability relief and reduction of matching requirements) and private entities (through tax credits) could prove very helpful to certain projects.

The Superfund liability reforms are also helpful, but the absence of bona fide prospective purchaser and contiguous property owner defenses is unfortunate, and the failure to include a lender liability exemption for the Navigation Law may discourage redevelopment of the thousands of petroleum-contaminated sites in New



York. Potentially stringent cleanup standards, overly broad reopeners, possibly burdensome public participation requirements and lack of financial incentives for private developers may also serve as obstacles to brownfield redevelopment. NYSDEC admits that the application process under the BCP will be more time-consuming than the VCP and that the remedy selection process will be more detailed. The need to perform remedial alternatives, the potential involvement of NYSDEC in local land use processes and the absence of enforceable deadlines for NYSDEC means developers may face greater delays and costs under the statutory brownfield program than under the current VCP.

By all accounts, senior management of NYSDEC appears committed to interpret its new authority in a manner that will promote the re-use of brownfields. Whether the legislation provides sufficient incentives to spur the development of contaminated sites in New York may well depend on how NYSDEC implements this new law.

## Endnotes

1. These funds would be provided by the sale of bonds sold by the Environmental Facilities Corporation ("EFC"). Approximately \$33 million will continue to be appropriated to fund the State's Petroleum Spill Program.
2. N.Y. Env'tl. Conserv. Law § 27-1301, *et seq.* ("ECL"). The SSF applies to "hazardous wastes." The Brownfield Act amended the definition of "hazardous waste" to include hazardous substances. This is the opposite of the approach used under the federal Superfund program, where "hazardous substances" includes "hazardous wastes." U.S.C. 9601(14).
3. ECL § 27-1401 to 27-1431; N.Y. Nav. Law §§ 170-197 (2003); ECL § 56-0505.
4. Because the remedial programs have different statutory goals, individual cleanup projects may not be required to complete each of the investigative and remedial steps. For example, when there is a known spill event or the contamination is associated with an underground storage tank, a responsible party may skip certain portions of the Site Characterization process (e.g., records review). In addition, the individual remedial programs continue to use different types of oversight documents used to implement response actions.
5. Previously, the regulated community had to rely on speeches for guidance on the scope of the program, a procedure that one of the authors (Larry Schnapf) has termed "rulemaking by speech-making."
6. ECL § 27-1405(2)(a).
7. *Id.* at § 27-1405(1)(b).
8. *Id.* at §§ 27-1411(1), 27-1415(2)(b).
9. *Id.* at § 27-1405(1)(b).
10. *Id.* at § 27-1411(6).
11. *Id.* at § 27-1405(1)(a).
12. ECL § 27-1411(1).
13. 40 C.F.R. § 300.425(b) (2002).
14. Interim status sites are eligible for the BCP unless they are subject to a corrective action order.
15. N.Y. Nav. Law § 12-170 *et. seq.*
16. NY Comp. Codes R. & Regs. tit. 6, § 375 1.8(a)(1) defines an "inconsequential" as an amount of hazardous waste that could never constitute a significant threat to the environment under any foreseeable exposure scenario ("N.Y.C.R.R.").
17. ECL 27-1405(2).
18. *Id.* at § 27-1305(3).
19. *Id.* at § 27-1305(4).
20. *Id.* at § 27-1407.
21. *Id.* at § 27-1409.
22. *Id.* at § 27-1417. According to conversations with senior NYSDEC representatives, NYSDEC believes that only three of these notice periods require formal public participation. The NYSDEC is currently planning to satisfy the other notice requirements by publishing fact sheets.
23. ECL § 27-1417.
24. Compare ECL § 1417(2)(e) with § 27-1417(2)(b); § 27-1407(7).
25. 6 N.Y.C.R.R. § 375-1.4(c). A significant threat is deemed to exist if the presence of hazardous waste at a site results in, or is reasonably likely to result in a significantly increased risk to the public health; a significant adverse impact to fish and wildlife; a significant adverse impact due to a fire, spill, explosion, or the generation of toxic gases; or other significant environmental damage. 6 N.Y.C.R.R. § 375.1-4(a).
26. ECL § 27-1411(6).
27. *Id.* at § 27-1411(4).
28. *Id.* at § 27-1415(6)(c).
29. *Id.* at § 27-1415(4). The cleanup tables must be completed in the fall of 2004. NYSDEC currently contemplates selecting the criteria to be considered by the end of 2003. The second step, planned for spring 2004, involves the development of the assumed values associated with these criteria. The final step, slated for fall 2004, will include the proposed soil cleanup numbers. Public participation events will be held around these milestones. Until the rulemaking is completed, approvals will continue to be made on a case-by-case basis by NYSDEC in consultation with the DOH.
30. *Id.*
31. *Id.*
32. ECL § 27-1415(4).
33. *Id.* at § 27-1415(8).
34. *Id.* at § 27-1413(4).
35. DEC must consider (i) existing standards, criteria and guidance (e.g., the TAGM 4046 guidance document, the STARS guidance document); (ii) the behaviors of children; (iii) the protection of adjacent uses; (iv) the toxicological, synergistic and/or additive effects of certain contaminants; and (v) the feasibility of achieving more stringent remedial action objectives based on experience under existing remedial programs, particularly where toxicological data are lacking. Based on this last criterion, it appears that DEC will be required to analyze historic cleanup levels achieved in the state Superfund program, VCP and Oil Spill programs to develop the new table of numbers. See ECL § 27-1415(6)(b).
36. ECL § 27-1415(6).
37. *Id.* at § 1415(5)(a)(i).
38. *Id.* at (5)(ii).
39. *Id.* at (5)(iii).

40. *Id.* at (5)(iv).
41. *Id.* at § 27-1415(5)(b).
42. ECL § 27-1415(4).
43. *Id.* at § 15-3109.
44. *Id.* at § 27-1415(7)(b) & (c).
45. *Id.* at § 71-3605.
46. *Id.* at § 71-3605.
47. ECL § 17-3607(2).
48. *Id.* at § 27-1419(2)(b).
49. *Id.* at § 27-1421.
50. *Id.* at § 27-1421(1).
51. *Id.* at § 27-1419(5)(c).
52. *Id.* at § 27-1421(6).
53. ECL § 27-1421(5).
54. *Id.* at § 27-1421(a)(i).
55. *Id.* at § 27-1421(2)(a)(ii).
56. *Id.* at § 27-1421(2)(a)(iii).
57. *Id.* at § 27-1421(2)(a)(iv).
58. *Id.* at § 27-1421(2)(a)(v).
59. ECL § 27-1421(2)(a)(vi).
60. *Id.* at § 27-1421(2)(a)(iv).
61. *Id.* at § 27-1425.
62. *Id.* at §§ 27-1421(2)(a), 27-1425(2).
63. *Id.* at § 72-0403.
64. *Id.* at § 56-0101, *et seq.* NYSDEC regulations implementing the Bond Act are codified at 6 N.Y.C.R.R. § 375-4, *et seq.*
65. The CWSRF is jointly administered by the Environmental Facilities Corporation (“EFC”) and NYSDEC.
66. For example, municipalities can apply for low-interest loans from the CWSRF to satisfy the 25% cost share. The CWSRF can also be used for pre-finance design and construction costs incurred prior to reimbursement of the state share and costs that are ineligible for reimbursement under the Brownfield Act.
67. ECL § 56-0503(2)(h).
68. ECL § 56-0505(3). This has caused some confusion because the SSF does not address petroleum while the ERP does include petroleum-contaminated sites. Some have asked how can a municipality remediate a site with petroleum contamination to the SSF standards when the SSF does not address petroleum? Senior NYSDEC officials have indicated that the reference is simply to the pre-disposal remediation goal of the SSF.
69. ECL § 56-0101(7).
70. *Id.* at § 56-0503.
71. *Id.* at § 56-0503(2)(c).
72. *Id.*
73. *Id.* at § 56-0507.
74. ECL § 56-0505.
75. *Id.* at § 56-0508.
76. *Id.* at § 56-0509.
77. *Id.* at § 56-0509(2).
78. N.Y. Gen. Mun. Law § 970-r(3)(d)(8).
79. N.Y. Tax Law § 21.
80. *Id.* at § 1511(g).
81. *Id.* at § 23(a).
82. ECL § 27-1417(4).
83. *Id.* at § 27-1301, *et seq.* The state Superfund regulations are set forth in 6 N.Y.C.R.R. pt. 375-1.
84. 42 U.S.C. § 9601 (2003), *et seq.*
85. ECL § 27-1313(3)(a).
86. 42 U.S.C. § 9606.
87. ECL § 27-1313(4).
88. The DOH may also order a responsible party to clean up a significant threat under the Public Health Law, which will supercede any order issued by DEC. ECL § 27-1313(3)(a).
89. ECL § 27-1301(1).
90. *Id.* at § 27-1323(4).
91. 42 U.S.C. § 9601(35)(B)(i)(I).
92. *Id.* at § 9607(b)(3).
93. *Id.* at § 9607(r).
94. *Id.* at § 9607(q).
95. Indeed, the legislature included the new post-closing “appropriate care” requirements that were added to the CERCLA innocent purchaser defense in 2002, and also required NYSDEC to institute an “appropriate inquiry” rulemaking identical to that required of EPA under the 2002 CERCLA Amendments. *See* 42 U.S.C. § 9601(35).
96. ECL § 27-1323(1).
97. *Id.* at § 27-1323(2).
98. N.Y. Nav. Law § 12-170, *et seq.*
99. *Id.* at § 173.
100. *Id.* at § 181.
101. 96 N.Y.2d 403, 754 N.E.2d 179, 729 N.Y.S.2d 420 (2001).
102. N.Y. Nav. Law § 181(4).
103. ECL § 27-1405(2)(d).
104. N.Y. Nav. Law. § 181(4).

