

The New York Environmental Lawyer

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

Message from the Chair

What an exciting time to be an environmental lawyer! The world is facing the monumental threat of global warming, and our country's leaders are struggling with how to address this dilemma in a way that strengthens, rather than damages, our economy. Here in New York, the Marcellus Shale natural gas deposits may present the economic opportunity of a lifetime for the Southern Tier, but others warn that it could lead to folly that will pollute our treasured waters. And while we all prefer domestic alternative energy over chasing oil to the deserts of the Middle East, many rural communities in our state have turned into battlegrounds over wind energy.



Alan J. Knauf

Just when we thought environmental law was a mature field, the high courts of the state and nation have handed down landmark decisions that surprised many of us. In *Burlington Northern*, the Supreme Court told us that

CERCLA joint and several liability, which we all assumed was the rule, is not so automatic. And in *Save the Pine Bush*, the Court of Appeals instructed us that standing is not limited to NIMBYs, but rather, people who use an environmental resource have standing to protect it.

Our Section is vigorously addressing these and other issues of the day. We just completed a successful Fall Meeting in Canandaigua. On Friday afternoon, Yvonne (Marciano) Hennessey and Dominic Cordisco from our Mining Committee chaired a great program that taught us the ABCs of Marcellus Shale. On Saturday, Ed Premo from our Land Use Committee led three panels on *Green Development and Alternative Energy*, which highlighted these exciting areas, and also addressed the controversies surrounding wind farms and global warming. At the same time, Glen Bruening and Chris Rizzo chaired an informative program on Historic Preservation. Plus, as an outgrowth of the regular meetings our Section Cabinet is having with DEC General Counsel Alison Crocker and her staff, three DEC attorneys gave us an informative Sunday morning update on the bottle bill, brownfield litigation and ARRA.

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We also had a great time cooking (or watching others cook) at the New York Wine and Culinary Center. I was especially pleased to see so many downstaters enjoying the splendors of the Finger Lakes Region. We had a great turnout for the weekend, and I think it has invigorated many of our committees.

Some Section members have questioned whether we are adequately addressing the potential environmental impacts of Marcellus Shale. So, our Executive Committee requested a 60-day extension on the comment period on the pending DSGEIS, and we established an *ad hoc* committee to examine the issue, and if appropriate recommend further action. Please let me know if you have any thoughts on this issue, which we may take up at our Annual Meeting.

Our committees are active. The Environmental Impact Committee is looking at whether we should propose a statute of limitations for SEQRA in light of the confusing case law. The Petroleum Spills Committee is planning a program in Albany on the state's oil spill program, and is seeking participation from the three agencies involved in spill investigation and spills—DEC, the Comptroller, and the Attorney General. Our Hazardous Waste/Site Remediation Committee is looking at the current issues related to the Brownfield Cleanup Program, including efforts by DEC to expel volunteers from the program who have stalled their progress due to the current economic climate. The Wetlands Committee has reviewed our Section's 2007 recommendation that New York State seek authorization to administer the federal wetlands program, and we have again forwarded it to the State Legislature. With the help of the ABA and the New York City Bar, we

are hoping to fund at least three minority fellows next summer.

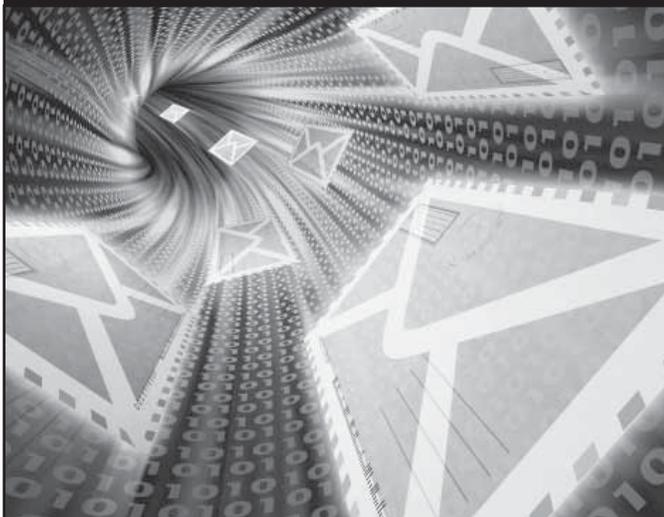
Earlier this year, our committees held webinars and conference calls. I am hopeful that we can continue to utilize these and other technologies to keep the members of our Section involved in a way that does not necessitate traveling across the state.

Our 2010 Annual Meeting will be held on Friday, January 29, at the New York Hilton in New York City. Barry Kogut, our Section's First Vice-Chair, is putting together the program, which will be entitled *Sea Changes or Ripples on the Pond: Marking the Evolution of Environmental Law*. We will address the three recent landmark decisions from the Supreme Court, examine whether the New Jersey Site Remediation Reform Act can provide a model to improve our own state's embattled brownfield program, follow up on federal wetlands regulation after *Rapanos*, and then look at the new Code of Professional Conduct. It should be an exciting program. Barry is also planning a program for next summer in each of the DEC regions to commemorate the 40th anniversary of the Department, and the 30th anniversary of our Section.

I am optimistic that the work our Section is doing will help equip our state's environmental bar to address the critical environmental issues with which we are currently faced. This should help us to continue in our common goal of improving environmental quality while keeping our economy strong, and protecting our individual freedoms.

Alan J. Knauf

Request for Articles



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

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www.nysba.org/EnvironmentalLawyer

From the Editor-in-Chief

It is Fall, the leaves are turning color, the air is crisp, the Section has had its Fall Meeting in Canandaigua, NY, and it is time for a new issue of *The New York Environmental Lawyer*. Professor Keith Hirokawa, Albany Law School, is taking his turn as issue editor. Keith has put together a terrific publication and I thank him for his effort. This issue includes the regular columns: long-time and new member profiles; member news; and substantial updates from our DEC Update columnist, John L. Parker, and our EPA Update columnists, Marla E. Wieder and Chris Saporta. We have also added a new column about which we are very excited.



Miriam E. Villani

The new column is called “Open for Discussion” and is structured to invite further conversation. David Freeman, Larry Schnapf, and Laura Karvosky are the inaugural column’s authors and have provided the opening for a discussion about the impact of the *Burlington Northern* case on New York State jurisprudence. Won’t you join in the dialogue? If you have used the *Burlington* decision to advance your position in a case, or if you have some thoughts on how the decision will impact the practice of environmental law, please let us know. You can log onto the New York State Bar Association Environmental Law Section’s Web site and go to our blog to continue the discussion. Visit us at www.nysba.org/environmental.

Soon, *The New York Environmental Lawyer* will be in an electronic format as part of the Section’s pollution-prevention efforts. When that happens, there will be a link in the “Open for Discussion” column that will take

the reader/discussion participant directly to the Section’s Web site and to our blog to continue the discussion. And speaking of an electronic format, as long as you have a valid e-mail address on file with the New York State Bar Association, soon you will receive an electronic version of *The New York Environmental Lawyer* in addition to the old-fashioned paper edition. You will have the opportunity to opt out of the paper edition for future issues. Of course, if you opt not to receive the electronic format, you will miss all the fun everyone else will be having with the “Open for Discussion” column.

In addition to the regular columns, this issue includes three articles that tell us environmental law continues to change, develop, and even expand as the concerns about, and awareness of, environmental issues grow. The state and local governments are adopting new environmental laws; environmental statutes that have been on the books since the early days of the environmental movement are being reinterpreted by the courts; and the new federal administration has made the environment a priority. It is clear from the articles in this issue, from the news we hear every day, and from the work that comes across our desks, that we environmental lawyers have our work cut out for us, and that our field is on the verge of a very exciting explosion. Luckily, there are many students graduating from law schools across the state who are ready, willing, and able to take on the challenges of this ever-developing practice. If you have a position, or can offer an internship to a recent graduate looking for experience in the field, please let me know. I have a stack of resumes from bright, eager lawyers, or soon-to-be lawyers, all of whom are ready to get to work. They are the future of our practice. Let’s welcome them, and then let’s put them to work.

Miriam E. Villani

From the Issue Editor

We often find law struggling to meet emerging political, social, moral, economic, religious and other demands. Sometimes law responds to these challenges through fortification, but other times we witness change: well-entrenched doctrines of law may be abandoned or displaced to favor new policies or beliefs, interpretations of common law rules and statutes may be revisited, and the law occasionally moves into a new direction. In other words, adaptation to new circumstances is a familiar project for law.



Keith H. Hirokawa

As one of today's most pressing environmental challenges, the inevitability of climate change is forcing some complex decisions. Climate change awareness is at its height, yet many wonder whether the monumental changes made in law are adequate to prepare us to thrive in the future environment. Regulatory agencies have largely embraced the methods and ideals of sustainable practices, yet the perceived effects of sustainability on local and global economies bring to the fore a difficult balancing act between risk and cost. Holmes' observation, even if a bit plain, recognized that "whenever a doubtful case arises, with certain analogies on one side and other analogies on the other, that what really is before us is a conflict between two social desires, each of which seeks to extend its dominion over the case, and which cannot both have their way."

Given the character of the Environmental Law Section and its members, it is difficult to imagine a more productive setting to discuss the environmental challenges of the present. As a newcomer to the NYSBA, but not a newcomer to the profession, I can say (with some authority)

that the activities of the Environmental Law Section are inspiring and a bit contagious. In my estimation, the Section plays an exemplary role in joining the law to those governed by it. The Section fosters a sincere connectivity between young and experienced attorneys, between the profession and law schools, and between the professionals of the Section and the legislature. The members of this Section also do an excellent job of sharing their experience, expertise, and creativity in problem solving through the Section's outreach efforts and publications. The Fall issue of *The New York Environmental Lawyer* is no exception.

The articles in this issue converge on the theme of law's adaptation to a changing environment. Whether as an evolutionary response to the current environmental challenges, or as a trend that signifies that state and local governments have been emboldened by the vision of the new federal administration, state and local environmental laws are changing in ways that were previously thought to be improbable. Dean Patricia Salkin examines the growing number of New York local laws aimed at lessening the global impacts of local energy development. Matthew Ahrens, Oded Mizrahi, Ryan Waterman, and Davon Collins of Latham & Watkins, LLP offer insights into DEC's new SEQRA greenhouse gas (GHG) policy. Alison Karmel, a young attorney at the New York City Mayor's Office of Environmental Remediation, details the recent efforts of New York to play a stakeholder's role in brownfields redevelopment. In each of these articles, the authors consider the directions and limits of these trends, while recognizing the dramatic shifts that are currently shaping New York environmental law.

Completion of this issue would not have been possible without the assistance of my research assistants Anna Binau, Stephen Dushko, and especially Andrew Wilson, each of whom played a significant role in assembling, reviewing and editing the content of this issue.

Keith H. Hirokawa

Catch Us on the Web at
WWW.NYSBA.ORG/Environmental



EPA Update

By Marla E. Wieder and Chris Saporita¹

A. Introduction

On November 5, EPA Administrator Lisa P. Jackson announced President Barack Obama's selection of Judith Enck as the Regional Administrator for EPA's Region 2 Office. Enck has been a well-respected figure in the New York State environmental arena for nearly 30 years. In her most recent position as Deputy Secretary for the Environment in the administration of Governor David Paterson, she was responsible for policies and operations of New York State's environmental protection agencies, including the Department of Environmental Conservation, Office of Parks, Recreation and Historic Preservation, the Adirondack Park Agency, Agriculture and Markets, Department of State and others. She worked for eight years as a policy advisor to the Attorney General of New York and for five years as the Executive Director of Environmental Advocates of New York. Before joining the Attorney General's office, she was Senior Environmental Associate with the New York Public Interest Research Group. She is a past president of Hudson River Sloop Clearwater and former director of the Non-Profit Resource Center. She also serves on a number of boards in New York, including the New York State Energy Board and the New York State Superfund Management Board. Enck replaces George Pavlou, a career EPA manager, who has served as Region 2's acting administrator since the beginning of the year.

EPA Administrator Jackson continues to roll out new initiatives and regulations and to encourage innovation on all levels and in all EPA programs. Administrator Jackson's focus has been in four essential areas: confronting climate change and getting the U.S. running on clean energy; protecting and cleaning up our air and water; updating our country's regulations and laws on chemicals and toxics; and expanding the conversation on environmentalism. Below is just a small sampling of what the Agency, Region 2 in particular, has been working on over the past few months. You are invited to visit EPA's national and regional Web sites to learn more about EPA's work to protect and restore the environment.

B. Restoration and Protection

1. Superfund Cleanups

(a) Hudson River PCBs Dredging Update

Since the dredging project began on May 15, more than 240,000 cubic yards of PCB-contaminated sediment have been dredged from the Upper Hudson River in the area of Fort Edward, New York. This year's dredging is the first phase of the two-phase project, which spans 40 miles and is expected to be complete by 2015. Dredging can only occur between May and November, because the

project's dewatering facility is located on the Champlain Canal, which only operates during those months.

Over the summer, dredging crews worked in 10 of 18 designated areas around Roger's Island and near Griffen Island in the Upper Hudson. The crews removed as much contaminated sediment from the 10 areas they addressed as they expected to remove from all 18 areas. Dredge engineers encountered approximately 100,000 cubic yards of additional, contaminated logging debris attributable to the historical Adirondack logging trade and a timber dam that was removed in the early 1970s. Dredging this additional debris, and finding contamination at levels much deeper than anticipated, kept the crews from working in the other eight areas. These eight areas will be the starting point for dredging in Phase 2 of the project.

During the winter of 2009, a peer review panel of independent dredging experts will convene to look at all of the production and monitoring data generated during Phase 1. This group will make recommendations to EPA and General Electric about changes that can be incorporated into Phase 2, so the project will be more efficient and effective. The project review, completion of the final design for Phase 2, a public comment period, as well as any new construction that might be necessary at the dewatering facility, will take place in 2010. The next opportunity to resume dredging will be May of 2011.

Further information on the Hudson River PCBs Superfund Site can be found at <http://www.epa.gov/hudson>. For additional articles and commentary, see also, EPA's blog, "Greenversations" at <http://blog.epa.gov/blog/category/cleanup/hudsonpcbs/>.



Day one of the Hudson River PCB dredging effort, May 15, 2009

(b) NPL Site Listings and the Gowanus Canal

In September 2009, EPA proposed adding New York City's Newtown Creek to the Superfund National Priorities List (NPL).² The NPL comprises sites with known or threatened releases of hazardous substances to the environment that warrant further investigation and long-term cleanup.

Newtown Creek is part of the core area of the New York-New Jersey Harbor Estuary, which has been designated by EPA as an "Estuary of National Significance." While the creek has been described as "grossly contaminated," nearby residents continue to use the creek for recreational purposes such as kayaking and fishing. Various sediment and surface water samples have been taken along the creek and reveal the presence of pesticides, metals, PCBs, and volatile organic compounds (VOCs), which are potentially harmful contaminants that can easily evaporate into the air. The State of New York referred the site to EPA due to the complex nature of the contamination along the creek.³

While in April 2009 EPA proposed adding the Gowanus Canal in Brooklyn, New York to the NPL in an effort to begin a long overdue investigation and comprehensive cleanup of the area, as of the drafting of this article in October, despite considerable debate and discussion, the site has yet to be listed. Nevertheless, EPA is proceeding with the Remedial Investigation/Feasibility Study and other enforcement activities. EPA also expects to begin sampling and other fieldwork this winter. Periodically check EPA's Web site for the latest news and information on the fate of the Gowanus Canal at <http://www.epa.gov/region2/superfund/npl/gowanus/>.

2. Mountaintop Removal Permit Review and Coal Ash Impoundment Assessment

Mountaintop removal coal mining, as the name implies, involves the removal of the top of a mountain to access a seam of coal. This practice usually requires a Clean Water Act permit under Section 404, because it involves discharging the removed soil (and other materials) into adjacent valleys ("valley fills"), with significant impacts on streams and other waterways. The United States Army Corps of Engineers (the Corps) has primary permitting authority under Section 404 of the Act, but EPA retains review and (rarely used) veto power for any permits the Corps issues.

On a June 11, 2009, EPA, the Corps, and the United States Department of the Interior entered into a memorandum of understanding (MOU) to strengthen regulation of surface coal mining in Appalachia. The MOU calls for an Interagency Action Plan with the following goals: (1) minimize the adverse environmental consequences of mountaintop coal mining through short-term actions to be completed in 2009; (2) undertake longer-term actions to tighten the regulation of mountaintop coal mining; (3)

ensure coordinated and stringent environmental reviews of permit applications under the Clean Water Act and Surface Mining Control and Reclamation Act of 1997 (SM-CRA); (4) engage the public through outreach events in the Appalachian region to help inform the development of Federal policy; and (5) work in coordination with appropriate regional, state, and local entities to help diversify and strengthen the Appalachian regional economy and promote the health and welfare of Appalachian communities.

Pursuant to the Interagency Action Plan, and based on EPA's concern that discharges associated with mountaintop removal mining are causing significant harm to the quality of surrounding waterways, EPA undertook a review of 108 pending Section 404 permits for mountaintop removal mining projects in Appalachia. Twenty-nine were removed from consideration for various reasons, including the withdrawal of some by the applicants, and on September 11, 2009, EPA concluded that the remaining 79 pending projects would likely cause water quality impacts requiring additional review under the Clean Water Act.⁴

3. Financial Crisis and Recovery—American Reinvestment and Recovery Act of 2009

By October 2009, EPA Region 2 had announced all of its awards under the American Reinvestment and Recovery Act of 2009. All told, Region 2 has awarded upward of \$1 billion to states, municipalities, tribes and non-governmental organizations in New Jersey, New York, Puerto Rico and the U.S. Virgin Islands for drinking and storm water infrastructure upgrades, Superfund site cleanups, clean diesel projects, brownfields job training grants, and cleaning up leaking underground storage tanks. The Region's grants include the largest single award in the agency's history: a \$430 million grant to New York State for wastewater infrastructure improvements and projects to protect lakes, ponds, and streams. Many of the grants include provisions for improving energy or water efficiency, or have other environmentally innovative aspects. For more information on stimulus projects in EPA Region 2, visit <http://epa.gov/region2/eparecovery/index.html>.

C. Science and Regulation

1. Air

(a) Greenhouse Gas Reporting

On January 1, 2010, the U.S. Environmental Protection Agency will, for the first time, require large emitters of heat-trapping emissions to begin collecting greenhouse gas (GHG) data under a new reporting system. This new program will cover the approximately 10,000 facilities that emit 25,000 metric tons or more of CO₂ equivalent per year, and together comprise approximately 85 percent of the nation's GHG emissions. The 25,000 metric ton threshold is the approximate equivalent of the annual

GHG emissions from 4,600 passenger vehicles. The first annual reports for the largest emitting facilities, covering calendar year 2010, will be submitted to EPA in 2011. Vehicle and engine manufacturers outside of the light-duty sector will begin phasing in GHG reporting with model year 2011. Some source categories included in the proposed rule are still under review.

The new reporting system will provide a better understanding of where GHGs are coming from and will guide development of the best possible policies and programs to reduce emissions. The data will also allow businesses to track their own emissions, compare them to similar facilities, and provide assistance in identifying cost-effective ways to reduce emissions in the future. This comprehensive, nationwide emissions data will help in the fight against climate change.

In a related development, on September 30, 2009, EPA announced a proposed rule requiring large industrial facilities that emit at least 25,000 tons of GHGs a year to obtain Clean Air Act construction and operating permits for those emissions, and demonstrate the use of best available control technologies and energy efficiency measures to minimize GHG emissions when new facilities are constructed or existing facilities are significantly modified. The proposed rule addresses a group of six greenhouse gases: carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆), and is designed to be a common sense approach that will reduce emissions and drive technological innovation by incorporating nearly 70 percent of U.S. greenhouse gas emissions from facilities such as power plants, refineries, and factories. EPA estimates that 400 new sources and modifications to existing sources would be subject to review each year for GHG emissions, and notes that most of these sources are already subject to clean air permitting requirements because they emit other pollutants.

More information on the new reporting system and reporting requirements is available at <http://www.epa.gov/climatechange/emissions/ghgrulemaking.html>, and more information about the proposed new Clean Air Act permitting requirements is available at <http://www.epa.gov/nsr/actions.html>.

(b) New Emissions Standards for Coal Preparation and Processing

The EPA set more stringent emissions standards for coal preparation and processing facilities in a final rule released informally on September 30, 2009. The final rule amends the new source performance standards for coal preparation and processing plants, setting new emissions standards for particulate matter, sulfur dioxide, nitrogen oxides, and carbon monoxide. The rule will take effect upon publication in an upcoming edition of the *Federal Register*.

The revised performance standards will apply to all coal processing facilities at coal mines, power plants, cement plants, coke manufacturing facilities, and other industrial sites that process more than 200 tons of coal per day. The coal processing performance standards had not been updated since being issued in 1976.

Section 111(b) of the Clean Air Act requires EPA to establish performance standards for emissions sources that contribute to air pollution that endangers public health and welfare. New source performance standards set the minimum level of emissions control technology that must be used at new and reconstructed stationary sources of air pollution.

EPA had until September 26, 2009 to finalize the new performance standards for coal processing plants as part of a consent decree (*Kentuckians for the Commonwealth v. Johnson*, D.D.C., No. 06-0184, December 1, 2006).

EPA first proposed revisions to the performance standards in April 2008.⁵ However, after reviewing public comments on the proposed rule, EPA decided to revise the proposed emissions limits, establish additional control requirements, and make the rule applicable to additional facilities in a supplemental proposal issued in May 2009.⁶ The rule revises the performance standards for coal preparation and processing plants at 40 C.F.R. Part 60, subpart Y.

New Thermal Dryer Standards

The final rule establishes a particulate matter emissions standard of 0.023 gram per dry standard cubic meter (g/dscm) with an opacity limit of less than 10 percent for all new and reconstructed thermal dryers. Modified thermal dryers would have to continue to meet the 0.070 g/dscm standard set in 1976 with an opacity limit of less than 20 percent.

Thermal dryers constructed, reconstructed, or modified after May 27, 2009, either will have to limit their emissions of sulfur dioxide to 85 nanograms per Joule (ng/J) or reduce potential emissions by 90 percent. EPA originally had proposed a 50 percent reduction. "We have reassessed the available SO₂ data and believe that the limits established in the final rule are appropriate for new, reconstructed, and modified thermal dryers," EPA said.

New thermal dryers also will need to meet a combined nitrogen oxide and carbon monoxide emissions limit of 280 ng/J (0.65 pound per million Btu). The emissions limit for reconstructed and modified units would be set at 430 ng/J (1.0 lb/MMBtu).

Coal Processing Standards Set

Pneumatic coal-cleaning equipment for all ranks of coal built, modified, or reconstructed after April 28, 2008, will be required to meet a particulate matter emissions limit of 0.023 g/dscm as well as an opacity limit of equal or less than 5 percent.

Mechanically vented coal handling equipment also will have to meet the 0.023 g/dscm emissions standard for particulates with an opacity limit of less than 10 percent. The 0.023 g/dscm emissions standard will also apply to coal processing equipment enclosed in a building and mechanically vented.

Buildings containing coal-processing and conveying equipment also will be subject to an opacity limit of 20 percent or less. Fugitive emissions from those buildings will have an opacity limit of 10 percent or less.

“Wastewater discharged from coal ash ponds, air pollution control equipment, and other equipment at power plants can contaminate drinking water sources, cause fish and other wildlife to die, and create other detrimental environmental effects.”

Coal processing facility operators will be required to develop and maintain a fugitive coal dust emissions control plan for open storage piles. Establishing opacity limits for open storage piles is “not feasible,” and emissions standards would be “prohibitively expensive,” according to EPA.

EPA estimates that the 22 new coal preparation and processing facilities to be built within the next five years would be subject to the revised standards. Particulate matter emissions would be reduced by 7,600 tons annually, according to EPA. Meeting the revised standards would cost \$7.9 million nationwide annually.

For further information on this issue, see EPA’s Fact Sheet, available at http://www.epa.gov/ttn/caaa/t1/fact_sheets/cpp_nsps_fr_fs_092509.pdf.

(c) EPA’s Schools Air Toxics Monitoring Initiative

The EPA, working with state air quality agencies, is now monitoring at all four schools in the Region that were selected as part of EPA’s Schools Air Toxics Monitoring Initiative. The monitoring is part of a national initiative, for which the Agency is monitoring the outdoor air at 63 schools in 22 states. The initiative is designed to help EPA and the states learn whether outdoor air quality near the schools poses health concerns for children and staff, and to help reduce emissions of air toxics.⁷

The first data set is already in for the only New York City school in the program: Intermediate School 143 (IS 143) in the Washington Heights Section of Upper Manhattan. While the air is already monitored as part of New York State’s normal air monitoring network, IS 143 was chosen for this further monitoring because it is representative of many schools located in large metropolitan areas that are impacted by traffic congestion. IS 143 is located

near the Cross Bronx Expressway and is situated near many buildings that incinerate trash. It is being monitored for volatile organic compounds (VOCs), which can decrease air quality within a region and adversely impact public health. Preliminary results show that levels of key air toxics at this school are below levels of short-term concern. The new data is posted at <http://www.epa.gov/schoolair/schools.html>.

While some school officials and parents have expressed concerns, EPA scientists advise against drawing conclusions at this point for most of the pollutants being monitored. However, the Agency is providing information early on acrolein, which EPA anticipates is likely to be elevated at most schools. Acrolein is a widespread pollutant that can irritate the eyes, nose and throat.⁸ Elevated acrolein is not limited to schools: preliminary results from the 40 schools that are monitoring for acrolein are similar to levels from air toxics monitors in other areas of the country.

EPA has been regulating the emissions of acrolein from industrial facilities and vehicles since 1990. The agency already has seen reductions in acrolein emissions and expects to see more reductions in the future, as rules such as the mobile source air toxics and heavy duty highway vehicle rules are fully phased in. EPA plans to continue monitoring for acrolein at various locations across the country and will continue to look for ways to reduce acrolein emissions.

Once monitoring is complete, the full set of results from all of the schools will be analyzed to evaluate the potential for health concerns related to long-term exposure to these pollutants. EPA will post this analysis on its Web site once it is complete.

The remaining three schools being monitored in EPA Region 2 are Olean Middle School in Olean, New York; Mabel Holmes Middle School in Elizabeth, N.J., and Paulsboro High School in Paulsboro, N.J.

To learn more about EPA’s efforts to study outdoor air near schools, visit <http://www.epa.gov/schoolair>.

2. Water

(a) EPA Expects to Revise Rules for Wastewater Discharges from Power Plants

Discharges from power plants can have major adverse effects on water quality and wildlife. EPA plans to revise the existing standards for water discharges from coal-fired power plants to reduce pollution and better protect America’s water. Wastewater discharged from coal ash ponds, air pollution control equipment, and other equipment at power plants can contaminate drinking water sources, cause fish and other wildlife to die, and create other detrimental environmental effects.

Earlier this year, EPA completed a multi-year study of power plant wastewater discharges and concluded that current regulations, which were issued in 1982, have not kept pace with changes that have occurred in the electric power industry over the last three decades. Air pollution controls installed to remove pollution from smokestacks have made great strides in cleaning the air people breathe, saving lives, and reducing respiratory and other illnesses. However, some of the equipment used to clean air emissions do so by “scrubbing” the boiler exhaust with water, and when the water is not properly managed it sends the pollution to rivers and other water bodies. Treatment technologies are available to remove these pollutants before they are discharged to waterways, but these systems have been installed at only a fraction of the power plants.

As part of the multi-year study, EPA measured the pollutants present in the wastewater and reviewed treatment technologies, focusing mostly on coal-fired power plants. Many of the toxic pollutants discharged from these power plants come from coal ash ponds and the flue gas desulfurization systems used to scrub sulfur dioxide from air emissions.

Once the new rule for electric power plants is finalized, EPA and states would incorporate the new standards into wastewater discharge permits. More information about EPA’s study is provided in an interim report published in August 2008. A final study will be published later this year. More information on wastewater discharges from power plants is available at <http://www.epa.gov/waterscience/guide/steam>.

(b) EPA Releases List of Priority Drinking Water Contaminants for Regulatory Consideration

EPA has released its third list of drinking water contaminants that are known or anticipated to occur in public water systems and may require regulation. EPA will continue to evaluate and collect data on the contaminants, and determine by 2013 for some of them whether or not to propose drinking water regulations.

The contaminant candidate list (CCL 3) includes 104 chemical contaminants or groups and 12 microbes. Among them are contaminants, pesticides, disinfection byproducts, pharmaceuticals, chemicals used in commerce, waterborne pathogens, and algal toxins. The agency’s selection of the contaminants builds upon evaluations used for previous lists and is based on substantial expert input and recommendations from different groups including stakeholders, the National Research Council, and the National Drinking Water Advisory Council.

EPA will make regulatory determinations for at least five contaminants in accordance with the Safe Drinking Water Act. For those CCL 3 contaminants that lack sufficient information for a regulatory determination by 2013,

EPA will encourage research to provide the information needed.