**David J. Freeman is a partner and Chair of the Environmental Practice Group at the New York office of Paul, Hastings, Janofsky & Walker LLP. Larry Schnapf is an environmental lawyer practicing principally in New York and New Jersey, and is an adjunct professor at New York Law School where he teaches “Environmental Problems in Business Transactions.” Messrs. Freeman and Schnapf are Co-Chairs of the Hazardous Waste/Site Remediation Committee of the New York State Bar Association’s Environmental Law Section and also serve as Co-Chairs of the Section’s Brownfields/Superfund Reform Task Force. The assistance of David W. Rugh in the preparation of this article is gratefully acknowledged.**

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# Insurance Recovery for Mold-Related Claims in New York

By Suzanne M. Avena

The spate of mold litigation in recent years and eye-popping verdicts for damages have led our clients in the real estate industry to question the adequacy of their insurance portfolio in providing a retrospective source of financial recovery for current third-party liability, property damage and cleanup claims arising from past water intrusion conditions. In an attempt to answer this important question, this article will discuss the current status of case law interpreting general liability and property policies as well as offer an interpretation of past environmental liability policies regarding how they may be deemed to provide recovery for mold-related damages.

There are several salient issues to consider in determining whether and what an insured can recover under past policies in the event of mold-related claims: (1) the terms and conditions of coverage, including the absolute pollution exclusion and other secondary exclusions; (2) case law interpreting these exclusions as they regard mold; (3) the science being used to determine date of loss due to mold as it relates to the theories being applied by courts to determine trigger of coverage; (4) allocation of damages; and (5) the applicable statute of limitations.

## Terms and Conditions of General Liability and Property Policies

General liability ("GL") and property policies provide all-risk coverage on an occurrence-basis. Since, under an occurrence-based policy, a claim can be made any time, as long as it relates back to an event that occurred during the policy term, if other exclusions can be overcome, past policies may be an excellent source for retrospective coverage. First, the policy should be examined for any exclusion for loss caused by "smog, rust or other corrosion, mold wet or dry," or the existence of a separate "Fungus, Wet Rot, Dry Rot, Bacteria and Virus" endorsement deleting coverage for damages arising from these conditions. Carriers began adding mold exclusions to most policies after May 2002, as a result of the large losses they were incurring from mold claims. However, before this date, it was not uncommon for policies to be silent on the subject of mold, thus clearing this first hurdle for insurance recovery.

## Absolute Pollution Exclusion

New York courts have not, as of yet, adjudicated whether past GL or other policies existing prior to mold

exclusions cover mold-related claims. However, most of these policies do contain an absolute pollution exclusion. Insurance carriers may attempt to invoke this exclusion as a means to deny coverage. This absolute pollution exclusion, promulgated in 1986, broadly precludes coverage for "bodily injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants." The policies define "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste . . ."

At least one New York trial court has ruled that mold is a "contaminant" that has been released, within the meaning of the pollution exclusion.<sup>1</sup> Additionally, some EPA materials describe mold as an indoor air pollutant. However, the following arguments can be marshaled from analogous case law to assert that mold should not be considered a pollutant: (1) mold is a naturally occurring substance and is an indoor condition issue and not an industrial pollution condition typically excluded in the traditional sense; (2) there is a "reasonable expectation" on the insured's part that this exposure should be covered; and (3) such an interpretation would render the absolute pollution exclusion ambiguous and other related exclusions surplusage, a result not generally preferred by the court.

In the past year, in *Belt Painting Corporation v. TIG Insurance Company*, New York's highest court interpreted the absolute pollution exclusion as not precluding coverage for an insured exposed to indoor paint fumes. Thus, the Court joined the trend recently set by other top state courts in distinguishing cases that do not involve "traditional environmental pollution," but instead turn on issues of indoor conditions, such as paint fumes, insecticides improperly applied for an interior infestation and carbon monoxide poisoning.<sup>2</sup> In *Belt*, the Court reviewed the history of the pollution exclusion and concluded that it was intended by insurers to preclude coverage mainly for pollution caused mainly by "long-term, gradual discharge of hazardous wastes and by-products." A court could draw a strong analogy between the reasoning behind this case law and a case concerning mold. Thus, it is probable a New York court would not consider mold a pollutant, under the rationale that mold occurs and grows naturally and is not released as a waste or by-product of industrial processes.



The second argument is that there is a reasonable expectation that mold should be covered under commercial insurance policies because the definition of a pollutant would not likely include mold according to an ordinary businessperson.<sup>3</sup> When terms are not ambiguous, New York courts examine the contract according to the “sense and meaning” of the parties.<sup>4</sup> New York courts determine the meaning of a word in a commercial insurance policy by examining the “reasonable expectation and purpose of the ordinary business [person] when making an ordinary business contract.”<sup>5</sup> There is no study available to determine the reasonable expectations of an ordinary businessperson with regard to whether mold is a pollutant. Nevertheless, unlike other contaminants, mold is not a “waste” or a pollutant that is a by-product of some human industrial activity. As noted in the Bible, mold is, to coin a phrase from a classic Beatles song, “here, there and everywhere.” Based on this reasoning, the chance that any court will force the word “mold” into the word “pollutant” in the context in which it is used in policies, is doubtful.

Thirdly, an interpretation that mold is a pollutant would create ambiguity in the absolute pollution exclusion, which would then be construed against the insurer as the drafter. The absolute pollution exclusion can be unambiguous in one context and not in another.<sup>6</sup> For example, in *Hicks v. American Resources Ins. Co.*,<sup>7</sup> the exclusion was not ambiguous as to acids, alkalis and toxic chemicals, whereas in *Molton, Allen & Williams v. St. Paul Fire & Mar. Ins. Co.*,<sup>8</sup> the exclusion was found ambiguous with regard to “natural material.” Furthermore, such an interpretation would negate the incorporation of any mold or other related exclusion. For instance, in *Westview Assocs. v. Guaranty Nat’l Ins. Co.*,<sup>9</sup> the insurer issued a GL policy that specifically excluded liability for injuries arising out of lead paint. However, the umbrella policy contained two types of coverage: excess, which specifically incorporated the provisions of the GL policy, and additional primary coverage, which did not contain an incorporation clause. The court decided that an interpretation that the umbrella coverage should totally exclude coverage for lead paint at the very least “created an ambiguity in the umbrella policy which must be resolved against the insurer as the drafter of the agreement,” and furthermore, “rendered the umbrella policy’s specific exclusions mere surplusage, a result to be avoided.” Indeed, if pollution exclusions were meant to include mold, why are there now separate mold exclusions on new liability insurance policies? The New York Court of Appeals has ruled that to negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular

case.<sup>10</sup> Thus, a court could hold that the pollution exclusion is ambiguous with regard to mold, and require the carriers to provide coverage.<sup>11</sup>

## Case Law Beyond New York

Because New York courts have not yet directly addressed mold-related insurance claims, it helps to look to other jurisdictions for guidance. Although other jurisdictions provide an inconsistent interpretation, at best, of pollution exclusion clauses, courts have typically ruled that the exclusions do *not* apply when confronted with mold-related and other like claims. The courts have reached that conclusion in three different ways.

First, the Eighth Circuit has ruled that if a water pipe burst, and this was the “dominant and efficient cause” of a loss, then a mold exclusion would not apply.<sup>12</sup> In that case, a water pipe burst in plaintiff’s basement. When the water receded, mold grew in the basement because of the humidity. The insurance policy explicitly excluded “mold.” The court stated that the lower court must determine whether the mold or the bursting of the water pipe was the “dominant and efficient cause” of the loss before determining coverage.<sup>13</sup> Like Arkansas and other states, New York has adopted the legal theory that requires that an exclusion pertain to the “most direct and obvious causes” in order to have effect.<sup>14</sup> If water damage is the “dominant and efficient cause” of mold, the pollution exclusion does not negate coverage, even if the pollution exclusion were determined to include mold.

Second, it has been held that a bacterium is not excluded as solid, liquid or gas, but is covered as a living organism under a policy with a pollution exclusion.<sup>15</sup> Nor are bacteria, fungi or mold listed as contaminants or hazardous substances under any federal statutes. By similar logic, a court in New York could hold that mold, a living fungus, is not solid, liquid or gaseous and therefore should not fall under the pollution exclusion. Even if any court ruled that the true irritants and contaminants in a mold case were the poisonous non-living mycotoxins that the mold discharges, and not the mold itself, the court could still hold that the mold was nevertheless the dominant and efficient cause of the mycotoxins, and therefore hold that the pollution exclusion would not apply.

Third, a California court has stated that a pollution exclusion clause did not apply to a mold-related claim, even when the applicable insurance policy excluded claims for mold and dry-rot, because the policy had separate exclusions for damages due to “dry-rot” as opposed to “collapses” due to “dry-rot” and the court noted an ambiguity when the exclusions were taken together.<sup>16</sup> In this case, the structure belonging to the

plaintiffs collapsed. The court determined that the dry-rot exclusion would apply only in those situations where the structure did not collapse. This demonstrates the extent to which a court will go to find ambiguity in an insurance policy in order to provide coverage for a mold-related claim.

## Date of Loss and Trigger of Coverage

Insurance recovery from past policies further depends on the court's understanding of the date of loss and its decision as to which of the four theories of triggers of coverage to apply. In mold-related damages, setting the date of loss and which policy should apply is an inexact process. This is because the rate at which mold grows varies depending upon the species of mold and upon the environment in which the species of mold finds itself (i.e., temperature, moisture, and cellulosic food availability). Furthermore, there may be subsequent damage each time there is a water event or the humidity reaches a certain level. Thus, there will be debate on which policy or policies should apply to the loss. Arguably, the date of loss may be the date the building was constructed, the date water first entered the building, the date the mold was discovered, the period of time the mold was growing, or a combination of these coverage triggers, depending on which is applied by the court deciding the issue. Finally, the residual coverage available from these past occurrence-based or renewed claims-made policies will become less valuable over time, as it becomes more and more likely that a new water intrusion event causing mold growth is or will be incurred during the coverage period of a later policy that has a separate mold exclusion endorsed onto it.