The Agency evaluated approximately 7,500 chemicals and microbes and selected 116 candidates for the final list based on their potential to pose health risks through drinking water exposure. The Agency considered the best available health effects and occurrence data and information to evaluate unregulated contaminants. A draft CCL 3 was published for review and comment on February 21, 2008. EPA reviewed and analyzed the information provided in the comments in developing the final CCL 3.

For more information on the contaminant candidate list, visit <http://www.epa.gov/safewater/ccl>.

(c) Water Quality Study

In September, a team of EPA scientists collected water quality data as far as 80 miles off the New Jersey and Long Island coasts as part of an ongoing agency effort to monitor the health of the New York Bight. Scientists worked aboard EPA’s ocean survey vessel BOLD, a state-of-the-art mobile laboratory that the agency uses to assess American coastal waters.

“EPA’s monitoring efforts in the Atlantic Ocean not only help us better understand and respond to any changes in coastal water quality, they are some of most advanced ocean studies on the planet,” said EPA Acting Regional Administrator George Pavlou. “The data we have collected helps illustrate how what we do on land affects the health of our harbors and oceans, and the species that live in them.”

The data collected during this survey will be checked for accuracy and then shared with federal, state and local government agencies and non-governmental organizations. For more information on EPA’s ocean monitoring work in New Jersey and New York, visit <http://www.epa.gov/region02/water/oceans>. For more information on the OSV BOLD, visit <http://www.epa.gov/bold>.

3. Toxics

(a) Caulk PCB Guidance

In September, EPA identified a series of steps that building owners and school administrators should take to reduce exposure to Polychlorinated biphenyls (“PCBs”) that may be found in caulk in many buildings constructed or renovated between 1950 and 1978. The agency is also conducting new research to better understand the risks posed by caulk containing PCBs. This research will guide EPA in making further recommendations on long-term measures to minimize exposure as well as steps to prioritize and carry out actions to remove the caulk to better protect public health.⁹

PCBs are man-made chemicals that persist in the environment and were widely used in construction ma-

terials and electrical products prior to 1978. PCBs can affect the immune system, reproductive system, nervous system, and endocrine system and are potentially cancer-causing if they build up in the body over long periods of time.¹⁰ While PCBs have essentially been banned for the last 30 years, unfortunately high levels of PCBs are present in many facilities, buildings, and some schools constructed prior to the PCB ban. As noted by Administrator Jackson, "We're concerned about the potential risks associated with exposure to these PCBs and we're recommending practical, common sense steps to reduce this exposure as we improve our understanding of the science. For building owners and administrators who want to take added and more aggressive immediate steps, EPA is providing additional guidance to help them identify the extent of potential risks and determine whether mitigation steps are necessary. Local communities and governments have constrained resources that make this a particularly challenging and sensitive situation."¹¹

Although Congress banned the manufacture and most uses of PCBs in 1976, and they were phased out in 1978, there is evidence that many buildings across the country constructed or renovated from 1950 to 1978 may have PCBs at high levels in the caulk around windows and door frames, between masonry columns and in other masonry building materials. Exposure to these PCBs may occur as a result of their release from the caulk into the air, dust, surrounding surfaces and soil and through direct contact.

Although this is a serious issue, EPA stresses that the potential presence of PCBs in buildings should not be a cause for alarm. For buildings that were constructed or renovated between 1950 and 1978, EPA recommends that owners implement the following steps to minimize exposure to potentially contaminated caulk:

- Clean air ducts.
- Improve ventilation by opening windows and using or installing exhaust fans where possible.
- Clean frequently to reduce dust and residue inside buildings.
- Use a wet or damp cloth or mop to clean surfaces; do not sweep with dry brooms and minimize the use of dusters in areas near potential PCB-containing caulk.
- Use vacuums with high efficiency particulate air ("HEPA") filters.
- Wash hands with soap and water often, particularly before eating and drinking.
- Wash children's toys often.

EPA also recommends testing peeling, brittle, cracking, or deteriorating caulk directly for the presence of

PCBs and removing the caulk if PCBs are present at significant levels. Building owners and facility managers should also consider testing to determine if PCB levels in the air exceed EPA's suggested public health levels. If testing reveals PCBs in the air above these levels, building owners should be especially vigilant in implementing and monitoring ventilation and hygienic practices to minimize exposures.

Where buildings were constructed or renovated between 1950 and 1978, EPA recommends that PCB-containing caulk be removed during planned renovations and repairs (when replacing windows, doors, roofs, ventilation, etc.). It is critically important to ensure that PCBs are not released to the air during replacement or repair of caulk in affected buildings.

In addition, the agency is currently conducting research to determine the sources and levels of PCBs in buildings in the U.S. and to evaluate different strategies to reduce exposures. The results of this research will be used to provide further guidance to building owners as they develop and implement long-term solutions.

For further information on PCBs in caulk, see <http://www.epa.gov/pcb Sinclair>. Concerned parties can also call an EPA hotline toll free at 1-888-835-5372.

(b) New Chemical Management Framework/TSCA Update

In September 2009, Administrator Jackson released a set of essential principles for reform of chemical management legislation to help inform efforts under way in Congress to reauthorize and significantly strengthen the effectiveness of the Toxic Substances Control Act (TSCA), and announced a comprehensive approach to enhancing chemical management under existing laws. TSCA gives EPA authority to take specific measures to assess chemical substances and mixtures, and protect against unreasonable risks to human health and the environment from existing chemicals.

In a speech delivered in San Francisco, Jackson said EPA's current oversight of the 21st century chemical industry is based on a 1976 law that is now outdated. "Over the years, not only has TSCA fallen behind the industry it's supposed to regulate—it's been proven an inadequate tool for providing the protection against chemical risks that the public rightfully expects," Jackson said.¹²

The principles, outlined below, present the Administration's goals for legislation that will give EPA the mechanisms and authorities to quickly target chemicals of concern and promptly assess and regulate new and existing chemicals in commerce:

- Chemicals should be reviewed against risk-based safety standards based on sound science.

- Manufacturers should provide EPA with the necessary information to conclude that new and existing chemicals are safe and do not endanger public health or the environment.
- EPA should have clear authority to take risk management actions when chemicals do not meet the safety standard, with flexibility to take into account sensitive subpopulations, costs, social benefits, equity and other relevant considerations.
- Manufacturers and EPA should assess and act on priority chemicals, both existing and new, in a timely manner.
- Green chemistry should be encouraged and provisions assuring transparency and public access to information should be strengthened.
- EPA should be given a sustained source of funding for implementation.¹³

Although legislative reform is necessary for an effective chemicals management program, EPA is committed to strengthening the performance of the current program while Congress considers new legislation. EPA has identified an initial list of chemicals for possible risk management action and anticipates completing an initial set of four action plans in December 2009. The agency will post additional chemical action plans in four-month intervals thereafter. Additionally, EPA will focus on “accelerating efforts to gather the critical information from industry that the agency needs to make chemical risk determinations.”¹⁴ The information gathering efforts will include filling the gaps in health and safety data on high production volume chemicals; enhanced, transparent, and more current reporting of use and exposure information; and a number of requirements for increased reporting on nanoscale chemical materials. EPA is also focused on reviewing how nanoscale materials are managed under TSCA and improving ways to increase the public’s access to information about chemicals.¹⁵

Senators Barbara Boxer (D-Calif.) and Frank Lautenberg (D-N.J.) are expected to introduce legislation soon to amend TSCA.

For further information on EPA’s efforts to enhance its Chemical Management Program, see <http://www.epa.gov/oppt/existingchemicals/pubs/enhanchems.html>.

Additional information on the program, including information on specific aspects of EPA’s effort, an initial list of chemicals under consideration for “Action Plan” development, the new hazard characterization for 100 chemicals, EPA’s recently announced risk management on lead and its plans for banning the use of mercury in certain products, can be found on EPA’s Web site at www.epa.gov/oppt/existingchemicals/index.html.

(c) Nanomaterials Assessment

In September, EPA outlined a new research strategy to better understand how manufactured nanomaterials may harm human health and the environment. Nanomaterials are materials that are between approximately one and 100 nanometers. A nanometer is approximately 1/100,000 the width of a human hair. These materials are currently used in hundreds of consumer products, including sunscreen, cosmetics, and sports equipment.¹⁶

The strategy outlines the research EPA will support over the next few years to generate information about the safe use of nanotechnology and research into ways nanotechnology can be used to clean up toxic chemicals in the environment.

EPA’s role among federal agencies is to determine the potential hazards of nanotechnology and develop approaches to reduce or minimize any identified risks. The research is being conducted in EPA’s laboratories and by grant recipients as part of a collaborative effort with other federal organizations and the international community.

EPA’s research is conducted using a multidisciplinary approach that examines all aspects of nanomaterials in the environment, from their manufacture and use to their disposal or recycling. EPA’s new nanotechnology Web site provides more details about the research and offers news and publications.

For more information about nanotechnology research, see <http://www.epa.gov/nanoscience>.

D. Regional Actions—Compliance and Enforcement

Below are some selected settlements and matters from Region 2’s compliance and enforcement docket, with a particular focus on New York and New Jersey.

1. Water Matters

On March 4, 2009, the United States moved in the U.S. District Court in Buffalo for an order enjoining Acquest Transit LLC (Acquest) from “placing additional fill or performing any additional earthmoving work” in wetlands pending the final resolution of the United States’ lawsuit against Acquest for illegal discharges of fill into the wetlands on its 96-acre parcel in Amherst, New York. The court found that the property was entirely covered by wetlands, that Acquest had discharged fill into at least 13.3 acres of those wetlands without a permit, and that the wetlands were “waters of the United States” under both the plurality and Kennedy tests articulated in *Rapanos v. United States*, 547 U.S. 715 (2006). The court rejected Acquest’s argument that its activities in the wetlands were exempt from the permitting requirement of the Clean Water Act because they were limited to ongoing farming, and thus exempt under Clean Water Act § 404(f), upon its finding that the construction of a retail nursery on 2.6 acres of the wetlands, the construction of a 26’

wide, 1,800' long, 2' high gravel road, the deposition of non-native fill material on 3.2 acres of the wetlands, and the substantial maintenance of ditches and creation of new ditches, with corresponding deposition and spreading of the dredged material on the wetlands, do not qualify as agricultural activity.

On June 12, 2009, Region 2 issued a Consent Agreement and Final Order ("CAFO") in *In re Mid Atlantic Vegetable Shortening Co. Inc. of Kearny, NJ*, for violations of regulations issued pursuant to Section 311 (j) of the Clean Water Act. The Respondent had failed to prepare and implement a Spill Prevention Control and Countermeasures Plan for its facility as required by 40 C.F.R. § 112.7 and § 112.8. The Respondent has agreed to pay a civil penalty of \$40,000. Since the company was sold on March 6, 2009, its successor has agreed to fully implement the compliance actions, which include an underground sump and pumping system next to a rail car unloading area that will cost over \$300,000.

On June 29, 2009, Region 2 issued a Notice of Complaint and Proposed Assessment of a \$130,000 civil penalty to Landmark at Rahway, LLC (Landmark), alleging extensive and continuing violations of its construction stormwater discharge permit. Landmark is a long-standing home-building company with several development sites in New Jersey. The site at issue is a 3.08-acre lot in Rahway, New Jersey, upon which Landmark is constructing a mixed-use commercial and residential development. Stormwater from the site discharges via a municipal separate storm sewer system into the Rahway River. EPA conducted a Compliance Evaluation Inspection on December 3, 2008 and discovered numerous violations of Landmark's permit. Specifically, Landmark failed to prepare a Stormwater Pollution Prevention Plan, and as a result, failed to implement and maintain necessary stormwater pollution controls and Best Management Practices and failed to conduct and document weekly site inspections. On December 9, 2008, EPA issued an administrative order directing Landmark to correct its violations. Notwithstanding the order, a follow-up inspection by EPA on March 11, 2009 found that most of the violations had not been corrected.

2. Waste and Toxic Substance Matters

On June 26, 2009, Region 2 signed a CAFO settling the second enforcement action against Lonza Inc., the largest manufacturer of sanitizers and hospital disinfectants in the United States. This second action, alleged numerous violations of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) (distribution and sale of numerous hospital disinfectants which failed efficacy testing) and was settled for a civil penalty of \$552,400.

On July 21, 2009, U.S. District Court Judge Sifton of the Eastern District of New York delivered a bench ruling denying defendant Cary Fields' motion for summary judgment in EPA's CERCLA § 107 action to recover \$3.5

million in removal action response costs incurred at the BCF Oil Refining, Inc. site, located in Brooklyn, New York. The BCF site, which is not on the NPL, was a waste oil recycling facility. In 1994, its tanks were contaminated by PCBs. After unsuccessful litigation against Consolidated Edison as the alleged PCB source, BCF abandoned the site in 2000. Although the defendant had an extensive environmental compliance role as BCF's Chairman, CEO and controlling shareholder, his post-discovery summary judgment motion argued that under the Supreme Court's *U.S. v. Bestfoods* decision,¹⁷ his role was as a mere shareholder and passive investor. In denying the motion and ordering the case set for trial, the court noted, among other things, that Fields' testimony in the prior Consolidated Edison litigation contradicts his assertions of passive involvement.

On August 21, 2009, Judge Amon of the Eastern District of New York entered a consent judgment resolving the United States' claims against Citygas Corporation and 26 other defendants, who were owners and operators of underground storage tanks (USTs) at 24 gasoline service stations located in all five boroughs of New York City and in New Jersey. The judgment imposes continuing compliance and reporting requirements for the 14 stations and 112 USTs still owned by the defendants and a related entity, and requires the defendants to pay a \$1,400,000 penalty. This follows entry of an earlier consent judgment with four other defendants in the case who were required to pay a \$325,000 civil penalty.

Also in August, EPA Region 2 issued a final order against the City of New York to resolve violations in the City's procedures for the handling of hazardous waste. As a result of inspections and the City's response to an information request letter, EPA became aware that the Department of Citywide Administrative Services (DCAS) was improperly managing spent fluorescent bulbs and computer monitors at 53 buildings that are either owned by the City or used by various City agencies, and for which DCAS serves as the landlord and building manager. Under the settlement, the City will pay a \$50,000 penalty and has agreed to perform a Supplemental Environmental Project consisting of a comprehensive hazardous waste audit of up to 1,000 facilities throughout the City. If the audit uncovers any violations in the handling and managing of hazardous waste, the City will undertake corrective action and conduct additional audits.