In order to determine what policies would be triggered by mold-related claims, it is necessary to determine when the injury or property damage occurred. Courts have taken four different approaches with respect to determining the appropriate trigger:

- **Manifestation:** This theory triggers policies in force when the underlying injury or damage is discovered. For mold, this would be when mold-related property damage is discovered, or when people start reporting ailments that turn out to be the result of exposure to mold.
- **Exposure:** This theory triggers policies in force when a person or property first makes contact with an injury-producing agent. Under this theory, liability for mold injury or damage would fall to the policies in force when the mold first started to build up beyond normal levels, which would be difficult to determine.
- **Injury In Fact:** This theory triggers policies in force when the actual injury occurs, something

that is also difficult to determine in mold cases where there may be a latent period between injury and manifestation of ailments or between the beginning of the mold growth and the discovery of the property damage.

- **Continuous trigger:** This theory triggers coverage under all policies in force from the first exposure through the manifestation of injury or damage.

The American Association of Insurance Services ("AAIS") says that determining when mold-related third-party liability has occurred and what policies must respond will depend on the circumstance of each case and how heavily a court relies on one or more of the four main legal theories regarding liability coverage triggers. AAIS believes that most courts will apply the manifestation and continuous triggers to maximize coverage similar to what was done with asbestos claims, and because the date of loss with mold, as with asbestos, is so difficult to determine.

However, New York follows the "injury-in-fact rule" which says that coverage is triggered when the injury, sickness, disease or disability actually began, not when it was diagnosed; in other words, not by the happening of an occurrence, but at the point in time that the occurrence results in bodily injury.<sup>17</sup> For bodily injury claims, it would be the policy that was in force when the plaintiff was first exposed to mold and disease developed, and for property damage it would be the policies in place when the mold-producing materials were installed. Numerous policies may be involved, increasing the insured's potential coverage as well as spreading the risk for the insurer.

## Allocation Issues

There are two allocation issues that pertain to application of coverage to mold-related claims: how the damages will be allocated between policy years, and how damages will be allocated between different policies. When more than one GL, property, environmental and/or other policies are being considered to provide recovery, complex questions arise as to which policies cover what damages and how to allocate the loss among the policies that may be triggered. Of course the insured will argue that each policy should provide full coverage for the loss, whereas, alternatively, the insurer will likely want to respond on a *pro rata* basis. Also, the insured needs to look to the policy definitions to see which policies may respond to the factual types of damages. For example, the cost of moving tenants to temporary housing may be covered as an extra expense under a property policy and also under a business interruption coverage grant in an environmental policy. Furthermore, there may be specific policy language, for example, within the "Other Insurance" provision, that may

dictate the allocation issue more clearly. Throughout all this, the insured should be mindful to preserve and not to prejudice the rights of the insurers to subrogation against other parties.

## Statute of Limitations

A frequent defense in tort actions is the statute of limitations, which, for personal injury claims due to the latent effects of exposure to toxic substances is typically three years from the date of discovery of the injury by the plaintiff or from the date when, through the exercise of reasonable diligence, such injury should have been discovered by the plaintiff, whichever is earlier.<sup>18</sup> The insurance company can raise this defense to preclude liability, irrespective of what, if any, insurance policy is triggered to provide financial recovery to indemnify and defend. However, there is another provision in the statute of limitations whereby, if the discovery of the *cause* of the injury is alleged to have occurred less than five years after discovery of the injury, an action can be brought within one year from such discovery, if the plaintiff or claimant can prove that “technical, scientific or medical information sufficient to ascertain the cause of injury had not been discovered prior to the expiration of the period within which the action was authorized to be brought.”<sup>19</sup>

An Appellate Court recently held that a cause of action for bodily injury for exposure to a toxic substance such as mold begins to accrue “when the injury is apparent, not when the specific cause of the injury is identified.”<sup>20</sup> This case involved the interpretation of a homeowner’s policy where the plaintiffs were aware of mold in their dwelling in 1995, and they began to suffer adverse physiological effects from the time the substance began to grow. However, they did not file a claim until 1998, so the court dismissed the action as time-barred.

## Secondary Property Policy Exclusions

There are several secondary exclusions to property insurance that make it difficult for insureds to collect damages arising either directly from a mold condition, or from a more “efficient proximate cause” which resulted in the mold condition leading to the damages. There may be an exclusion for “wear and tear, marring and deterioration,” a secondary exclusion sometimes relied upon by insurers to preclude coverage for mold, under the argument that mold growth results from poor maintenance of the insured premises, if the contamination arose gradually over time.

Losses due to an “inherent vice, latent defect, or mechanical breakdown” may be excluded if any of these events cause water damage not otherwise exclud-

ed, but the policy may cover ensuing loss caused by the water (including tearing out and replacing any part of a building necessary to repair the system or appliance), if caused by a covered peril.<sup>21</sup> In named peril policies which do not contain a separate mold exclusion, this exception to the latent defect exclusion has been interpreted by insurance industry experts and at least one court<sup>22</sup> as having the effect of providing coverage for loss caused by mold that is hidden within the walls or ceilings or beneath the floors or above the ceilings if the loss was the result of an accidental discharge or overflow of water from, for instance, an HVAC system, fire sprinkler, household appliance or storm drains and sewer pipes. Furthermore, the Insurance Services Office (“ISO”) has published an ISO Filing Memorandum stating that the coverage under an all-risk policy should not be less than that under a named peril policy. Given the intense pressure of public perception of bad faith claims on the part of insurers and the fact that the “efficient proximate cause” argument has prevailed in some courts,<sup>23</sup> the intent of this exclusion seems to be still open for interpretation.

Other exclusions may omit coverage for losses caused either *directly* or *indirectly* by water damage, from flood, overflow of a body of water or spray or water which exerts pressure on or seeps or leaks through a building, foundation or other structure, regardless of any other cause or event contributing concurrently or in any sequence to the loss. This “concurrent causation” type language does not bode well if claims from mold are precipitated by any of these enumerated events. Finally, loss due to faulty, inadequate or defective “design, specifications, workmanship, repair, construction, renovation or remodeling, grading, compaction” or “materials used in repair, construction, renovation remodeling or maintenance” may be excluded in the policy. However, such an exclusion bears further examination to see if *ensuing loss* such as mold, caused by any of the immediately aforementioned proximate causes, if not excluded elsewhere in the policy, may be covered.

Amendatory endorsements may delete any “loss in value to the dwelling due to the requirements of any ordinance or law; or the costs to comply with any ordinance or law which requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants on the dwelling.” In this case, if governmental agencies were to require testing and removal of mold, these costs would not be covered. However, the policy should be checked carefully for related provisions that may actually put coverage back into the policy for mold remediation in limited amounts, if triggered by “governmental ordinance.”



## Environmental Insurance Policies

An insured may also look to past environmental insurance policies for coverage. Generally, these policies are claims-made, which means that the claim must have arisen and been filed during the multi-year policy term. However, if the pollution liability policy has been kept in force continuously, in effect it becomes an occurrence-based policy, and an insured may have a chance to recover for mold-related damages manifested at a later date than the original occurrence, barring any applicable exclusionary language to the policy in existence at the time that mold was incurred.<sup>24</sup> Or if the mold-related damages relate back to a pollution condition that occurred during the term of a pollution policy with no mold exclusions, and an extended reporting period ("ERP") was purchased that is still in force, there also may be coverage.<sup>25</sup>

A possible limitation to recovery under pollution liability insurance is if the policy defines Remediation Expenses as including only those expenses required by laws or a legally executed state voluntary program governing the cleanup. Since remediation of mold contamination is currently not governed by any federal or state statutes or regulations, the carrier may attempt to block coverage based on an interpretation that remediation for the mold condition is thereby not included. One possible way to avoid such a coverage denial would be for the insured to enter into the Brownfield Cleanup Program with the state, following, of course, a weighing of the various business and legal issues that could arise as a result of such action.<sup>26</sup> The New York Brownfield Cleanup Program is voluntary and, for the most part, self-directed and without admission of liability. Furthermore, entering the state program offers the additional benefit of providing an agency "sign off" of the cleanup, for the purpose of securing coverage for mold going-forward. However, since there are no cleanup standards for mold, it would have to be determined if remediation based on USEPA guidelines would be accepted by the agency and the carrier in order to trigger coverage.

An examination of the facts (i.e., the number of affected common and/or connected structures) and causative sources of the mold contamination must be made and measured against the per incident and aggregate limit of liability of the policy, as well as the deductible per loss, in order to avoid either the costly imposition of repetitive deductibles or, alternatively, the limitation of a per incident cap to coverage. For example, let's say there were pervasive mold conditions in a residential townhouse development, but the sources of the mold could be tied to three separate water intrusion events, such as an HVAC problem, faulty tub enclosure

construction, and faulty shower pan construction. If the policy has a \$1 million per incident and a \$5 million per aggregate limit of liability with a \$50,000 deductible per incident, it is possible the carrier would limit coverage for damages to three incidents at a cap of \$3 million and apply \$150,000 in three separate \$50,000 deductible charges to the insured, as opposed to allowing for the full \$5 million limit of liability of the policy to be available to the loss with only one deductible charge of \$50,000.

There are other terms of the policy that will need to be examined to determine just how much recovery for certain damages will be possible. For example, in addition to mold remediation of conditions "on, at, under or emanating from" the insured property, will the insured be entitled to build-back construction costs? The insured should check if the definition of Remediation Expense includes not only the treatment of Pollution Conditions, but Replacement Costs, which are typically defined to include "costs necessarily incurred to repair or replace real or personal property damaged during the course of Remediation Expense in order to restore the property to the condition it was in prior to Remediation Expense," but not costs associated with improvements or betterments. Additionally, under the third party coverage grant for pollution liability insurance, the policy usually pays for "Loss," which is usually defined to include "Property Damage," but may or may not be further amplified to include "physical injury to or destruction of tangible property, provided that it is caused by Pollution Conditions," as further defined under the policy.