In September 2009, EPA Region 2 issued an administrative complaint alleging multiple violations of TSCA by Ampacet Corporation (Ampacet) of Tarrytown, New York. The complaint alleges that Ampacet, an importer of chemical substances, violated Section 15(3)(B) of TSCA by failing to submit information regarding chemicals imported for commercial purposes into the U.S. during the relevant reporting period, and seeks a penalty of over \$130,000.

In September 2009, EPA Region 2 issued a Consent Agreement and Final Order (CAFO) to Samsung Electronics America, Inc., a major distributor of electronic and computer equipment. The CAFO simultaneously commenced and concluded an administrative proceeding under Section 14(a)(1) of FIFRA. The company's labels and promotional material for computer laptops made claims of antimicrobial protection for computer users, implying that the products inhibited mold, viruses, fungus and bacteria growth. FIFRA prohibits such claims in connection with the sale or distribution of products which have not undergone EPA review for effectiveness and safety as part of EPA's pesticide registration process, as was the case here. Pursuant to the CAFO, Samsung will pay a civil penalty of \$205,000 and provide a certification that it has complied with FIFRA by removing all pesticidal claims made in connection with the sales and distributions of these products, and Samsung has notified its retailers and distributors to remove any pesticidal claims from labels, promotional brochures, and Internet/Web-based content for the subject products.

In September 2009, EPA Region 2 issued an administrative complaint against Oakite Products, Inc., and Chemetall Us, Inc. for failing to timely submit information on their manufacture and importation of chemical substances for the 2006 TSCA Inventory Update, in violation of TSCA. The complaint alleges that the respondents failed to report three chemicals manufactured in 2005 at a facility they own and operate in California, and also failed to report 16 chemicals manufactured at their Michigan facility and one imported through that facility. The complaint seeks a civil penalty of \$440,000.

On September 23, 2009, the U.S. District Court for the District of Columbia upheld the Environmental Appeals Board (EAB)'s Final Decision in an EPA RCRA action initiated by EPA against Howmet. By way of background, Regions 2 and 6 issued administrative complaints alleging that Howmet failed to manage used KOH generated at its facilities as a hazardous waste. Litigation ensued regarding the definition of "spent material." The ALJ and the EAB upheld EPA's interpretation of the definition of spent material and found that the Respondent had fair notice of this interpretation. Howmet filed a complaint in the District Court for the District of Columbia appealing the EAB's Decision, and reiterated its positions regarding the definition of spent material and lack of fair notice. The Department of Justice, on behalf of EPA, argued that the EAB's Final Decision was due deference and should be upheld. Mindful of the deference due to an agency's interpretation of its own regulations, the Court affirmed the EAB's Final Decision, stating that EPA's interpretation was not arbitrary, capricious, or an abuse of discretion. In addition, the court found that EPA provided fair notice of its interpretation, and stated Howmet was liable for a \$309,091 penalty.

On September 30, 2009, EPA Region 2 issued an administrative complaint to the United States Army and the Army & Air Force Exchange Service ("AAFES") seeking a civil penalty of \$167,116 for violations of RCRA at the West Point Garrison in West Point, New York. The complaint alleges that the Army failed to perform release detection monitoring, to conduct cathodic protection testing, to investigate unusual operating conditions, to maintain spill protection, and to keep required monitoring and test records for various USTs owned and operated by the Army at West Point. In addition, the complaint alleged that both respondents failed to conduct testing of the automatic line leak detectors for three additional diesel fuel and gasoline USTs owned by the Army and operated by AAFES.

On the same date, EPA Region 2 issued an administrative complaint against McHone Industries, Inc. for violations of RCRA and its implementing regulations at McHone's facility in Salamanca, New York. The complaint alleges that McHone failed to make a hazardous waste determination for solid waste generated at its facility, failed to prepare a hazardous waste manifest for a waste shipment off-site, and operated a hazardous waste storage facility without a permit. The complaint seeks injunctive relief and a penalty of over \$30,000.

On October 3, 2009, the U.S. District Court for the Southern District of New York entered into a stipulation and order resolving the United States' claims that Kawasaki had violated regulations governing the management and storage of hazardous waste. This is an action that was commenced with the filing of a judicial complaint on September 22, 2009 and concluded with the entry of this stipulation soon afterward. In response to EPA's action, Kawasaki performed a detailed audit of all of its hazardous waste streams and disposed of all the stored waste properly. Under this agreement Kawasaki is required to pay a penalty of \$130,000.

3. Selected Initiatives

Building on the success of the Region's prior efforts with colleges and universities, the Region this quarter has issued notices resolving self-reported noncompliance across media by transportation and health care entities that had previously entered into self-auditing agreements with the Region.

(a) Fleet Initiative

In July, EPA Region 2 issued a Notice of Determination ("NOD") to the Metropolitan Transportation Authority (MTA)'s Amsterdam Depot, Casey Stengel Depot, Far Rockaway Depot, and Jackie Gleason Depot in response to voluntary disclosures that the facilities had failed to comply with CAA, CWA, and RCRA requirements. The disclosures qualified for 100% mitigation of gravity-based penalties under EPA's Audit Policy. Economic benefit was insignificant, and the environmental benefits resulting

from this audit were proper management of 27,500 gallons of oil, waste minimization of 25 pounds of hazardous waste per year, waste treatment of 40 pounds per year of paint-related material and solvents, proper identification and labeling of 83 gallons of hazardous waste, proper disposal of 80 gallons of hazardous waste, proper monitoring, recordkeeping, reporting, notification, and training of workers handling hazardous waste.

In August, EPA Region 2 issued an NOD to Amtrak's 525 E Street, Rensselaer Maintenance Facility in response to a voluntary disclosure that it had failed to comply with RCRA and CWA requirements. The disclosure qualified for 100% mitigation of gravity-based penalties under the Audit Policy. Economic benefit was insignificant, and the environmental benefits resulting from the audit include treatment of 450 pounds of hazardous waste and proper management of 437,000 gallons of fuel oil and 55 gallons of hazardous waste.

"[T]he Agency is continuing its efforts to protect and restore the environment, and those efforts have been reinvigorated by EPA's new national leadership."

(b) Health Care Initiative

Over the last several months, EPA Region 2 has issued NODs to the New York State Office of Mental Health's Capital District Psychiatric Center (CDPC), Hutchings Psychiatric Center (HPC), Western New York Children's Psychiatric Center (WNYCP), and Cook Chill Production Center (Cook Chill) in response to voluntary disclosures of failures to comply with RCRA, CWA and CAA requirements at the facilities. These disclosures qualified for 100% mitigation of gravity-based penalties under EPA's Audit Policy. The economic benefit of noncompliance was insignificant, and the environmental benefits resulting from the audits include proper treatment of 13 pounds of hazardous waste, proper management of 70 gallons of hazardous waste and 178,050 gallons of fuel oil/diesel, and proper planning, reporting, and training.

E. Conclusion

As can be seen, the Agency is continuing its efforts to protect and restore the environment, and those efforts have been reinvigorated by EPA's new national leadership. At the time of the drafting of this article, the appointment of the new Regional Administrator, Judith Enck, had just been announced. The next issue of *The New York Environmental Lawyer* will share some of Ms. Enck's thoughts on Regional issues.

Endnotes

1. Any opinions expressed herein are the authors' own, and do not necessarily reflect the views of the U.S. Environmental Protection Agency (EPA).
2. EPA Press Release, EPA Proposes Newtown Creek for the Superfund List of Hazardous Waste Sites, September 23, 2009, available through EPA's Newsroom at <http://www.epa.gov/newsroom/newsreleases.htm>.
3. See also, NPL Site Narrative for Newtown Creek, <http://www.epa.gov/superfund/sites/npl/nar1813.htm>.
4. EPA Press Release, EPA Releases Preliminary Results for Surface Coal Mining Permit Reviews, September 11, 2009, available through EPA's Newsroom at <http://www.epa.gov/newsroom/newsreleases.htm>.
5. 73 Fed. Reg. 22,901.
6. 74 Fed. Reg. 25,304; 98 DEN A-1, May 26, 2009.
7. EPA Press Release, EPA Posts First Data from One of Four Schools in NY and NJ, October 1, 2009, available through EPA's Newsroom at <http://www.epa.gov/newsroom/newsreleases.htm>.
8. For more information on acrolein, see The Agency for Toxic Substances and Disease Registry (ATSDR)'s ToxFAQs Web site at <http://www.atsdr.cdc.gov/tfacts124.html>.
9. EPA Fact Sheet, EPA Announces Guidance to Communities on PCBs in Caulk of Buildings Constructed or Renovated Between 1950 and 1978 EPA to gather latest science on PCBs in caulk, September 25, 2009, available through EPA's Newsroom at <http://www.epa.gov/newsroom/newsreleases.htm>.
10. For further information on PCBs and their health effects, see <http://www.cdc.gov/nceh> or <http://www.cdc.gov/atsdr>.
11. *Id.*
12. Administrator Lisa P. Jackson, Remarks to the Commonwealth Club of San Francisco, As Prepared, September 29, 2009, available through EPA's Newsroom at <http://www.epa.gov/newsroom/newsreleases.htm>.
13. EPA Press Release, EPA Administrator Jackson Unveils New Administration Framework for Chemical Management Reform in the United States, September 29, 2009, available through EPA's Newsroom at <http://www.epa.gov/newsroom/newsreleases.htm>. See also, EPA's Web site, Essential Principles for Reform of Chemicals Management Legislation, <http://www.epa.gov/oppt/existingchemicals/pubs/principles.html>.
14. *Id.*
15. *Id.*
16. EPA Press Release, EPA Announces Research Strategy to Study Nanomaterials, September 29, 2009, available through EPA's Newsroom at <http://www.epa.gov/newsroom/newsreleases.htm>. See also, Cornelia Dean, *Nanomaterials Under Study by the E.P.A.*, N.Y. Times, September 29, 2009.
17. 524 U.S. 51 (1998).

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DEC Update—Fall 2009

By John L. Parker

DEC Today: Fiscal Challenge/Fiscal Reality FY 09/10

The Department of Environmental Conservation (DEC) continues to operate despite the challenges inherent to the ongoing fiscal situation. On October 6, 2009, Governor Paterson directed the state government to identify \$500 million in current year spending cuts, which amount to approximately an 11 percent reduction in each agency's 2009-10 non-personal services budget. This amounts to an \$11 million non-personal services reduction for DEC. Despite these mandated fiscal constraints, a budget deficit of approximately \$3 billion is expected for this 09/10 fiscal year. Further, based upon current projections, about 200 DEC staff will leave the agency this year through normal attrition. In addition, on November 11, 2009, the severance incentive offered to state employees will result in approximately 150 additional DEC staff leaving the agency. While the numbers are not finalized, this equates to a reduction of approximately 10% of DEC staff.

Despite these fiscally challenging times and the impacts of decreased staffing levels, DEC continues to advance many significant initiatives and projects in every DEC region of the State of New York. Here is a brief update of some of the highlights of that work.

Marcellus Shale Draft Supplemental Generic EIS

On September 30, 2009, DEC released a draft Supplemental Generic Environmental Impact Statement (DSGEIS) addressing the potential horizontal drilling and high-volume hydraulic fracturing techniques used to extract natural gas from the Marcellus Shale formation and other low permeability gas reservoirs across the Southern Tier and into the Catskills. The DSGEIS outlines safety measures, protection standards, and mitigation strategies applicable to the permitting process. There is a 60-day public comment period for submission of written comments on the DSGEIS, and public information meetings will be scheduled during that time period which will close on December 31, 2009.

The DSGEIS addresses a number of issues related to the extraction of Marcellus Shale formations in New York. Pre-drilling issues addressed in the draft include disclosure of fracturing fluids, pre-drilling water well testing to gather baseline information, ongoing groundwater monitoring, water consumption requirements, more stringent and protective stream flow analysis applicable to water withdrawal plans, certification of technical compliance requirements, and mitigation planning for environmental impacts and truck traffic in local communities. Regarding drilling and post-drilling, the DSGEIS proposes more stringent requirements in primary and principal aquifer areas, on-site flowback handling requirements, centralized flowback storage requirements, flowback disposal require-

ments, and specific mitigation measures for the NYC watershed and other sensitive areas. The draft also addresses operational restrictions in floodplains and the requirement for a multi-sector stormwater general permit for industrial activities.

The DSGEIS expands on the 1992 Generic Environmental Impact Statement that addressed requirements for oil and gas drilling in New York State. Additional information is available at <http://www.dec.ny.gov/energy/46288.html>.

Open Burning Regulations

The DEC's amendments to the open burning regulations become effective on October 14, 2009. Under the regulations in 6 N.Y.C.R.R. Part 215, the open burning of residential waste will be prohibited in all communities statewide, regardless of population, but with certain exceptions. The open burning regulations are intended to respond to a wide array of public health concerns. DEC, working jointly with the New York State Department of Health on a U.S. Environmental Protection Agency study, concluded that emissions of dioxins and furans from backyard burning alone exceeded those from all other sources combined in 2002-2004. Household wastes often contain plastics, polystyrene, pressure-treated and painted wood, and bleached or colored papers. These may emit significant levels of arsenic, carbon monoxide, benzene, styrene, formaldehyde, lead, and hydrogen cyanide, among others, when burned in household waste fires. In addition, DEC's Forest Protection Division data show that debris burning accounted for about 40% of wildfires between 1986 and 2006.

After reviewing public comments, DEC modified the original proposal to exempt the burning of tree limbs and branches in smaller municipalities (less than 20,000) between May 15 and the following March 15. Exemptions from the new regulations also include, among others: small cooking and camp fires, on-site burning of organic agricultural wastes (excluding pesticides, plastics, or other non-organic material), ceremonial or celebratory bonfires, disposal of a flag or religious item, prescribed burns performed according to state regulations, and open fires as necessary to control invasive plant and insect species.

Changes to the Petroleum and Chemical Bulk Storage Programs

In July of 2008, the state legislature amended the Environmental Conservation Law (ECL) to provide the DEC with the statutory and administrative tools necessary to achieve equivalency with federal Underground Storage Tank regulations, 40 C.F.R. Part 280, and to achieve compliance with the federal Energy Policy Act of 2005. Chapter 334 of the Laws of 2008 (Assembly 9019/Senate

6055) amends Title 10 of Article 17 and Article 40 of the ECL, pertaining to petroleum and chemical bulk storage. Article 37 was also amended to allow DEC to update the lists of identified hazardous substances, the bulk storage of which is regulated by Article 40. The bill provides a foundation for New York to meet specific deadlines set forth in the Energy Policy Act, and to enable the State to continue receiving federal grant money for the bulk storage program.

Included in the changes is an amendment to the definition of "petroleum," to include "crude oil and any fraction thereof; any mixture containing crude oil or any fraction thereof; and synthetic forms of lubricating oil, dielectric oils, insulating oils, hydraulic oils and cutting oils." The definition of "facility" given in Article 17 was modified and expanded to include underground tanks 110 gallons and larger, except for heating oil tanks up to 1,100, unless the tank is located at a site that qualifies as a facility. These newly regulated tanks were required to be registered with the DEC by July 21, 2009. The law also now contains definitions for "tank," "leak" and "spill."

Both the petroleum and chemical bulk storage laws now contain a provision requiring DEC to promulgate rules establishing training requirements for operators of bulk storage facilities. Pursuant to the requirements of the Energy Policy Act, New York must have all operators of bulk storage facilities certified as trained by August 2012, to continue qualifying for federal grant funds. The DEC is also required by the Energy Policy Act to prohibit deliveries to any tank that is leaking, where a leak appears probable, or if the tank is in violation of certain installation and maintenance requirements. Exceptions may be made for emergency situations and for rural areas with limited access to petroleum. Tanks prohibited from receiving deliveries would be tagged by the Department and owners and operators would be provided the opportunity for prompt administrative hearings and determinations reviewing any such prohibition.

DEC has selected members of the Petroleum Bulk Storage Advisory Council to consult with regarding the required rulemaking process. The process is under way and draft regulations are expected to be released for public comment in late 2010. Public hearings will be held across the state. If you are interested in the DEC Tank Bulletin and wish to receive updates regarding the bulk storage program, please visit DEC's Web site at <http://www.dec.ny.gov/chemical/287.html>. Please direct legal questions regarding the amendments to Articles 17 and 40, or the pending rulemaking, to Mary Wojcik at (518) 402-9188.

Shad Fishery in Decline: DEC Proposes to Close Fishery

Over the past 20 years, the American shad stock, one of the few fish still caught for human consumption from the Hudson River Estuary, has declined dramatically, reaching historic lows in 2002. Fishing interests suffered

an interstate ban in 2005 on harvest of American shad from ocean waters of the Atlantic Coast, and Hudson River recreational and commercial fisheries were restricted in 2008 with the hope that protection would improve reproduction in young American shad. However, these efforts have not been successful in reversing the decline in the shad fishery. The American shad spawning population reached approximately 1,000,000 in the mid-1980s. It is now less than 40,000. DEC now proposes closing the shad fishery.

The DEC proposal, which could be effective as early as this coming spring, would close recreational and commercial fishing for American shad in the Hudson and prohibit commercial landings in marine waters. Provisions of Title 6 N.Y.C.R.R. that may be subject to the proposed change include: Part 10 "Sportfishing"; Part 11 "More Than One Species"; Part 35 "Licenses"; Part 36 "Gear and Operation of Gear"; and Part 40 "Marine Fish." These pertain to fishery closures for Hudson River American shad stock and fishery restrictions for the Delaware River American shad stock.

SEQRA and Assessing Energy Use and Greenhouse Gas Emissions

A previous update noted the proposed DEC policy to analyze energy use and potential greenhouse gas emissions during environmental impact review. The policy applies when DEC is the lead agency in a State Environmental Quality Review Act (SEQRA) Environmental Impact Statement (EIS). The policy was issued on July 15, 2009, details at <http://www.dec.ny.gov/regulations/56552.html>.

The DEC greenhouse gas policy identifies the scope and methodology for assessing energy demand and greenhouse gas generation from particular projects and offers an illustrative list of avoidance and minimization measures that can be included in developing alternatives and mitigation in an EIS. The policy is not intended to create new SEQRA procedural requirements. The policy is also not intended to provide a threshold of significance under SEQRA, or otherwise identify the point at which the impacts of potential energy demand or greenhouse gas generation would trigger a requirement to prepare an EIS. The policy does indicate that when DEC is an involved agency, DEC should advise the lead agency of any identified climate change or energy use impacts relevant to SEQRA review.

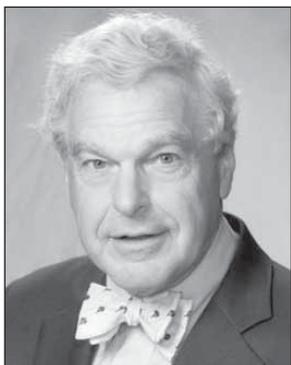
John L. Parker is a Regional Attorney with the Department of Environmental Conservation, Region 3.

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

Member Profiles

Long-Time Member: John Hanna, Jr.

For this issue, we have focused the Long-Time Member Profile on the extraordinary goals, vision and persistence of John Hanna, Jr. As many of you are well aware, there may be no single word (or for that matter, collection of words) that can capture John's impact on the practice of environmental law, both here in the State of New York and on the international sphere. And,



John Hanna, Jr.

although I have not yet shared the history with John that many Section members have, I can offer an anecdote that I suspect may bring a smile to those who know him well. Interviewing John is nothing less than touching the history of environmental law in New York. As he recalled the battles and challenges he faced in his career, I found myself mentally exhausted and engorged with the history to which he connected me. What makes me grin is that, through this interview, John kept me true to the agenda that I proposed and reminded me of the questions that I had forgotten to ask. John, a true gentleman, made sure that both our jobs were done well.

When John first stepped into his role as the first Deputy Commissioner and General Counsel of the Department of Conservation (DEC) in 1973, he was faced with a disjointed agency that exercised authority over conservation, public health, parks and the state's air force (for firefighting). John sought to consolidate, simplify, and improve the quality of environmental decision-making in the DEC. As the science grew more complicated, he set out to recruit scientific expertise into the DEC. John recalls he felt "it would be easier to teach the process to scientists and engineers than it would to teach science and engineering to lawyers." He also sought to improve the environmental police force by sending environmental conservation officers to the police academy for training.

The problem, John recalls, was that the DEC operated a patchwork and piecemealed regulatory process: "even with good people, there was a limit to what we could do." At that time, the DEC boasted some 178 permit programs, all governed by their own procedural rules. Eventually, he would see his ideas on regulatory reform realized in the Uniform Land Use Procedures Act.

As the third Chair of the Environmental Law Section of the NYSBA, in 1982, John took on the problem of Section membership and tried to engage both utilities and government lawyers in Section activities. As John

recalled, he was eventually able to measure his efforts at a Section event: "Although at one point I knew most of the Section members, there came a time when I said to a friend, 'I think we are successful, because I don't know most of the people in the room.'"

John is a graduate of Princeton University and Harvard Law School. He is one of the founders of Whiteman Osterman & Hanna, LLP, where he continues to practice environmental and commercial law in their extensive and influential environmental law practice. He serves as an arbitrator and mediator for international and domestic commercial disputes. He has a substantial resume of publications and presentations on environmental, international, and arbitration matters. In addition, John has educated laypersons on the administrative process at Russell Sage College, has taught environmental law in the undergraduate program at RPI, and has taught international environmental law for several years at the John Marshall Law School in Chicago.

John's accomplishments are virtually coextensive with the rich history of conservation in New York, and so it is with great regret that we can mention only a few. Put simply: through his leadership, advocacy, vision or the simple act of offering his hand, John's contribution has been profound.

By Keith Hirokawa

New Member: Amy Lavine

In this New Member profile, we introduce Amy Lavine to the Section. Amy serves as a Staff Attorney at the Government Law Center at Albany Law School. At this year's Jefferson Fordham Up & Comer Award ceremony (hosted by the State & Local Government Section of the ABA), Associate Dean Patricia Salkin remarked that "in the nineteen years that I have worked at the Center, I can say with all honesty that I have never worked with a more committed and talented attorney who focuses on state and local government law issues."



Amy Lavine

Amy is the type of law professional who must use a tiny font to fit her accomplishments on her resume. What makes Amy so impressive is not merely her graduation from Bard College at the age of nineteen, or her graduation *magna cum laude*, with concentrations in both art and ecology. One could also overlook the fact that she graduated *cum laude* from Albany Law School with jour-

nal experience. What cannot be disregarded, however, is that her accomplishments, including those as an attorney, have not tarnished her sensibilities, passion, or drive.

In only two years since law school graduation, Amy has accomplished more than most attorneys do in their entire careers. Amy already boasts an impressive array of scholarly and professional articles on state and local government law topics. Her articles have appeared in the *Urban Lawyer*, the *Rutgers Journal of Law and Public Policy*, the *UCLA Journal of Environmental Law & Policy*, *Brooklyn Law Review*, the *Food and Drug Law Journal*, the *Practical Real Estate Lawyer*, several NYSBA bar and industry periodicals, and as book chapters. As a speaker, Amy is highly sought after by professional and community organizations on a wide range of community development topics.

Amy has established herself as a leading national expert on the emerging subject of community benefit agreements. She maintains the most comprehensive blog on the emerging topic of community benefit agreements and is currently collaborating on a comprehensive book to address the subject. Amy is also working on a book addressing eminent domain and the oddities of the landmark case of *Berman v. Parker* in which she plans to incorporate her considerable archival research, both on-site and at the D.C. Public Library and the D.C. Historical Society.

Amy is an excellent model of professional excellence and service to the profession, the bar, and the community. We extend our welcome and can expect to hear more about her in years to come.

By Keith Hirokawa

The New York Environmental Lawyer is also available online

The screenshot shows the website for the New York State Bar Association's Environmental Law Section. The main heading is 'The New York Environmental Lawyer'. Below it, there is a section titled 'About this publication' which describes the journal's focus on environmental law topics like climate change, brownfields, and air quality. A sidebar on the left lists various services like 'My NYSBA', 'Blogs', and 'CLE'. Another sidebar on the right lists 'Environmental Law' resources, including 'Join This Section', 'The New York Environmental Lawyer', and 'Publications Download'. At the bottom of the sidebar, there is a 'Past Issues' section with links to various volumes and issues.

Go to www.nysba.org/EnvironmentalLawyer to access:

- Past Issues (2000-present) of *The New York Environmental Lawyer**
- *The New York Environmental Lawyer* Searchable Index (2000-present)
- Searchable articles from *The New York Environmental Lawyer* that include links to cites and statutes. This service is provided by Loislaw and is an exclusive Section member benefit*

*You must be an Environmental Law Section member and logged in to access.

Need password assistance?
Visit our Web site at www.nysba.org/pwhelp.
For questions or log-in help, call (518) 463-3200.

Member News

Philip Weinberg, the featured Long-Time Member in *The New York Environmental Lawyer*, Summer '09 issue, has retired from St. John's University School of Law. He was a Professor of Environmental Law and Constitutional Law at the Law School for 28 years. But Phil has been a fixture in the environmental law arena for around 40 years. He founded the Environmental Protection Bureau for the Office of the New York State Attorney General, which Bureau he headed from 1970 to 1978. He has been a member of the Section since its founding in the 1970s and he was the Section Chair for the 1988-89 term. He has been active in other associations, committees and on several boards, all addressing environmental law or constitutional law issues. Phil is an accomplished author and editor and wrote the Practice Commentary to McKinney's New York Environmental Conservation Law from 1984 to 2008, and authored an environmental law casebook, as well as other books, articles, and treatises on environmental law and constitutional law. Phil has made such tremendous contributions to St. John's, to this field, and to the Section over the years that his retirement, although well deserved, leaves a huge gap that will not be filled. All that can be said is—Congratulations, Phil, but please include us in your next chapter!

* * *

Yvonne Marciano (featured in the Member News column of *The New York Environmental Lawyer*, Summer '09 issue) is now Yvonne Hennessey. Yvonne and Eric Hennessey were married on September 25, 2009. The ceremony took place at Siena College's Chapel and the reception was at Schuyler Meadows Club, both in Loudonville, NY. The newlyweds took a Mediterranean cruise for their honeymoon with stops in Italy, France and Spain. Congratulations and best wishes to the newlyweds.

* * *

Yvonne Hennessey has more news. She has been named to the Board of Trustees for the Federal Court Bar Association. Yvonne says that she is "very excited and incredibly honored" to have been named to the Board. Congratulations to Yvonne on this well-deserved appointment.

* * *

Justin Birzon, one of the issue editors for *The New York Environmental Lawyer*, has been accepted into the Pace Environmental Law LLM program. Justin began his first semester and reports that the challenging program has much to offer those interested in specializing in environmental law. Good luck, Justin.

Do You Have News You Want to Share with Your Colleagues?

E-mail your news and photos (jpg or tif format, please) to one of our Editors:

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New York Local Governments Respond to Climate Change and Energy Efficiency

By Patricia E. Salkin

I. Introduction

New York ranks eighth out of the fifty states in terms of carbon emissions.¹ While the State government is just beginning to enact programs and incentives for local governments to encourage municipal policies and actions that will reduce the impact of local decisions on our carbon footprint, a number of local governments across the State have already been at work developing and adopting “greening” strategies, policies and regulations. At the state level, in September 2008, Governor Paterson signed into law the Green Residential Building Grant Program, which authorizes the New York State Energy Research and Development Authority (NYSERDA) to develop and establish standards for the program.² NYSERDA has reorganized its Web site so that municipalities can quickly find information about available state incentives

“In large part, this article focuses on the manner in which local governments have incorporated climate change concerns into land use regulations, cognizant of the State’s Renewable Energy Task Force’s recent identification of several challenges present at the local level that toll against establishing a pervasive program to address climate change impacts.”

to promote “green,”³ as well as information about local government sustainability initiatives in the State.⁴ Another State-level climate change program was launched in February 2009 by the New York State Department of Environmental Conservation (DEC), with the announcement of the Climate Smart Communities Initiative, designed as a State and local partnership effort to encourage climate protection.⁵ More than forty municipalities have now adopted the Climate Smart community pledge.⁶ In March 2008, Governor Paterson issued Executive Order 2 calling for a new State Energy Plan,⁷ and in August 2009, a draft plan was published for comment.⁸ The comment period extends through October 2009, with the expectation that a final plan will be adopted in November 2009.⁹ On August 16, 2009, Governor Paterson issued Executive Order 24 setting a goal of reducing greenhouse gas emissions by 80% by the year 2050, and calling for the creation of a climate action plan.¹⁰

While these State-level programs are vital to achieving emissions reductions goals, New York’s cities, towns,

and villages also have been at work trying to develop and implement strategies to curb emissions. Municipalities are choosing to adopt clear statements and action items in their comprehensive land use plans.¹¹ They are creating climate change or sustainability task forces and developing strategies.¹² Local governments are also enacting regulations to promote green building and alternative energy development.