Environmental policies typically contain an exclusion for "Prior Known but Non-Disclosed Pollution Conditions." Thus, an examination should be made of all application materials submitted to the carrier to ascertain if any of the reports contained information regarding a mold condition that occurred or would be substantially likely to occur. These are some of the possible exclusionary or limiting terms affecting recovery for mold-related claims under past environmental policies.

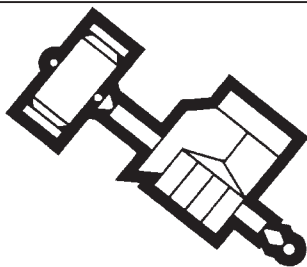
## Conclusion

As can be seen from the foregoing, the analysis and successful recovery of insurance on behalf of an insured for mold-related damages is a complicated and dynamic issue, requiring not only a detailed examination of sometimes double-negative and often cross-referenced policy terms, but a tracking of current and developing case law on the issue, and an appropriate understanding and application of the science of mold as it pertains to the date of loss and allocation of damages.

## Endnotes

1. *Health Resources, Inc. v. Merchants Ins. Co. of New Hampshire*, N.Y.L.J., Oct. 27, 1997, at 26, col. 3 (Sup. Ct., Suffolk Co.).
2. *Belt Painting Corporation v. TIG Ins. Co.*, 100 N.Y.2d 377, 763 N.Y.S.2d 790, 795 N.E.2d 15 (2003); *MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635, 3 Cal. Rptr. 3d 228, 73 P.3d 1205 (2003); *See Richardson v. Nationwide Mutual Ins. Co.*, 826 A.2d 310 (D.C. 2003), *vacated and reh'g granted*, 832 A.2d 752 (D.C. 2003).
3. *Atlantic Mutual Ins. Co. v. McFadden*, 413 Mass. 90, 595 N.E.2d 762 (1992).
4. *In re Estates of Covert*, 97 N.Y.2d 68, 76 (2001), citing *Barash v. Ins. Co. of No. Am.*, 451 N.Y.S.2d 603, 605, 114 Misc. 2d 325, 326 (1982); *Hartol Prods. Corp. v. Prudential Ins. Co. of Am.*, 290 N.Y. 44, 47, 47 N.E.2d 687 (1943), citing *Johnson v. Travelers Ins. Co.*, 269 N.Y. 401, 408 (1936).
5. *Baughman v. Merchants Mutual Ins. Co.*, 87 N.Y.2d 589, 593 (1996), citing *Michaels v. City of Buffalo*, 85 N.Y.2d 754, 757, 651 N.E.2d 1272, 1273 (1995), citing *Bird v. St. Paul Fire & Mar. Ins. Co.*, 224 N.Y. 47, 51 (1918).
6. *Continental Casualty Co. v. Rapid American Corp.*, 80 N.Y.2d, 640, 653 (1993).
7. 544 So. 2d 952, 954 (Ala. 1989).
8. 347 So. 2d, 95, 99 (Ala. 1997).
9. *Westview Assocs. v. Guaranty Nat'l Ins. Co.*, 95 N.Y.2d 334, 340 (2002), citing *Continental Casualty Co. v. Rapid American Corp.*, 80 N.Y.2d 640, 652 (1993).
10. *Continental* at 646–47.
11. *Confer, 80 Broad St. Co. v. United States Fire Ins.*, 389 N.Y.S.2d 214, 88 Misc. 2d 706 (1975) in which loss sustained as a result of the buckling of marble facing on a building due to the combination of rain, frost, moisture seepage, rust and corrosion, and original improper construction of building forty years later came squarely within the policy exclusion for “rust or corrosion, mould [sic], wet or dry rot.” *Aff'd*, 389 N.Y.S. 2d 214 (2d Dep't 1976).
12. *Shelter Mutual Ins. Co. v. Tommy Maples, et al.*, 309 F.3d 1068, 1071 (8th Cir. 2002).
13. *Id.* at 1071.
14. *See Ginsberg v. New York Property Ins. Underwriting Ass'n*, 620 N.Y.S.2d 52, 53, 210 A.D.2d 130, 131 (1st Dep't 1994), *Album Realty Corp. v. American Home Assurance Co.*, 80 N.Y.2d 1008, 607 N.E.2d 804 (1992).
15. *See Keggi v. Northbrook Property & Casualty Ins. Co., et al.*, 199 Ariz. 43, 13 P.3d 785 (App. Div. 2000).
16. *Glaviano v. Allstate Ins. Co.*, 35 Fed. App. 493, 496 (9th Cir. 2002).
17. *Continental Gas Co. v. Rapid-American Corp.*, 177 A.D.2d 61, 581 N.Y.S.2d 669 (1992), (1st Dep't 1992), *aff'd*, 80 N.Y.2d 640, 593 N.Y.S.2d 966 (1993); *Greater New York Mutual Ins. Cos. v. Royal Ins. Co.*, 238 A.D.2d 261, 657 N.Y.S.2d 326 (1st Dep't 1997); *American Empire Ins. Co. v. PSM Ins. Cos.*, 687 N.Y.S.2d 32 (1st Dep't 1999); *Campbell v. Metropolitan Property & Casualty Ins. Co.*, 98 CIV 5328, 2000 WL297174 (S.D.N.Y. Mar. 20, 2000), *aff'd in part, rev'd in part*, 239 F.3d 179 (2d Cir. 2001).
18. N.Y. CPLR 214(c)(2) (McKinney's 2003).
19. N.Y. CPLR 214(c)(2) (McKinney's 2003).
20. *Searle v. City of New Rochelle*, 742 N.Y.S.2d 314 (2d Dep't 2002).
21. “Covered perils” typically include windstorm, fire, lightning, aircraft impact, etc. and damage directly caused by leakage or accidental discharge from automatic fire protective systems.
22. *Home Ins. Co. v. McClain*, No. 05-97-0149, 2000 WL 144115 (Texas App., February 10, 2000).
23. *Atlantic Mutual Ins. Co. v. McFadden*, 413 Mass. 90, 595 N.E.2d 762 (1992).
24. Before May 2002, pollution liability policies did not typically contain a mold exclusion. Thereafter, mold coverage was either limited or excluded, but could be “bought back” from the insurer after going through additional underwriting.
25. ERPs can be as long as five years after the policy expiration.
26. At this time, in New York, there are some new, untested procedural and administrative issues to consider in entering the new Brownfield Cleanup Program.

**Suzanne M. Avena is an attorney with the Environmental Department at the New York City law firm of Paul, Hastings, Janofsky and Walker LLP. Ms. Avena advises clients in all areas of environmental law and regulatory compliance and performs due diligence for complex real estate transactions. Her practice focuses on analyzing environmental aspects of major real estate and corporate transactions. She has particular experience in the application of environmental insurance to contaminated property redevelopment projects and as a tool to achieve balance sheet integrity against corporate contingent environmental liabilities. She received her B.S. degree from Cornell University and her J.D. degree from St. John's University School of Law. Ms. Avena is a past co-chair of the New York State Bar Association's Environmental Insurance Committee and a frequent lecturer on the topic at Bar Association conferences.**



# Administrative Decisions Update

Prepared by Jeffrey L. Zimring

**CASE:** *In re the Application for Permits to Construct and Operate a Solid Waste Management Facility in Ava, Oneida County, Pursuant to Articles 15, 19, 24, and 27 of the Environmental Conservation Law, and Parts 201, 301, 364, 608, and 663 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York.*

**DECIDED:** March 19, 2004

**AUTHORITY:** Environmental Conservation Law ("ECL") Articles 15, 19, 24, and 27  
Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (6 N.Y.C.R.R.)  
Parts 201, 301, 364, 608, and 663

**DECISION:** The Department of Environmental Conservation ("DEC") Commissioner Erin M. Crotty (the "Commissioner") considered the application of the Oneida-Herkimer Solid Waste Management Authority (the "Authority") for the permits necessary to construct and operate a full-service sanitary landfill (the "Landfill") in the town of Ava, Oneida County. After an adjudicatory hearing that took place in September and October of 2002, Administrative Law Judge Edward Buhrmaster ("ALJ Buhrmaster" or the "ALJ") concluded that the Authority had met its burden of proof on all issues presented for adjudication and recommended that the Commissioner issue the appropriate permits. The Commissioner agreed with the ALJ and directed the DEC staff to issue the appropriate permits. The Commissioner, however, did address one issue raised by objectors to the Landfill (the "Objectors") regarding a proposal for a full-scale pump test proposed by the Objectors.

In a related proceeding, the Objectors sought to reclassify certain wetlands in the project area from Class II to Class I. The Objectors asked the Commissioner to hold the permit proceedings in abeyance until the wetlands reclassification determination had been completed. In March 2004, the Commissioner denied the

request to reclassify the wetlands. Any further delay, therefore, was unnecessary and the Objector's request for an abeyance was rendered academic.

The Objectors, after the record before the ALJ had been closed, argued that a full-scale pump test was necessary to determine whether an aquifer underlying the project site met the criteria for classification as a principal aquifer. The Authority responded by arguing that there was no legal authority to support the proposition that additional testing of the project site could be required after the record was closed; that the results of the test would not affect the final permitting decision because the results, while verifying the availability of the water, could not undermine the determination that the aquifer was confined; and that the Objectors had ample opportunity to conduct the test during the pendency of the proceedings.

The DEC asserted that the Authority's hydrogeological testing had been both extensive and complementary. Furthermore, two independent departments within the DEC had reviewed the Authority's aquifer site characterization process. The record, therefore, provided the DEC with a high degree of confidence that there was an adequate basis upon which the permit application could be considered.

As a preliminary matter, the Commissioner cited ECL § 70-0117(2) for the proposition that additional information may be requested of the applicant at any time during the permit process—including after the adjudicatory record has closed. The standard, however, for determining whether the additional information will be required is whether the information is "reasonably necessary" to make the required legal and factual determinations. Requiring additional information from an applicant during the later stages of the permit process should be limited to those instances in which the information is important to the decision-making process (i.e., "there is a likelihood that it will change the basic outcome of the proceeding") and the record is lacking the information.



An aquifer is a principal aquifer when it is both highly productive and highly vulnerable to contamination from activities conducted on the land over the aquifer. In this case, the ALJ had previously ruled that the permeability of the layer immediately above the aquifer was such that the aquifer was not unduly vulnerable to activities at the Landfill site. While the full-scale pump test that the Objectors asserted was necessary would address the productivity of the aquifer, it would not provide any additional information regarding the permeability of the layer above the aquifer. Therefore, the pump test results would not, even if it were discovered that the productivity criteria of a principal aquifer was met, undermine the ultimate determination that the aquifer is confined and not vulnerable to contamination from Landfill activity.

## Background

On January 30, 2001, ALJ Buhrmaster certified four broad issues that required adjudication: 1) the Landfill's impact on wetland resources; 2) the need for the Landfill, especially in light of the fact that the project would involve filling of regulated wetlands; 3) the impact of the Landfill on several threatened bird species; and 4) the impacts of the Landfill on project-site hydrogeology.

In an interim decision, dated April 2, 2002, the Commissioner affirmed two issues for adjudication, modified one issue, removed one issue from consideration altogether, and added one additional issue to the adjudicatory agenda. The impacts of the Landfill on project-site hydrogeology and threatened bird species continued to the adjudicatory hearing. The Commissioner ruled, however, that the extent to which the project-site wetlands were state or federally regulated wetlands had been adequately addressed by the Authority and that the mitigation measures proposed and agreed to by the Authority, including the creation of replacement wetlands, were sufficient to compensate for any wetlands that will be filled by the Landfill. The Commissioner also ruled that the need for the Landfill had been demonstrated by the Authority and the Objectors had not "seriously challeng[ed] the [DEC's] determination that the need for the Landfill outweighed the loss of the wetlands to be impacted." The Commissioner added to the issues for adjudication the air quality effects caused by the emissions of particulate matter of ten microns or less (PM10) and the pollutants vinyl chloride and acrylonitrile.

## Threatened Bird Species Habitat Impacts

After the Commissioner's interim decision affirmed the ALJ's ruling with respect to the effects of the Landfill on threatened bird species, the ALJ granted a request by the Objectors to conduct a further survey of

the project site. At the completion of the survey, the Objectors withdrew from the consideration of the issue. The ALJ, therefore, concluded that the siting of the Landfill did not violate the DEC's regulations with respect to the destruction or adverse modification of the critical habitat of an endangered or threatened species.

## Wetlands Issues

The surviving issues regarding the effect of the Landfill on regulated wetlands primarily concerned the groundwater suppression system, the effect of the leachate collection system on area hydrogeology, and the effect of the Landfill on area flood flows. These issues were substantially interrelated with the other hydrogeology issues that were advanced to adjudication. All of the remaining wetlands issues, therefore, were considered in the context of the adjudication of the hydrogeology issues.

## Hydrogeology

Beneath the Landfill site is a buried bedrock valley with extensive areas of saturated permeable material. The Objectors classify the area as a buried valley aquifer and further contend that it qualifies as a principal aquifer as that term is used in the regulations.<sup>1</sup> DEC Technical Operational Guidance Series ("TOGS") memorandum 2.1.3 provides further clarification to the definition of principal aquifer by stating that they are "highly productive" and "highly vulnerable." The Authority has demonstrated to the satisfaction of the ALJ that although the buried valley may qualify as an aquifer, it is sufficiently protected by a layer of low-permeability material such that it is not vulnerable to contamination from the operation of the Landfill. The Objectors argue, though, that further pump-testing is required to determine the productivity of the buried valley aquifer. The ALJ disagreed and ruled that the results of a pump test would not change the classification because of the previous finding that it is not highly vulnerable.

It was also asserted by the Objectors that the groundwater suppression system contained in the project design would have the unintended effect of facilitating leachate migration off-site. The groundwater suppression system is to exist under the entire Landfill footprint and will be of a six-inch layer of high-permeability fill. Although the Objector's witness claims that the system, as a whole, will increase the mixing of leachate with groundwater, the ALJ found, based on testimony by the Authority's consultants, that the high-permeability material will increase the lateral movement of groundwater and, therefore, prevent the mixing of leachate and groundwater. Furthermore, according to the Authority's witness, the suppression system will act

to reduce the hydraulic gradient away from the Landfill. This reduction (including, in some instances, a reversal) in hydraulic gradient will work to minimize the migration of contaminants away from the site. The ALJ concluded, therefore, that the groundwater suppression system would, contrary to the Objector's contention, act to prevent the migration of contaminants from the site.

The Objectors argued that the Authority incorrectly characterized the critical stratigraphic section and groundwater flows under the Landfill. The modeling procedure used by the Authority, according to the Objectors, is inadequate and, consequently, unreliable. The Authority used the USGS Modular Three-Dimensional Finite Difference Groundwater Flow Model (MODFLOW) to model the groundwater flow conditions under the Landfill site. The model is well-documented, publicly available, and universally accepted. Further, to simulate the transport of particles within the flow-field predicted by MODFLOW, the Authority's consultants used the USGS three-dimensional particle tracking technique called MODPATH—also well-documented, publicly available, and universally accepted. The Objectors asserted that the use of MODFLOW was inappropriate for this type of application and that several of the inputs used by the consultants were inaccurate. The ALJ, however, ruled that MODFLOW and MODPATH reasonably represented site conditions, that the models were appropriately calibrated, and that the data used to run the models was reasonably collected from site investigation and background literature.

## Air Quality Impacts

Although the Commissioner added the air quality impacts to the adjudicatory agenda, the Objectors did not pursue the issue in the hearing. The ALJ, therefore, made the requisite findings based on pre-filed testimony from the Authority, the DEC and the Objectors. The Authority argued that the concentration of vinyl chloride and acrylonitrile escaping from the Landfill would be adequately controlled pursuant to permit conditions included in the facility's draft permit. The DEC agreed with the Authority's position, adding that the uncontrolled emissions were not expected to exceed applica-

ble guidelines for the first eighteen years of Landfill operation. Furthermore, once the Landfill's gas collection and control system was operational, actual data would be available to evaluate the emissions from the Landfill. The Objectors argue that, contrary to the Authority's assertions, the estimates of the Landfill's emissions are not conservative and unsupported by the evidence. The ALJ found that the emissions of the pollutants would not exceed state guidelines for the life of the Landfill.

The Objectors did not submit evidence with respect to PM10. The ALJ's findings, therefore, were identical to the evidence provided by the Authority and the DEC. There are some PM10 emissions expected from various aspects associated with the operation of the Landfill. The concentrations of the PM10, though, will not exceed national ambient air quality standards during the life of the landfill.

## Conclusion

The ALJ's hearing report and findings provided the Commissioner with an adequate basis on which to make the findings required by the State Environmental Quality Review Act. The Commissioner concluded that, consistent with social, economic, and other essential considerations, including reasonable alternatives, the Landfill avoids or minimizes adverse environmental impacts to the maximum extent practicable. Additionally, the permits contain the mitigation measures necessary to ensure the avoidance or minimization of adverse environmental impacts. The DEC staff is directed to issue the permits requested by the Authority.

## Endnote

1. A principal aquifer is "a formation or formations known to be highly productive or deposits whose geology suggests abundant potential water supply, but is not intensively used as a source of water supply by major municipal systems at the present time." 6 N.Y.C.R.R. § 360-1.2(b)(10)(ii).

**Jeffrey L. Zimring is a first-year associate with Whiteman Osterman & Hanna LLP in Albany, New York.**



# Recent Decisions in Environmental Law

Student Editor: Brian Smetana

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

## ***Alaska Department of Environmental Conservation v. Environmental Protection***

***Agency, et al.***, 124 S. Ct. 983; 157 L. Ed. 2d 967 (January 21, 2004)

**Facts:** This case involved a zinc concentrate mine operated by Teck Cominco Alaska Inc. ("Cominco") in northwest Alaska approximately 100 miles north of the Arctic Circle. The mine, known as the Red Dog Mine, is the region's largest private employer and a "major emitting facility" under the Clean Air Act ("CAA").<sup>1</sup> Since it is in an area that meets the National Ambient Air Quality Standards as an "attainment area," it is subject to the Prevention of Significant Deterioration ("PSD") program. In 1988, it obtained a PSD permit from the Alaska Department of Environmental Conservation ("ADEC") to operate five diesel electric generators, designated MG-1 through MG-5, whereby two were permitted to operate only in standby status. In 1994, it obtained a second PSD permit to allow the addition of a sixth generator, MG-6. Accompanying the second permit was an operational cap that allowed 5 out of 6 to run full time. In 1996, Cominco applied to the ADEC for another PSD permit for modification of the facility to allow increased zinc production and electricity generation by MG-5, which would together increase nitrogen oxide ("NOx") emissions by more than 40 tons per year.<sup>2</sup>

Under the PSD program, any construction or modification of a major emitting facility would require the use of "best available control technology" ("BACT").<sup>3</sup> In 1999, ADEC initially proposed that the BACT for MG-5 was selective catalytic reduction ("SCR"),<sup>4</sup> which reduced NOx emissions by 90%. Cominco then amended its application, adding a seventh generator, MG-7, and suggested a substitute BACT known as "Low NOx." This method could achieve a 30% reduction in NOx by improving fuel atomization and enhancing the mixture of air and fuel. In ADEC's first draft PSD permit, it recognized that SCR was the most stringent technology then technically and economically feasible;<sup>5</sup>

however, it concluded that the BACT was in fact Low NOx. Under this scheme, all seven generators would be fitted with Low NOx, instead of fitting just MG-5 and MG-7 with SCR.