This article introduces the ways in which local governments have taken the lead in mitigating and preparing for climate change. In large part, this article focuses on the manner in which local governments have incorporated climate change concerns into land use regulations, cognizant of the State’s Renewable Energy Task Force’s recent identification of several challenges present at the local level that toll against establishing a pervasive program to address climate change impacts. Specifically, the report recommends addressing existing barriers to municipal government purchase of green power¹³ and notes that “renewable energy installers and potential owners face a patchwork of widely differing local government permitting requirements as well as home owner association (HOA) restrictions, which create hurdles to the efficient and widespread installation of renewable energy systems such as PV, solar thermal and small wind.”¹⁴

II. Green Legislation and the Local Level

While climate change is not exclusively a land use issue, some of the most effective strategies to slow climate change can be accomplished through modifications to building codes, zoning ordinances and other land use regulations. However, to be truly effective and to attain quantifiable results, local governments must implement a variety of tools and techniques and send a consistent message to residents. Local governments must look at opportunities for energy efficiency in municipally owned buildings and in services provided, as well as methods that can be utilized by residents of the locality to promote conservation and increased efficiency.¹⁵ What follows is a discussion of various approaches recently adopted throughout the State.

A. Climate Change Laws

The chief elected officials of approximately forty local governments in New York have voluntarily signed onto the U.S. Conference of Mayors Climate Change Agreement.¹⁶ A few municipalities have adopted greenhouse gas emission (GHG) reductions goals and comprehensive strategies to meet those goals. In 2007, New York City enacted the Climate Change Protection Act with the goal of

reducing the City's operational greenhouse gas emissions by 30% of 2006 levels by 2017.¹⁷ The goal is to be reached through programs set up as part of PlaNYC 2030,¹⁸ and annual City-wide GHG inventories are to be posted on the City's Web site.¹⁹

In 2008, Westchester County passed a similar resolution intended to mitigate possible sources of climate change within the county. The law proposes to reduce greenhouse gases to 20% below 2005 levels by 2015, and to 80% below 2005 levels by 2050. It also calls for the completion of a county-wide inventory of greenhouse gas emissions, the development and implementation of a county-wide climate change action plan, and for increased public education and open communication.²⁰

The Town of New Castle also amended its code in 2008, to rename the Solid Waste Advisory Board as the Sustainability Advisory Board.²¹ In addition to its existing duties, the Sustainability Advisory Board is now responsible for developing GHG reduction targets and recommending programs to meet those goals. It is required to: undertake a GHG inventory; suggest options for increasing energy efficiency and reducing energy use; encourage the use of alternative energy; continue monitoring the town's recycling program; promote water conservation and efficient use; develop suggestions for a green building code; track the effectiveness of land use planning changes at lowering emissions; and work cooperatively with neighboring government bodies to achieve emissions reductions.²²

In April 2009, the Mayor of the City of Albany issued an executive order establishing the City of Albany Sustainability Agenda.²³ The agenda adopts a series of initiatives organized under energy, the built environment, public space, transit and transportation, recycling and waste management, purchasing, water, green jobs, the community sector and ensuring and measuring success.²⁴ Among the laundry list of initiatives is the development of a climate action adaptation plan, exploration of green buildings for new municipal construction, and the investigation of green building codes.²⁵

The Town of Irondequoit recently adopted the recommendations of its Environmental Sustainability Task Force, which include a series of initiatives designed to meet nine policy statements designed to, among other things: ensure energy efficient and environmentally supportive town codes, plans and policies; improve energy efficiency of existing town buildings; build more efficient new or renovated buildings; encourage green economic development; and include green practices in the new Town master plan.²⁶

B. Energy Efficiency/Energy Star Laws

Many municipalities have adopted local laws relating to energy efficiency in buildings. Babylon,²⁷ Brookhaven,²⁸ Great Neck,²⁹ Greenburgh,³⁰ Huntington,³¹

North Haven,³² North Hempstead,³³ Oyster Bay,³⁴ Riverhead,³⁵ and Southampton³⁶ have all joined the Long Island Power Authority Energy Star Homes program and incorporated Energy Star requirements into their building codes.³⁷ Although the LIPA Energy Star Homes program is generally targeted at providing incentives for builders,³⁸ Long Island municipalities that enacted Energy Star requirements have also been eligible for \$25,000 incentive grants.³⁹

C. Green Building Laws

Green building laws expand on the sustainability agenda of energy efficiency, applying principles of efficiency and conservation to the entire building, its design, operating systems and generated waste. At the state level, in March 2008, Governor Paterson continued Executive Orders 111 and 142 directing state agencies and authorities to be more energy efficient and environmentally aware, and directing state agencies and authorities to diversify their energy use by including biofuels.⁴⁰ Although NYSEDA has announced that it will provide additional funding under the New Construction Program,⁴¹ which has provided some funding for municipal-sponsored programs in the past,⁴² the State has not adopted any specific policies or goals to encourage the adoption of local green building laws. Despite this, in line with the national trend,⁴³ local governments across New York have started to enact local laws relating to green building development. Some green building ordinances apply only to municipal construction/renovation projects;⁴⁴ some apply to private projects that receive public funding;⁴⁵ and a few apply to both public and private construction/renovation projects.⁴⁶ The ordinances also differ in their specific applications, including whether actual certification by the United States Green Building Council is necessary, which level of LEED criteria must be sought, and whether waivers are available.⁴⁷ Some of these recently passed laws are highlighted below.

Erie County enacted a green buildings law in 2007 that requires major county construction and renovation projects to meet at least the LEED silver rating. Rockland County enacted a municipal green building law in 2008. Rockland's law requires county projects costing more than \$1 million to comply with the LEED silver criteria and to actually seek formal certification.⁴⁸ (It is not clear, however, what the consequences of failing to achieve certification are.) Waivers are available under the law if the county executive determines that "the benefits of waiving this local law's requirements outweigh the environmental benefits to the residents of Rockland County[.]"⁴⁹ The Village of East Aurora⁵⁰ and the Town of Riverhead⁵¹ have enacted similar municipal green building laws.

New York City's green building law was enacted in 2005 and requires municipal projects costing more than \$2 million to be designed to meet LEED silver criteria, although actual certification is unnecessary.⁵² In addition to City projects, however, the LEED requirements apply

to private developments that receive more than 50% City funding or more than \$10 million of City money. Nassau County's 2007 green building requirements, like New York City's, apply to publicly funded projects as well as to public works construction and renovation projects.⁵³ The law generally mandates compliance with the requirements for the LEED silver rating, but actual certification is not required, and exemptions can be granted on a number of financial grounds.⁵⁴ Ulster County requires high performance green building standards for county projects through a requirement that buildings comply with LEED silver, unless it is not financially possible.⁵⁵

The Town of Babylon, in addition to passing Energy Star requirements, enacted a green building law in 2006. The law requires applicants for commercial, industrial, and large residential projects to submit completed LEED checklists or their equivalent, as deemed acceptable by the commissioner of planning and development.⁵⁶ While the law does not require buildings to actually achieve LEED certification, it does require a project checklist to demonstrate that it is LEED-certifiable before a building permit can be issued.⁵⁷ The law also allows developers that do achieve certification to receive a fee refund; fees for buildings that do not achieve certification are deposited into a green building fund.⁵⁸

Finally, it should be noted that while Peekskill has not enacted a comprehensive green building law, a 2008 law grants density incentives to hotels and motels that meet LEED standards. Actual certification is not required, but applicants must submit proof that the project has been registered for LEED certification⁵⁹ and proof that they have applied for certification.⁶⁰

D. Solar

Historically, solar panel ordinances enacted by local governments tended to regulate these uses for aesthetic and safety reasons. However, with New York's newly adopted policy on net-metering,⁶¹ which in February 2009 changed the tariffs of six investor-owned utilities to strengthen and promote the installation of small-scale renewable energy programs in homes and businesses, the importance of local laws regulating renewable energy has increased substantially. While some municipalities have enacted local programs designed to incentivize the use of solar energy, zoning ordinances and land use regulations must similarly permit their use. What follows are examples of local laws that affirmatively provide for the use of solar energy.

A number of municipalities, including the Town of Bethlehem,⁶² the Town of East Hampton,⁶³ and the Town of Kent,⁶⁴ specifically indicate that solar energy and access to sunlight are important public purposes of their general land use regulations. The Village of Briarcliff Manor enacted a local law that allows solar energy collectors as permitted accessory uses in single-family residential districts, multi-family residential districts, and commer-

cial districts. Various provisions in the law regulate solar energy equipment so as to ensure that it is minimally visible from neighboring properties and public areas.⁶⁵ The City of Albany's solar energy regulations permit solar energy equipment as accessory uses in all zoning districts, and the law expressly states that "[w]hile there are aesthetic considerations, the City has determined that the environmental and economic benefits outweigh potential aesthetic impacts." The City requires solar energy equipment to obtain a certificate of appropriateness if located in a historic district, and that ground-mounted equipment may not be located in front yards.⁶⁶ The Town of Ithaca enacted a solar law in 2006 that permits rooftop solar collectors in all zoning districts and allows freestanding solar equipment as accessory uses in all districts.⁶⁷ The Town's law also requires solar energy equipment to be installed by "qualified solar installers" and regulates the handling and disposal of solar storage batteries.⁶⁸

A number of local laws provide exemptions from height restrictions for solar energy equipment. For example, the City of Amsterdam exempts solar collectors from height restrictions and provides that they shall only be as high as necessary to accomplish the purpose for which they are intended.⁶⁹ The Town of Bedford provides that while maximum height limitations shall not apply to solar energy collectors, they may not extend more than 15 feet above the roof, nor cover more than 10% of the roof area.⁷⁰

Municipalities may enact screening requirements and may consider the use of solar overlay zones to accomplish siting goals. The Town of Batavia enacted a local law that specifically provides that consideration should be given to the siting of residences to take best advantage of solar energy and that the zoning board of appeals should take this into consideration when reviewing requests for area variances to accomplish solar energy goals.⁷¹ Other municipalities, including the City of Cohoes⁷² and the Town of Bethlehem,⁷³ provide for similar considerations under site plan review.

Another method used to promote the use of solar energy at the local level is fee waivers or reductions. For example, the Town of Yorktown offers a 50% reduction in the building permit fee where the project includes solar improvements.⁷⁴ The Town of Rotterdam exempts projects that include green energy reduction, including solar, from site plan application fees,⁷⁵ and the Town of Southampton offers rebates for installation of solar energy systems.⁷⁶ Lastly, local governments interested in promoting solar energy should consider the use of incentive zoning to allow for density bonuses in exchange for the installation of renewable energy.

E. Wind

Municipalities that have wind potential have increasingly begun to enact regulations governing the siting, construction, operation, and decommissioning of wind

turbines. Wind turbines may be specifically permitted in some zoning districts, and prohibited from others, or they may be allowed only in wind overlay zones.⁷⁷ Some type of special permit is typically required, often in conjunction with site design and environmental review.⁷⁸ Wind ordinances may include separate provisions for building-mounted turbines, turbines intended to generate energy primarily for on-site use, and larger wind energy facilities intended to supply energy to the grid.

In 2008, New York State's Renewable Energy Task Force recommended that the State commit to realizing the potential of wind energy by, among other things, addressing local siting and permitting issues.⁷⁹ Wind power generation has a great potential to reduce reliance on GHG-emitting fossil fuels, but its use brings along a number of objections raised by project opponents. For example, some view wind farms as aesthetically displeasing and raise visual concerns ranging from the destruction of scenic viewsheds to the effect of shadow flicker. Project opponents also typically raise concerns associated with interference with wildlife such as birds and bats, leading the Department of Environmental Conservation to publish, in August 2009, *Guidelines for Conducting Bird and Bat Studies for Commercial Wind Energy Projects*.⁸⁰ Municipalities must be mindful that wind projects require safety regulation; access to the machinery must be restricted due to high voltages; blades can cause ice throw; and occasional machinery failures can lead to fires, oil spills, and flying blades. Additionally, the construction of wind farms, which often entails heavy traffic, significant road repairs and infrastructure improvements, can cause major impacts on host communities.⁸¹

Local wind laws impose varying height restrictions on wind towers. Some of the height regulations imposed on turbines are maximum values, intended to protect viewsheds and other visual aspects of the landscape.⁸² The Town of Bethany, for example, encourages small turbines as "a cost effective mechanism for reducing on-site electric costs[.]" but it does not support large wind facilities, as these would negatively impact viewsheds and possibly lower property values.⁸³ Accordingly, Bethany's 2008 wind law limits the height of turbines to 80 feet if located on parcels smaller than five acres, and to 150 feet on larger parcels.⁸⁴ In contrast, the Town of Cohocton, which permits utility-scale wind energy generation facilities, sets the maximum height at 500 feet.⁸⁵

For safety reasons, wind ordinances also often specify the lowest minimum distance permitted between the ground and the tips of the blades.⁸⁶ In Ithaca, for example, the lowest part of the turbine blade must pass no closer to the ground than 30 feet, and for building-mounted turbines, Ithaca requires the blades to be at least 15 feet above any "outdoor surfaces intended for human occupancy...that are located directly below the facility."⁸⁷ The Town of Eden's 2004 wind ordinance takes a slightly different approach and measures the 30 foot minimum

turbine blade height from the highest existing structure or tree within a 250-foot radius.⁸⁸

Setback requirements are another regulation commonly found in wind laws, and they serve to mitigate aesthetic impacts as well as to protect adjacent property from turbine dangers such as ice throws and collapses.⁸⁹ Nearly all local wind laws require wind turbines to be set back from residences, power lines, public roads, and property lines.⁹⁰ The Town of Ellington also specifies setback distances from wetlands and gas wells.⁹¹ Setbacks may be measured as a specific distance, or they may be calculated using a formula based on the turbine's height. In Cohocton, for example, the setback for a non-industrial turbine from property lines and roads is equal to one-and-a-half times its height.⁹² Industrial turbines must be set back a distance equal to their height plus 100 feet from property lines, roads, and power lines, and they must also be at least 1,500 feet removed from any residences or areas normally used by the public.⁹³ The Towns of Ellington and South Bristol use a setback formula based on the estimated ice/blade throw distance.⁹⁴

Height restrictions and setbacks are only two of the ways in which local governments have attempted to mitigate the visual impacts of wind turbines. In addition, many wind ordinances require the completion of a visual impact assessment as part of the permitting process.⁹⁵ In Cohocton, the visual impact analysis must address impacts within a five mile radius, and applicants may be required to submit scenic resource maps, viewshed maps, photographic simulations, and suggested visual mitigation strategies.⁹⁶ Provisions requiring turbines and blades to be painted in neutral, non-reflective colors are an option, and ordinances may also prohibit wind facilities from displaying advertisements. Lighting issues are usually tied to existing Federal Aviation Administration requirements, and transmission lines are typically required to be placed underground. A few ordinances require wind turbine applicants to assess the "shadow flicker effect." In the Town of Bethany, for example, the shadow flicker must be limited to less than 30 hours per year and 30 minutes per day.