In July 1999, the National Parks Service and EPA submitted comments objecting to the fact that ADEC was attempting to offset new emissions by imposing new controls on other emission units that were not even subject to BACT. ADEC's second draft PSD permit now concluded that SCR imposed a disproportionate cost on Cominco, and therefore Low NOx was BACT. EPA suggested that ADEC include an analysis of the adverse economic impacts of SCR on Cominco. In December 1999, the final permit was issued with no judgment made as to the economic impacts on Cominco; however, ADEC did express concern with economic impacts on the region and Cominco's "world competitiveness."

EPA issued three stop orders to ADEC under sections 113(a)(5) and 167 of the CAA. ADEC was prohibited from issuing the PSD permit without adequately documenting why SCR was not BACT for MG-7. Cominco was prohibited from commencing construction or modification at the Red Dog Mine. ADEC and Cominco then petitioned the U.S. Court of Appeals for the Ninth Circuit to review the EPA's orders. The Ninth Circuit upheld the EPA's orders, after which the Supreme Court granted certiorari.

**Issue #1:** Whether the EPA had supervisory authority over the reasonableness of the agency's BACT determination.

**Analysis:** In a 5-4 Supreme Court decision, Justice Ruth Bader Ginsburg's opinion, in which Justices John Paul Stevens, Sandra Day O'Connor, David H. Souter, and Stephen Breyer joined, affirmed the Ninth Circuit's ruling, holding that the EPA had the authority to prevent construction of a major emitting facility, even though a state agency had issued a permit for the facility, if the state agency's BACT determination was unreasonable. The Court's opinion relied on Clean Air Act §§



113(a)(5) and 167 as the basis for the EPA's "encompassing supervisory responsibility over the construction and modification of pollutant emitting facilities in areas covered by the PSD program."<sup>6</sup>

EPA asserted that its authority to take a supervisory role in the states' compliance with CAA requirements generally is outlined in section 113(a)(5), which allows the EPA to issue an order prohibiting construction, to prescribe an administrative penalty, or to commence a civil action for injunctive relief.<sup>7</sup> EPA also noted that the CAA specifically provides for EPA action in PSD programs in section 167.<sup>8</sup> In accordance with EPA, the Court interpreted these provisions to empower EPA to check a state's unreasonably lenient BACT determination. The Court reasoned that significant legislative history existed indicating that the purpose of the PSD program was prevention, and that without a federal check, new plants would play one state off another with threats to locate to a state with the most lax pollution controls.<sup>9</sup>

ADEC argued that the CAA's BACT definition assigns to "the permitting authority" alone the decision of what qualifies as BACT. Although it acknowledged that the CAA's definition of BACT gave the state permitting authority responsibility for determining what BACT was for a particular facility, the Court agreed with the EPA's reading of the BACT definition as requiring not just a BACT determination, but a determination "reasonably moored to the Act's provisions."<sup>10</sup> Therefore, the Court concluded, a BACT determination that does not select the emission control technology that results in the maximum pollutant reduction achievable for a facility, taking into account energy, environmental, and economic impacts and other costs, is not a proper BACT determination. The Court followed the reasoning that Congress would not have vested EPA with authority to simply check that the term "BACT" appears on the PSD permit. In this way, sections 113(a)(5) and 167 served as a catalyst for reaching the goals of the PSD program.

ADEC also argued that a BACT determination may only be enforced through state administrative and judicial processes. It noted that this was the only way to ensure that EPA carries the burden of proof and to promote certainty. The Court reasoned that a federal agency's decision to enforce federal law was not intended by the CAA to be remitted to state court. Additionally, the Court noted that the EPA submitted a complete record and all the parties agree to its adequacy.

**Dissent:** The dissent's main apprehension was that the Court's holding undercuts the role of state agencies in carrying out the mandates of the Clean Air Act.<sup>11</sup> Justice Kennedy argued that, even though the statute iden-

tifies the state permitting authority (here the ADEC) as the entity responsible for determining BACT, that "state agency can no longer represent itself as the real governing body" because "a single federal administrator can in the end set all aside by a unilateral order."<sup>12</sup> Justice Kennedy further argued that sections 113(a)(5) and 167, the crux of the conclusion reached by EPA and the majority, are not even applicable since ADEC complied with the other requirements of CAA.<sup>13</sup>

**Issue #2:** Whether the EPA properly determined that the agency's BACT determination lacked evidentiary support.

**Analysis:** Upon review of the ADEC's permitting process for the Red Dog Mine, the Court concluded that the EPA was not arbitrary and capricious in determining that the ADEC's BACT decision for the facility lacked evidentiary support. The Court reached this end since there was, admittedly, no financial basis for the ADEC's conclusion that SCR was not an economically viable option in this case.

ADEC argued that the "disproportionate cost" between SCR and Low NOx justified the selection of the latter.<sup>14</sup> However, ADEC relied on Cominco's suggestion rather than its own analysis or that of the EPA, partly because Cominco refused to provide relevant financial data. The Court noted that Cominco's proposal assumed that one or more generators would be inactive at all times.<sup>15</sup> However, if all seven were operational, using Low NOx would actually increase NOx emissions by 79 tons per annum.<sup>16</sup> Also, the Court articulated that no record evidence suggested that the mine would have to cut personnel, raise zinc prices, or lose profitability and competitiveness. Thus, the Court concluded that ADEC's basis for switching from SCR to Low NOx was reduced to a desire to support Cominco for its economic contributions to Northwest Alaska, and therefore fell well below the standard of demonstrating SCR as an inappropriate BACT.

William Deveau '04

## Endnotes

1. Defined as any source emitting more than 250 tons of NOx per year. Major emitting facilities require a PSD permit. Clean Air Act § 165, 42 U.S.C. § 7475.
2. According to the Alaska State Implementation Plan, "modifications to major emitting facilities that increase NOx emissions in excess of 40 tons per year require a PSD permit." 40 C.F.R. § 51.166(b)(23)(i).
3. 42 U.S.C. § 7475(a)(4).
4. SCR involves injecting of ammonia or urea into the exhaust before the exhaust enters a catalyst bed made with vanadium, titanium or platinum. The reduction reaction occurs when the gas passes over the bed and the NOx and ammonia combine to become nitrogen, oxygen and water.

5. ADEC employed the “top-down” process for determining BACT, whereby all available control technologies are ranked in descending order of control effectiveness. The “top” alternative is selected, unless the applicant demonstrates that technical, energy, environmental or economic considerations justify that the most stringent technology is not achievable. *App.* 61.
6. *Alaska Department of Environmental Conservation v. Environmental Protection Agency, et al.*, 124 S. Ct. 983; 157 L. Ed. 2d 967 (January 21, 2004).
7. 42 U.S.C. § 7413(a)(5).
8. 42 U.S.C. § 7477.
9. 124 S. Ct. at 1000 (noting that preventing significant deterioration of air quality in areas with relatively clean air was unlikely to be achieved without EPA oversight to prevent states from engaging in a “race to the bottom”).
10. *Id.*
11. See 124 S. Ct. 983, 1010, *dissenting opinion* (arguing that the majority’s holding conflicted “with the express language of the Clean Air Act . . . , with sound rules of administrative law, and with principles that preserve the integrity of States in our federal system”).
12. *Id.* at 1017, *dissenting opinion*.
13. See *id.* at 1011, *dissenting opinion* (arguing that “if a State has complied with the Act’s requirements, §§ 113(a)(5) and 167 are not implicated and can supply no separate basis for the EPA to exercise a supervisory role over a State’s discretionary decision”).
14. *Id.* at 990.
15. *Id.* at 995 (quoting *App.* 87).
16. *Id.*

## ***The New York Environmental Lawyer* Available on the Web [www.nysba.org/environmental](http://www.nysba.org/environmental)**



### **Back issues of *The New York Environmental Lawyer* (2000-present) are available on the New York State Bar Association Web site**

*Back issues are available at no charge to Section members only. You must be logged in as a member to access back issues. For questions, log-in help or to obtain your user name and password, e-mail [webmaster@nysba.org](mailto:webmaster@nysba.org) or call (518) 463-3200.*

### ***The New York Environmental Lawyer* Index**

For your convenience there is also a searchable index in pdf format. To search, click “Find” (binoculars icon) on the Adobe tool bar, and type in search word or phrase. Click “Find Again” (binoculars with arrow icon) to continue search.

# Scenes from the Environmental Law Section Annual Meeting Program

Friday, January 30 • New York Marriott Marquis

***Turning the Corner on Brownfields:  
The Effect of Recent Federal and State Legislation  
On Redevelopment of Contaminated Property in New York***



Walter E. Mugdan



Susan Bromm



Paul F. Simon



Linda R. Shaw



(l-r) Jim Periconi, Susan Bromm  
and Walter Mugdan.



(l-r) Walter Mugdan, David Freeman, Linda Shaw  
and Paul Simon.



The attendees found the program timely,  
interesting and informative.



The program was well-attended, with over  
250 registrants.



## Annual Meeting Awards

The Environmental Law Section was pleased to honor several distinguished guests on their contributions to the environment at the Section's Annual Meeting in New York City on January 30, 2004.

### Legislation of the Decade

Awards were presented to: State Senator Carl L. Marcellino, Chair of the New York State Senate Environmental Conservation Committee; State Assemblyman Thomas P. DiNapoli, Chair of the New York State Assembly Environmental Conservation Committee; Dale Desnoyers of the New York State Department of Environmental Conservation; and Carl Patka of the New York Governor's office for their long-standing and successful efforts in the enactment of the state's landmark brownfields legislation in 2003.

State Senator Marcellino and State Assemblyman DiNapoli addressed the Section at its luncheon and reviewed the difficulties and the ultimate success in passing state brownfields legislation. Both legislators expressed the hope that the legis-

lation would lead to enhanced economic development in New York State while ensuring essential environmental protections in the re-utilization of contaminated properties.

The Section's keynote speaker, Professor Jeffrey D. Sachs, was also the recipient of an award from the Environmental Law Section. Professor Sachs, who is the



Director of the Earth Institute at Columbia University and Special Advisor to the U.N. Secretary-General on the Millennium Development Goals, has long been active on environmental issues. Professor Sachs, in his remarks to the Section, outlined certain critical international environmental problems and discussed innovative approaches to

address and resolve them. A transcript of his remarks appears on pages 8-11 in this issue of *The New York Environmental Lawyer*.

In addition, awards were given to several Section members in recognition of their work on behalf of, and commitment to, the Environmental Law Section.

The current Section Chair, James Periconi, presented a gift on behalf of the Section to his immediate predecessor, John Greenthal. Mr. Periconi noted Mr. Greenthal's considerable service and dedication to the Environmental Law Section and thanked Mr. Greenthal for his significant contributions to both the Section and the practice of environmental law.



(l-r) Ginny Robbins, Carl Marcellino and David Freeman.



(l-r) Thomas DiNapoli, David Freeman and Jim Periconi.



(l-r) Jim Periconi and Jeffrey Sachs.



(l-r) John Greenthal and Jim Periconi.



(l-r) Joel Sachs, Jonah Triebwasser, Maureen Leary, Drayton Grant, Kevin Reilly and Jim Periconi.

Section Council member Joel Sachs presented awards for service to four Section members: Drayton Grant, for her long-standing service to the Section and, in particular, for her work on wetland issues; Jonah Triebwasser, for his work and leadership on continuing legal education; Maureen Leary, for her work and leadership on continuing legal education; and Kevin Reilly, for his exceptional work as editor of the Section's journal (*The New York Environmental Lawyer*).

## 2004 Minority Fellowships in Environmental Law

The New York State Bar Association's (NYSBA) Environmental Law Section announced that three outstanding law students have been selected to receive the minority fellowships in environmental law. Eileen Millett and Peter Casper, co-chairs of the Section's Environmental Justice Committee, presented this year's recipients:

- Karen T. Beltran, a second-year law student at the University at Buffalo Law School. Ms. Beltran is a graduate of Purchase College where she received a degree in anthropology, with honors. During the summer of 2003, Ms. Beltran was a judicial intern for the Hon. George A. Yanthis, U.S. Magistrate Judge. During her undergraduate studies Ms. Beltran worked with the New York Public Interest Research Group (NYPIRG), advocating the Pesticide Neighbor Notification Law in Westchester County.
- Genesis Fisher, a first-year law student at New York University School of Law. Ms. Fisher graduated from Smith College with degrees in sociology and anthropology. Ms. Fisher has worked for several public interest organizations, including: The Washington Legal Clinic for the Homeless, the Equal Rights Center, and Ohio Citizen Action.
- Rekha Rao, a second-year law student at Pace University School of Law. Ms. Rao earned her M.A. and B.A. in English literature from Bangalore University. Ms. Rao is currently working as a judicial intern for the Hon. William J. Martini, United States District Court. During the summer of 2003 she worked for the Pace Energy Center, where she analyzed federal cases on interstate commerce and potential Commerce Clause violations related to the energy trade.

The Minority Fellowship in Environmental Law Program was established in 1992 as joint project of the

Environmental Law Section of the NYSBA and the Environmental Law Committee of the Association of the Bar of the City of New York. The New York Bar Foundation and the American Bar Association's Section of Environment, Energy and Resources provide partial financial support. The Program seeks to provide opportunities to minority law students in the environmental legal field. Such students receive a \$6,000 stipend to spend 10 weeks during the summer working in environmental positions with governmental agencies or with not-for-profit environmental interest organizations. Past fellowship winners have worked at the Region II Office of the U.S. Environmental Protection Agency, the New York State Department of Environmental Conservation, the Environmental Protection Bureau of the New York State Department of Law, Environmental Defense Fund and the Natural Resources Defense Council.

Minority law students were eligible for the fellowship if they were either enrolled in law school in New York State, or were permanent residents of New York State and were enrolled in an out-of-state law school. The Fellowship recipients will also participate in meetings of the NYSBA and the Association of the City Bar of New York during this year, and will be assigned mentors within the organization or agency they work for and from the environmental bar.



**Peter Casper and Eileen Millett.**

The Environmental Justice Committee would like to thank Arnold & Porter for allowing us to use their New York office to conduct this year's fellowship interviews and give special thanks to Michelle DePass, Christine Fazio and Nelson Johnson for their assistance in the selection process.

**Eileen D. Millett  
Peter M. Casper**

## Section Secretary Receives Award

Joan Leary Matthews, Section Secretary, was honored by the Capital District Women's Bar Association in June for her significant service and leadership to the community, her work as a mentor to young people and newly admitted attorneys, and for her advocacy of the advancement of women in society and in the legal profession. Congratulations, Joan!



**(l-r) Rekha Rao, Jim Periconi, Genesis Fisher, Peter Casper, Karen T. Beltran and Eileen Millett.**

Environmental Law Section  
**FALL MEETING**

October 1-3, 2004 • West Point

***Environmental Lessons from the Hudson Valley:  
SEQRA, Sediment, and Risk***

**Schedule of Events**

**Friday, October 1**

3:00 p.m. Registration—Lobby/Thayer Hotel

6:00 p.m. Welcoming Reception

7:00 p.m. Dinner—Thayer Hotel

**Guest Speaker:** James M. Johnson, Ph.D., Colonel, US Army, Retired

**The Role of West Point in the American Revolution and the U.S. Military Academy's Contributions to the Nation**

**Saturday, October 2**

7:30 a.m. Breakfast

8:00 a.m. Registration

8:30 a.m. General Session

**Opening Remarks:** Virginia C. Robbins, Esq.  
Bond, Schoeneck & King, PLLC, Syracuse

8:35-10:00 a.m. **Environmental Assessment in the Shadow of Storm King Mountain**  
*The State Environmental Quality Review Act*

**Moderator:** Michael P. Naughton, Esq.  
Associate Counsel  
New York State Department of Environmental Conservation

*Update on Standing and Statute of Limitations*

**Panelists:** Joan Leary Matthews, Esq.  
Albany Law School

Kevin G. Ryan, Esq.  
Larchmont

*Visual Impacts—Assessing Significance*

**Panelists:** Richard C. Benas, RLA  
Associate Principal  
The Saratoga Associates

Warren P. Reiss, Esq.  
General Counsel  
Scenic Hudson

Andrew C. Davis  
Office of Electricity and Environment  
New York State Department of Public Service



10:00-10:15 a.m. Coffee Break  
10:15-Noon **On the Banks of the Hudson: Remediating Contaminated Sediment**

**Moderator:** **David H. King**  
Director, Hudson River Field Office  
U.S. Environmental Protection Agency

*Legal Authorities and Remedy Selection for Contaminated Sediment*

**Panelists:** **Gregory A. Bibler, Esq.**  
Goodwin Procter LLP  
**Patricia C. Hick, Esq.**  
U.S. Environmental Protection Agency, Region 2

*Risk Assessments—What Every Lawyer Should Know to Avoid the Pitfalls*

**Panelist:** **Tamara L. Sorell, Ph.D.**  
Brown and Caldwell

12:15-1:15 p.m. Lunch

**Afternoon in the Hudson Valley—**

- Private Tour of Constitution Marsh Audubon Center and Sanctuary
- Army vs. Texas Christian University Football Game - 1:00 p.m.\*
- Walking historic West Point
- Bear Mountain State Park
- Dia: Beacon Riggio Galleries
- Washington's Headquarters State Historic Site in Newburgh
- Boscobel Mansion in Garrison

*\*Tickets may be purchased when you register for the Fall Meeting; the cost is \$25 a ticket (30 tickets have been reserved for the Section).*

6:15-7:30 p.m. Cocktail Reception—Thayer Hotel

7:30 p.m. Dinner—Thayer Hotel

**Guest Speaker: J. Winthrop Aldridge**  
**Grabbing a Valley by the Tale**

**Sunday, October 3**

8:00 a.m. Breakfast

9:00-9:45 a.m. Committee Meetings

9:45-11:45 a.m. Executive Committee Meeting

11:45 a.m. Adjournment

Noon Lunch

# Section Committees and Chairs

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

## **Adirondacks, Catskills, Forest Preserve and Natural Resource Management Committee**

Carl R. Howard (Co-Chair)  
290 Broadway  
New York, NY 10007  
(212) 637-3216  
E-Mail:howard.carl@epa.gov

Thomas A. Ulasewicz (Co-Chair)  
358 Broadway, Suite 307  
Saratoga Springs, NY 12866  
(518) 581-9797  
E-Mail:phu@global2000.net

## **Agriculture and Rural Issues Committee**

David L. Cook (Co-Chair)  
1300 Clinton Square  
Rochester, NY 14603  
(585) 263-1381  
E-mail: dcook@nixonpeabody.com

Peter G. Rupparr (Co-Chair)  
2500 Main Place Tower  
Buffalo, NY 14202  
(716) 855-1111  
E-Mail:prupparr@dhyplaw.com

## **Air Quality Committee**

Inger K. Hultgren (Co-Chair)  
1290 Avenue of the Americas  
New York, NY 10104  
(212) 541-2242  
E-Mail:hultgreni@rspab.com

Robert R. Tyson (Co-Chair)  
One Lincoln Center  
Syracuse, NY 13202  
(315) 218-8221  
E-Mail:rtyson@bsk.com