Aside from visual impacts, the noise that can be generated from spinning blades can cause concern. For this reason, a review of local wind laws reveals that they typically impose noise limits of about fifty decibels, measured from adjacent property lines. The Town of Ellington, in addition to a noise limit, requires the establishment of a "noise complaint and investigation process[.]"⁹⁷

Safety provisions make up a large portion of most wind ordinances. Nearly all wind ordinances require an engineer to certify that towers are designed according to appropriate standards, and most require turbines to have automatic and/or manual braking systems. Municipalities typically require applicants to demonstrate that access to the turbines will be limited by fences, locked gates, and/or high climbing pegs. Signs generally have

to be posted to warn any passersby of high voltages and ice throws, although the number and placement of signs varies among local governments. South Bristol's regulations, for instance, require warning signs to be posted at 100-foot intervals along the setback lines, and they must include the text "CAUTION: FALLING OBJECTS."⁹⁸ In Ellington, warning signs must include a local phone number for a 24-hour hotline,⁹⁹ and in Bethany, warning signs must be located at a height of five feet (eye-level) on the base of any turbine.¹⁰⁰ Other local governments simply require "appropriate" warning signs.¹⁰¹ Periodic turbine inspection and reporting requirements are also fairly common, as are provisions requiring reports on such things as ice throw calculations, blade throw calculations, and "catastrophic tower failure."¹⁰² And because none of these safety provisions are fail safe, most applicants are required to obtain liability insurance.

"There is no doubt that this article just begins to scratch the surface of cataloging hundreds of efforts at the local government level to address climate change and covers only initiatives most closely related to land use planning and regulations."

Many local wind laws also include a section on de-commissioning, requiring the applicant to submit a de-commissioning plan and to post a performance bond.¹⁰³ Because the construction of wind farms can result in vegetation clearance and road damage, many ordinances also require performance bonds to ensure that applicants restore any areas affected by construction.¹⁰⁴ Host community agreements have also been used to address some of these concerns.¹⁰⁵

III. Conclusion

There is no doubt that this article just begins to scratch the surface of cataloging hundreds of efforts at the local government level to address climate change and covers only initiatives most closely related to land use planning and regulations. Local governments must continue these efforts, and do more to effectively meet the challenges posed by global warming. The Government Law Center of Albany Law School is creating an online database of local laws designed to address green development. If your municipality has adopted resolutions, executive orders, and legislation not mentioned in this article, please send a link to where the information may be accessed to psalk@albanylaw.edu.

Endnotes

1. eRedux.com, New York Energy Consumption & New York's Carbon Footprint, http://www.eredux.com/states/state_detail.

http://www.eredux.com/states/state_detail.php?id=1113&state=NEW%20YORK. The report indicates that each New York resident produces 11 tons of carbon a year.

2. Specifically, the law directs NYSERDA to: (1) develop and establish standards and criteria for a new green residential building grant program, and consult existing standards and criteria, such as those established by the United States Green Building Council under its Leadership in Energy and Environmental Design (LEED) programs and the American National Standards Institute (ANSI), in developing such standards; and (2) develop and establish other standards and criteria that are necessary for the administration of the program (such as eligibility criteria, training and qualification procedures for builders and technicians, application procedures, award determinations, award levels, and inspection, documentation and compliance requirements). The new law further provides that: The amount of the grants will be based on a number of considerations, including the size and the type of the residential structure, but may not exceed \$7,500 for one-family and two-family homes, \$11,250 for residential buildings with three to six dwelling units, and \$15,000 for residential buildings with more than six dwelling units. In addition to these limitations, no single owner, such as a developer of multiple qualified residential buildings who is a qualified owner, may receive more than \$120,000 in incentive payments during any calendar year. See Chapter 631 of the New York Laws of 2008 (S. 8134-B).
3. Nysersda.org, Local Government/Municipalities, <http://www.nysersda.org/municipalities/default.asp>.
4. Nysersda.org, Local Government Sustainability Initiatives in New York State, http://www.nysersda.org/programs/Green_Buildings/local_gov.asp.
5. See N.Y.S. Department of Environmental Conservation, Climate Change Office, Climate Smart Communities, <http://www.dec.ny.gov/energy/50845.html> (last visited Oct. 4, 2009) (The Pledge has ten primary components: (1) Pledge to combat climate change by becoming a climate smart community; (2) set goals, inventory emissions, move to action; (3) decrease energy demand for local government operations; (4) encourage renewable energy for local government operations; (5) realize benefits of recycling and other climate smart solid waste management practices; (6) promote climate protection through community land use planning; (7) plan for adaptation to unavoidable climate change; (8) support a green innovation economy; (9) inform and inspire the public; and (10) commit to an evolving process.).
6. See N.Y.S. Department of Environmental Conservation, Climate Partners, <http://www.dec.ny.gov/energy/56876.html> (last visited Oct. 4, 2009).
7. N.Y.S. Exec. Order No. 2 (2009), available at http://www.state.ny.us/governor/executive_orders/exeorders/eo_2.html.
8. New York State Energy Plan, <http://nysenergyplan.com/> (last visited Oct. 4, 2009).
9. New York State Energy Plan—Events, <http://www.nysenergyplan.com/events.html> (last visited Oct. 4, 2009).
10. N.Y.S. Exec. Order No. 24 (2009), available at http://www.state.ny.us/governor/executive_orders/exeorders/eo_24.html.
11. See, e.g., Town & Village of Coxsackie Community Plan, <http://www.coxsackiecommunityplan.net/actionitemsummary.pdf> (Goal VIII, action item 4.2, providing in part that the municipalities "Work to evaluate and promote alternative energy sources at larger development projects") and Town of Bethlehem Comprehensive Plan and Generic Environmental Impact Statement, <http://www.townofbethlehem.org/images/pageImages/EcoDevAndPlan/Comprehensive%20Plan%20FGEIS%20082405%20Per%20Saratoga.pdf> at 6, 11 (including a goal to "Promote energy efficiency and conservation, and the use of renewable energy in the Town" by focusing on both public and private buildings). The Village of Altamont has proposed a detailed set of action items to support its sustainability initiative: "Objective 5.1: To explore and implement where feasible "green" and environmentally sustainable programs in the Village...

- Explore and implement ways to use solar power/wind power for municipal facilities, thereby promoting energy efficiency through its use. iii. Establish zoning and development standards that encourage use of and remove impediments to using solar and green buildings...Encourage the use of Leadership in Energy and Environmental Design (LEED) standards for new development and redevelopment of buildings and sites in the Village. ii. Utilize environmentally-friendly materials where possible in municipal operations and construction and redevelopment of buildings and sites within the Village. iv. Encourage and offer incentives for cooperative sharing of residential solar power... Develop incentives to encourage private landowners to implement green building programs. i. Consider use of a density bonus to developers willing to undertake utilization of green building methods." Village of Altamont Comprehensive Draft Plan, <http://altamontvillage.org/complanone.htm>.
12. For example, Mayor Jennings of the City of Albany announced that he signed the U.S. Conference of Mayors Climate Change Agreement and that he set up a planning committee to evaluate what Albany needs to do. Mayor Gerald D. Jennings, State of the City Address, <http://albany.gov/Files/StateOfCity.pdf> at 24 (last visited Oct. 4, 2009).
 13. Renewable Energy Task Force, First Report to Lt. Governor David A. Paterson, *Clean, Secure Energy and Economic Growth: A Commitment to Renewable Energy and Enhanced Energy Independence* (February 2008), http://www.ny.gov/governor/press/Lt_RETF_Report.pdf.
 14. *Id.*
 15. See Keith H. Hirokawa, *At Home with Nature: Early Reflection on Green Building Laws and the Transformation of the Built Environment*, 39 *Env'tl. L.* 507, 529-539 (2009) (discussing the roles of incentive programs and the greening of municipal buildings as largely responsible for the explosion of interest in green building).
 16. USMayors.org, List of Participating Mayors—Mayors Climate Protection Center, <http://www.usmayors.org/climateprotection/list.asp> (In the Capital Region, the following municipalities have signed on: City of Albany, City of Schenectady, City of Watervliet.). By signing the agreement, municipalities agree to strive to reduce greenhouse gas emissions by, among other things, enacting anti-sprawl land use policies, and to support lobbying efforts before statehouses and Congress designed to reduce greenhouse gas emissions.
 17. City of New York, Local Law No. 55 (2007), available at http://www.nycouncil.info/pdf_files/bills/law07055.pdf.
 18. NYC.gov, PLANYC 2030, <http://www.nyc.gov/html/planyc2030/html/home/home.shtml>.
 19. City of New York, Local Law No. 55 (2007), available at http://www.nycouncil.info/pdf_files/bills/law07055.pdf.
 20. County of Westchester, Resolution No. 149 of 2008., <http://www.ecode360.com/?custId=WE0640>.
 21. Town of New Castle, Local Law No. 6, §§ 7-1 to 7-3 (2008), codified at New Castle Code pt. I, available at <http://www.ecode360.com/?custId=NE0395>. In its findings statement, the Town acknowledged that "climate change poses a real and increasing threat to our local and global governments and that it is due to greenhouse gas emissions" and that "[o]ur response to climate change provides us with an unprecedented opportunity to implement environmentally sustainable practices to protect and enhance the quality of life for future generations of the Town[.]" The law explains that "sustainable practices and programs are those designed to promote efficient and wise use of resources and materials such as: (i) using renewable energy sources, (ii) implementing reduce, reuse, and recycle programs to minimize the amount of solid waste generated and to conserve natural resources, (iii) protecting the quality and quantity of our water supplies, and (iv) ensuring that new construction is built to minimize impact on the environment."
 22. Town of New Castle, Local Law No. 6 (2008), <http://www.ecode360.com/?custId=NE0395>.
 23. Mayor Gerald Jennings, Executive Order No. 422-09, available at <http://albany.gov/Files/Exec%20Order%20Template%202.pdf>.
 24. *Id.*
 25. *Id.*
 26. Irondequoit Environmental Sustainability Task Force, Final Report, (Sept. 17, 2007) (adopted by the Town Board October 17, 2007), available at <http://www.irondequoit.org/images/SupervisorColumns/etfadoptedtrpt.pdf>.
 27. Town of Babylon, Local Law No. 23 (2006), available at <http://www.ecode360.com/?custId=BA0924>.
 28. Town of Brookhaven, Local Law No. 24 (2006), available at <http://www.ecode360.com/?custId=BR0012>.
 29. Village of Great Neck, Bill 11 (2008) (Energy Conservation Construction Code).
 30. Town of Greenburgh, Local Law No. 3-2002(2002), available at <http://www.ecode360.com/?custId=GR0237>.
 31. Town of Huntington, Local Law No. 24 (2007), available at <http://www.ecode360.com/?custId=HU0566>.
 32. Village of North Haven, Local Law No. 1 (2008), available at <http://www.ecode360.com/?custId=NO1009>, Pt. II, Ch. 55, Art. I, § 55-4 (K) (1).
 33. Town of North Hempstead, Local Law No. 12 (2008), available at <http://www.ecode360.com/?custId=NO0081>.
 34. Town of Oyster Bay, Local Law No. 12 (2006), available at http://gcp.esub.net/cgi-bin/om_isapi.dll?clientID=50615&infobase=oyster.info&softpage=Browse_Frame_Pg42.
 35. Town of Riverhead, Local Law No. 55 (2006), available at <http://www.ecode360.com/?custId=RI0508>.
 36. Town of Southampton, Local Law No. 58 (2008), available at <http://www.ecode360.com/?custId=SO0286>.
 37. See Long Island Power Authority News, *LIPA Lauds Brookhaven's Move to Require E-Star Homes*, available at http://www.lipower.org/newscenter/pr/2006/062806_brookhaven.html (explaining that LIPA gave municipalities \$25,000 grants to adopt Energy Star standards).
 38. LIPA | Efficiency | NY Energy Star Labeled Homes, http://www.lipower.org/efficiency/nyesh_builder.html.
 39. Long Island Power Authority, *supra* note 38.
 40. N.Y.S. Exec. Order No. 111 (2008), available at <http://www.nyserda.org/programs/exorder111orig.asp>; N.Y.S. Exec Order No. 142 (2008), available at http://www.ogs.state.ny.us/purchase/spg/pdfdocs/EO142_EEP.pdf.
 41. NYSEDA—New Construction Program, http://www.nyserda.org/programs/New_Construction/default.asp (last visited Oct. 4, 2009).
 42. NYSEDA—Energy Efficiency—Palace Theater, http://www.nyserda.org/programs/New_Construction/Case_Studies/palacetheater.pdf (last visited Oct. 4, 2009).
 43. See generally USGBC—LEED Public Policies, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1852> (last visited Oct. 4, 2009) (outlining LEED initiatives).
 44. See, e.g., Erie, Local Law No. 4 (2007); Town of Riverhead, Local Law No. 32 (2008), available at <http://www.ecode360.com/?custId=RI0508>; County of Rockland, Local Law No. 14 (2008), available at <http://www.ecode360.com/?custId=RO1021>; Village of East Aurora, Local Law No. 8 (2007), available at <http://www.ecode360.com/?custId=EA0398>.
 45. See, e.g., County of Nassau, Local Law No. 16 (2007), available at http://gcp.esub.net/cgi-bin/om_isapi.dll?clientID=50640&infobase=na2789.nfo&softpage=Browse_Frame_Pg42; City of New York,