## **Biotechnology and the Environment Committee**

Frank L. Amoroso (Co-Chair)  
990 Stewart Avenue  
Garden City, NY 11530  
(516) 832-7575  
E-Mail:famoroso@nixonpeabody.com

David W. Quist (Co-Chair)  
P.O. Box 2272  
Albany, NY 12220  
(518) 473-4632  
E-Mail:davidquist@earthlink.net

## **Coastal and Wetland Resources Committee**

Terresa M. Bakner (Co-Chair)  
One Commerce Plaza  
Albany, NY 12260  
(518) 487-7615  
E-Mail:tmb@woh.com

Drayton Grant (Co-Chair)  
149 Wurtemberg Road  
Rhinebeck, NY 12572  
(845) 876-2800  
E-Mail:grantlyons@aol.com

## **Continuing Legal Education Committee**

Robert H. Feller (Co-Chair)  
111 Washington Avenue  
Albany, NY 12210  
(518) 533-3222  
E-Mail:rfeller@bsk.com

Maureen F. Leary (Co-Chair)  
The Capitol  
Albany, NY 12224  
(518) 474-7154  
E-Mail:maureen.leary@oag.state.ny.us

Kimberlee S. Parker (Co-Chair)  
111 Washington Avenue  
Albany, NY 12210  
(518) 462-7421  
E-Mail:kparker@bsk.com

James P. Rigano (Co-Chair)  
1393 Veterans Memorial Highway  
Suite 301S  
Hauppauge, NY 11788  
(631) 979-3000  
E-Mail:jrigano@certilmanbalin.com

## **Corporate Counsel Committee**

George A. Rusk (Chair)  
368 Pleasantview Drive  
Lancaster, NY 14086  
(716) 684-8060  
E-Mail:grusk@ene.com

## **Energy Committee**

Kevin M. Bernstein (Co-Chair)  
One Lincoln Center  
Syracuse, NY 13202  
(315) 422-0121  
E-Mail:kbernstein@bsk.com

William S. Helmer (Co-Chair)  
30 S. Pearl Street, 10th Floor  
Albany, NY 12207  
(518) 433-6723  
E-Mail:helmer.b@nypa.gov

## **Enforcement and Compliance Committee**

George F. Bradlau (Co-Chair)  
P.O. Box 541  
18 Washington Street, 2nd Floor  
Morristown, NJ 07963  
(973) 656-1800  
E-Mail:gbradlau@thebradlaugroup.com

Dean S. Sommer (Co-Chair)  
Executive Woods  
5 Palisades Drive  
Albany, NY 12205  
(518) 438-9907  
E-Mail:dsommer@youngsommer.com

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900 Third Avenue  
New York, NY 10022  
(212) 508-6736  
E-Mail:evans@tanhelp.com

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59-17 Junction Boulevard, 19th Floor  
Flushing, NY 11373  
(718) 595-5650  
E-Mail:jfine@dep.nyc.gov

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237 Park Avenue  
New York, NY 10017  
(212) 880-6262  
E-Mail:jgracer@torys.com

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460 Park Avenue, 10th Floor  
New York, NY 10022  
(212) 421-2150  
E-Mail:mchertok@sprlaw.com

Kevin G. Ryan (Co-Chair)  
10 Circle Avenue  
Larchmont, NY 10538  
(914) 833-8378  
E-Mail:kevingryan@cs.com

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104 Corporate Park Drive  
P.O. Box 751  
White Plains, NY 10602  
(914) 641-2950  
E-Mail:jcavaluzzi@pirnie.com

Daniel W. Morrison, III (Co-Chair)  
One North Lexington Avenue  
White Plains, NY 10601  
(914) 287-6177  
E-Mail:dwm@bpslaw.com

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One Commerce Plaza  
Albany, NY 12260  
(518) 487-7777  
E-Mail:pcasper@woh.com

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311 West 43rd Street, Suite 201  
New York, NY 10036  
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E-Mail:emillett@iec-nynjct.org

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475 Park Avenue South, 16th Floor  
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(212) 483-9120  
E-Mail:abryson@worldnet.att.net

J. Kevin Healy (Co-Chair)  
1290 Avenue of the Americas  
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(212) 541-1078  
E-Mail:jkhealy@bryancave.com

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75 East 55th Street  
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(212) 856-7126  
E-Mail:davidfreeman@paulhastings.com

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55 East 87th Street, Suite 8B  
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(212) 996-5395  
E-Mail:lschnapf@aol.com

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5 Palisades Drive  
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E-Mail:jbaker@youngsommer.com

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E-Mail:tudorassoc@aol.com

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460 Park Avenue, 10th Floor  
New York, NY 10022  
(212) 421-2150  
E-mail:driesel@sprlaw.com

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750 Lexington Avenue, 4th Floor  
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(212) 872-1500  
E-Mail:cseristoff@lltlaw.com

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975 Crossroads Building  
2 State Street  
Rochester, NY 14614  
(585) 546-8430  
E-Mail:aknauf@nyenvlaw.com

Robert S. McLaughlin (Co-Chair)  
One Lincoln Center  
Syracuse, NY 13202  
(315) 218-8179  
E-Mail:mclaugr@bsk.com

**Land Use Committee**

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240 Clifton Corporate Parkway  
Clifton Park, NY 12065  
(518) 383-0059, x130  
E-Mail:rosemary\_nichols@dcddevelopment.com

Michael D. Zarin (Co-Chair)  
81 Main Street, Suite 415  
White Plains, NY 10601  
(914) 682-7800  
E-Mail:zslaw@worldnet.att.net

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One Commerce Plaza  
Albany, NY 12260  
(518) 487-7726  
E-Mail:pdixon@woh.com

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(Co-Chair)  
80 New Scotland Avenue  
Albany, NY 12208  
(518) 472-5840  
E-Mail:jmatt@mail.als.edu

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One Commerce Plaza  
Albany, NY 12260  
(518) 487-7600  
E-Mail:dre@woh.com

Eric D. Most (Co-Chair)  
120 Wall Street  
New York, NY 10005  
(212) 361-2400  
E-Mail:most@informinc.org



**Pesticides Committee**

Telisport W. Putsavage (Chair)  
1990 Old Bridge Road, Suite 202  
Lake Ridge, VA 22192  
(703) 492-0738  
E-Mail:putsavage@chemlaw.com

**Pollution Prevention Committee**

Dominic R. Cordisco (Co-Chair)  
171 Jersey Avenue  
Port Jervis, NY 12771  
(845) 569-4329  
E-Mail:dcordisco@yahoo.com

Shannon Martin LaFrance (Co-Chair)  
1 Civic Center Plaza, Suite 501  
Poughkeepsie, NY 12601  
(845) 473-7766  
E-Mail:slafrance@  
rapportmeyers.com

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500 South Salina Street, Suite 816  
Syracuse, NY 13202  
(315) 424-1105  
E-Mail:jsk@mkms.com

Terrence O. McDonald (Co-Chair)  
18 Washington Street, 2nd Floor  
Morristown, NJ 07963  
(973) 656-1800  
E-Mail:  
tmcdonald@thebradlaugroup.com

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John Francis Lyons (Co-Chair)  
149 Wurtemburg Road  
Rhinebeck, NY 12572  
(845) 876-2800  
E-Mail:grantlyons@aol.com

Michael G. Sterthous (Co-Chair)  
One Commerce Plaza  
Albany, NY 12260  
(518) 487-7620  
E-Mail:mgs@woh.com

**Toxic Torts Committee**

Ellen Relkin (Co-Chair)  
180 Maiden Lane  
New York, NY 10038  
(212) 558-5715  
E-Mail:erelkin@weitzlux.com

Cheryl P. Vollweiler (Co-Chair)  
150 East 42nd Street, 23rd Floor  
New York, NY 10017  
(212) 490-3000, x2674  
E-Mail:vollweilerc@wemed.com

**Transportation Committee**

William C. Fahey (Co-Chair)  
3 Gannett Drive, Suite 400  
White Plains, NY 10604  
(914) 323-7000, x4183  
E-Mail:faheyw@wemed.com

Prof. Philip Weinberg (Co-Chair)  
8000 Utopia Parkway  
Jamaica, NY 11439  
(718) 990-6628  
E-Mail:weinberp@stjohns.edu

**Water Quality Committee**

Robert M. Hallman (Co-Chair)  
80 Pine Street  
New York, NY 10005  
(212) 701-3680  
E-Mail:rhallman@cahill.com

George A. Rodenhausen (Co-Chair)  
1 Civic Center Plaza, Suite 501  
Poughkeepsie, NY 12601  
(845) 473-7766  
E-Mail:grodenhausen@  
rapportmeyers.com

**Task Force on Legal Ethics**

Roger Raimond (Co-Chair)  
1345 Avenue of the Americas  
31st Floor  
New York, NY 10105  
(212) 586-4050  
E-Mail:rar@robinsonbrog.com

Marla B. Rubin (Co-Chair)  
P.O. Box 71  
Mohegan Lake, NY 10547  
(914) 736-0541  
E-Mail:mbrbold@mindspring.com

**Task Force on Mining and Oil and  
Gas Exploration**

Dominic R. Cordisco (Co-Chair)  
171 Jersey Avenue  
Port Jervis, NY 12771  
(845) 569-4329  
E-Mail:dcordisco@yahoo.com

Laura Zeisel (Co-Chair)  
One Corwin Court  
Newburgh, NY 12550  
(845) 565-1100  
E-Mail:lzeisel@dsltc.com

**Task Force on Navigation,  
Petroleum and Related Issues**

Christopher J. Dow (Co-Chair)  
300 Linden Oaks, Suite 220  
Rochester, NY 14625  
(585) 899-6030  
E-Mail:cjd@devorsetz.com

Alan J. Knauf (Co-Chair)  
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Environmental Law Section  
New York State Bar Association  
One Elk Street  
Albany, NY 12207-1002

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(518) 472-5840  
E-Mail: jmatt@mail.als.edu

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