- Local Law No. 86 (2005), available at http://www.nyc.gov/html/dob/downloads/pdf/ll_86of2005.pdf.
46. See, e.g., Town of Babylon, Local Law No. 40 (2006), available at <http://www.ecode360.com/?custId=BA0924>.
 47. A word of caution for practitioners about incorporating LEED certification into local laws—the LEED certification standards continue to evolve, and what may be understood as required today, may not be enough to satisfy the criteria in the future. Furthermore, many discussions have been taking place at conferences over the last year about the impact of requiring LEED certification and housing affordability.
 48. County of Rockland, Local Law No. 14 § 3(2008), available at <http://www.ecode360.com/?custId=RO1021>.
 49. County of Rockland, Local Law No. 14 § 4(2008), available at <http://www.ecode360.com/?custId=RO1021>.
 50. Village of East Aurora, Local Law No. 8 (2007), available at <http://www.ecode360.com/?custId=EA0398>.
 51. Town of Riverhead, Local Law No. 32 (2008), available at <http://www.ecode360.com/?custId=RI0508>.
 52. City of New York, Local Law No. 86 (2005), available at http://www.nyc.gov/html/dob/downloads/pdf/ll_86of2005.pdf.
 53. County of Nassau, Local Law No. 16 §§ 3-4 (2007), available at http://gcp.esub.net/cgi-bin/om_isapi.dll?clientID=50640&infobase=na2789.nfo&softpage=Browse_Frame_Pg42, (projects smaller than 5,000 are not covered).
 54. County of Nassau, Local Law No. 16 § 6 (2007), available at http://gcp.esub.net/cgi-bin/om_isapi.dll?clientID=50640&infobase=na2789.nfo&softpage=Browse_Frame_Pg42, (exemptions).
 55. Establishing High Performance Green Building Standards For County Of Ulster New Construction Projects, Ulster County, Resolution No. 393 (Nov. 8, 2006), available at <http://www.co.ulster.ny.us/resolution-archives/2006/383-06.pdf>.
 56. Town of Babylon, Local Law No. 40 § 89-86 (A) (2006), available at <http://www.ecode360.com/?custId=BA0924>.
 57. *Id.* at § 89-86 (C). See <http://www.greenerbuildings.com/blog/2008/03/11/leed-certifi-able-vs-leed-certified> for commentary on the difference between LEED certified and LEED certifiable.
 58. *Id.* at § 89-86 (B).
 59. See <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=65>.
 60. Local Law No. 5, City of Peekskill, Peekskill City Code § 575-38 M-1 (2008), available at <http://www.ecode360.com/?custId=PE0161>.
 61. PUBLIC SERVICE COMM'N, *PSC Gives Green Light to Clean Energy*, available at [http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/ArticlesByCategory/2CF6704A17B63B6B8525755B005F929C/\\$File/pr09010.pdf?OpenElement](http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/ArticlesByCategory/2CF6704A17B63B6B8525755B005F929C/$File/pr09010.pdf?OpenElement).
 62. “The purposes of objectives of this chapter are to... (8) To facilitate, as far as environmental conditions may permit, the accommodation of solar energy systems and equipment and access to sunlight necessary therefor.” Town of Bethlehem, Ch. 128 Zoning, § 128-8 (2006), available at <http://www.ecode360.com/ecode3-back/getSimple.jsp?custId=BE1011&guid=8993782>.
 63. “(2) It is the Planning Board’s policy to encourage the use of alternative energy sources, including but not limited to solar, wind and water power, as a conservation measure.” Town of East Hampton, Ch. 220, § 220-1.05 (1999), available at <http://www.ecode360.com/ecode3-back/getSimple.jsp?&guid=8163507&j=256>.
 64. “This chapter is adopted to protect and promote the health, safety, comfort, convenience, economy, aesthetics and general welfare and for the following additional purposes:... (7) To make provision for access to sunlight and the accommodation of solar energy systems and equipment and other alternative energy systems.” Town of Kent, Ch. 77 § 77-2 (2008), available at <http://www.ecode360.com/ecode3-back/getSimple.jsp?&guid=8322939&j=256>.
 65. Village of Briarcliff Manor, Local Law No. 3 (2007), available at <http://www.ecode360.com/?custId=BR1701>.
 66. City of Albany, Albany City Code, Article XIV, § 375-9 (1995), available at <http://www.ecode360.com/?custId=AL0934>.
 67. Town of Ithaca, Local Law No. 11 of (2006), available at <http://www.ecode360.com/?custId=IT1944>.
 68. *Id.*
 69. City of Amsterdam, Ch. 250 § 250-15 (1992), available at <http://www.ecode360.com/ecode3-back/getSimple.jsp?&guid=8071006&j=256>.
 70. Town of Bedford, Ch. 125 § 125-20 (1983), available at <http://www.ecode360.com/ecode3-back/getSimple.jsp?&guid=6237436&j=256>.
 71. Town of Batavia, Ch. 235 § 235-61 (2000), available at <http://www.ecode360.com/ecode3-back/getSimple.jsp?&guid=8983839&j=256>.
 72. City of Cohoes, Ch. 285 § 285-127 (2006), available at <http://www.ecode360.com/ecode3-back/getSimple.jsp?&guid=8476691&j=256>.
 73. Town of Bethlehem, Ch. 128 § 128-71 (2008), available at <http://www.ecode360.com/?custId=BE1011>.
 74. Town of Yorktown, Local Law 4-2008 § 130-4 (2008), available at <http://www.ecode360.com/ecode3-back/getSimple.jsp?&guid=6849802&j=256>.
 75. Town of Rotterdam, Ch. 270 § 270-137 (2009), available at <http://www.ecode360.com/ecode3-back/getSimple.jsp?&guid=7093522&j=256>.
 76. Town of Southampton, Ch. 176 § 176-1 (2006), available at <http://www.ecode360.com/ecode3-back/getSimple.jsp?custId=SO0286&guid=8695756>; see also *id.* at § 176-2, available at <http://www.ecode360.com/ecode3-back/getSimple.jsp?custId=SO0286&guid=8695759>.
 77. POWER NATURALLY, WIND ENERGY MODEL ORDINANCE OPTIONS 3 (2004), available at http://www.powernaturally.org/Programs/Wind/toolkit/2_windenergymodel.pdf.
 78. *Id.*
 79. Renewable Energy Task Force, First Report to Lt. Governor David A. Paterson, *Clean, Secure Energy and Economic Growth: A Commitment to Renewable Energy and Enhanced Energy Independence* (Feb. 2008), available at http://www.ny.gov/governor/press/lt_RETf_Report.pdf.
 80. NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, GUIDELINES FOR CONDUCTING BIRD AND BAT STUDIES AT COMMERCIAL WIND ENERGY PROJECTS, available at http://www.dec.ny.gov/docs/wildlife_pdf/finwindguide.pdf.
 81. See generally POWER NATURALLY, OTHER POTENTIAL ENVIRONMENTAL IMPACTS (2004), available at http://www.powernaturally.org/Programs/Wind/toolkit/5_otherpotenviroimpactsrevised.pdf; see also POWER NATURALLY, AGRICULTURAL IMPACTS RESULTING FROM WIND FARM CONSTRUCTION (2004), available at http://www.powernaturally.org/Programs/Wind/toolkit/7_visualimpactupfront.pdf.
 82. See Patricia E. Salkin, *Planning & Zoning for Wind Power in New York*, GOVERNMENT LAW ONLINE, Sept./Oct. 2005, at 4, available at http://www.governmentlaw.org/files/ZLPR-Planning_Zoning_windpower.pdf.
 83. Town of Bethany, Local Law No. 1, Section IV (2008).
 84. Town of Bethany, Local Law No. 1 (2008), available at <http://www.townofbethany.com/other%20pdf%20files/WindEnergyZoningAmendments.pdf>.
 85. Town of Cohocton, Windmill Local Law (2006), available at <http://www.gflrpc.org/programareas/wind/LL/CohoctonWindmillLaw.pdf>.
 86. WIND ENERGY, *supra* note 77, at 5.

87. City of Ithaca, § 270-219.4.
88. Town of Eden, Local Law No. 3, § 217-4(C)(11)(2004), available at <http://www.ecode360.com/?custId=ED1729>.
89. See generally WIND ENERGY, *supra* note 77 (discussing setbacks); POWER NATURALLY, ASSESSING AND MITIGATING VISUAL IMPACTS (2004), available at http://www.powernaturally.org/Programs/Wind/toolkit/6_visualimpactupfront.pdf (discussing visual impacts); David Wahl & Philippe Giguere, *Ice Shedding and Ice Throw—Risk and Mitigation*, GE ENERGY (2006), available at http://www.gepower.com/prod_serv/products/tech_docs/en/downloads/ger4262.pdf (discussing ice throw mitigation).
90. WIND ENERGY, *supra* note 77.
91. Town of Ellington, Local Law No. 1, § 12(E)(3), (4).
92. Town of Cohocton, Windmill Local Law § I(b)(1) (2004), available at <http://www.gflrpc.org/programareas/wind/LL/CohoctonWindmillLaw.pdf>.
93. Town of Cohocton, Windmill Local Law § II(B)(1) (2006), available at <http://www.gflrpc.org/programareas/wind/LL/CohoctonWindmillLaw.pdf>.
94. Town of South Bristol, § 170-40 (B)(1) (residential), § 170-41 (B)(1) (commercial).
95. See, e.g., City of Lackawanna, § 230-85 (A)(c).
96. Town of Cohocton, *supra* note 93.
97. Town of Ellington, Local Law No. 1, § 12(A), (G).
98. South Bristol, Local Law No. 2, § 170-40(D)(1) (2003), available at <http://www.gflrpc.org/programareas/wind/LL/TofSouthBristol.pdf>.
99. Town of Ellington, Local Law No. 1, § 10(7)(1).
100. Town of Bethany, Local Law No. 1 § 5(D)(11) (2007), available at <http://www.townofbethany.com/other%20pdf%20files/WindEnergyZoningAmendments.pdf>.
101. See, e.g., Westfield Town Code § 185-43(J)(3)(f)(4) (2008), available at <http://www.ecode360.com/?custId=WE1631>.
102. Lackawanna Code § 230-85(A)(1)(j)-(l) (2008), available at http://www.e-codes.generalcode.com/codebook_frameset.asp?lg=1&t=ws&cb=1978_A.
103. Bethany, N.Y., Local Law No. 1, § V, art. VI(I)(1) (Jan. 14, 2008), available at <http://www.townofbethany.com/other%20pdf%20files/WindEnergyZoningAmendments.pdf>; EDEN, N.Y., CODE § 217-4(C)(18) (2008), available at <http://www.ecode360.com/?custId=ED1729>; WESTFIELD, N.Y., CODE § 185-43(J)(3)(j)(2) (2008), available at <http://www.ecode360.com/?custId=WE1631>.
104. See, e.g., Cohocton, N.Y., Windmill Local Law § I(F)(4) (Jan. 6, 2006), available at <http://www.gflrpc.org/programareas/wind/LL/CohoctonWindmillLaw.pdf>.
105. Salkin, Spitzer & Bookser, *Host Community Agreements for Wind Farm Development*, New York Zoning Law and Practice Report, Vol. 9 No. 5 (March/April 2009).

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A New Era of Brownfields Regulation: An In-Depth View of New York City's Municipal Approach to Brownfields Regulation

By Alison Karmel

Introduction

In May 2009, Mayor Bloomberg signed into law the New York City Brownfield and Community Revitalization Act ("Act").¹ The Act allows for the codification of the New York City Mayor's Office of Environmental Remediation ("OER") and grants OER the authority to develop and operate the nation's first municipality-created local brownfield cleanup program.² As the first fully comprehensive local program to address brownfield redevelopment in the United States, the Act may serve as the impetus that encourages other municipalities to adopt their own local brownfield cleanup programs. Thus, the Act may signal the beginning of a new era of brownfields regulations, one that introduces the municipality as an independent source of regulatory authority.

"[T]his article enumerates the benefits offered to property owners/developers who enter a regulated cleanup program, the specific incentives of the New York City Local Brownfield Cleanup Program and the inherent advantages of local regulation for brownfield redevelopment."

This article seeks to describe the provisions of the Act and the authority prescribed to OER, as well as to explain how it is envisioned that the local brownfield cleanup program will operate once implemented. Moreover, this article enumerates the benefits offered to property owners/developers who enter a regulated cleanup program, the specific incentives of the New York City Local Brownfield Cleanup Program ("LBCP") and the inherent advantages of local regulation for brownfield redevelopment. Finally, this article suggests that the anticipated success of the LBCP will spur municipalities nationwide to consider adopting similar programs, especially in areas where the State brownfield cleanup programs inadequately address the needs of that locality.

Background

New York State defines a "brownfield site" as "any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant."³ Brownfield sites are typically underuti-

lized properties that remain vacant due to the difficulties and expenses associated with site remediation. Despite these obstacles, brownfields redevelopment is important because it reduces threats to public health and the environment and can prevent urban sprawl. In addition, brownfields redevelopment can create economic benefits such as urban revitalization, economic stimulation, job creation and revenue generation.⁴

To promote brownfields redevelopment in New York, the New York State Department of Environmental Conservation ("DEC") enacted the Brownfield Cleanup Program ("BCP") in 2003. The BCP is a voluntary program whereby an applicant commits to undertaking remedial action at a contaminated site and agrees to State oversight of the cleanup.⁵ In exchange, the State provides the applicant with tax credits⁶ and a liability release.⁷ The DEC, however, does not accept all brownfield sites into the BCP.⁸ For example, many sites with low to moderate contamination are denied entrance into the program. Therefore, a municipal approach to brownfields regulation is necessary because if a site is denied admittance to the BCP, there is no other regulatory program that a property owner/developer can enter. It should be noted that a federal program is not available because the federal government has not established a voluntary cleanup program.⁹

Currently, in New York, if contamination at a site is classified as light to moderate, then it is likely that that site will not be accepted into a regulatory program.¹⁰ Consequently, the cleanup of these sites will be independently performed by the property owner/developer with no oversight to ensure the quality and effectiveness of the remedy. Without oversight, contamination may still exist at the site in levels that pose threats to public health and the environment. Furthermore, due to the extension of liability to a prospective purchaser for contamination at a site, the property owner/developer may have difficulty selling property that has undergone remediation if the remedial activities were not approved by a government entity.

A municipal brownfield cleanup program is also essential to address historic fill sites. Historic fill is categorized as non-indigenous materials, historically deposited or disposed of on a site to create useable land, which in no way is connected to the subsequent operations at the site and was contaminated prior to emplacement.¹¹ Because historic fill was not regulated at the time it was placed,

the fill may contain contamination.¹² The DEC has chosen to categorically exclude sites that are solely contaminated with historic fill from entering the BCP.¹³ Within New York City there are many historic fill sites, thereby adding to the importance of developing a regulated brownfield cleanup program that will include these sites.

PlaNYC 2030¹⁴ estimates that there may be as many as 7,600 acres of contaminated land in New York City.¹⁵ To address these sites and fill the gap created by the exclusion of sites from the BCP, the New York City Mayor's Office founded OER in June 2008.¹⁶ From its inception, OER has worked with City agencies, the New York City Council and environmental public interest organizations to draft a local law that will grant OER the authority to establish and implement the LBCP. On April 22, 2009, the New York City Council unanimously approved the Act, and on May 11, 2009, Mayor Bloomberg signed the Act into law.

The New York City Brownfield and Community Revitalization Act

The passage of the Act allows for the codification of OER by amending the New York City Charter ("Charter") to include a new Section 1404 in Chapter 57. The Act also amends Section 15 of the Charter by adding a Section (e), and incorporating OER under the Mayor's Office of Operations. Section (e) states that there will be a Director of OER, defines the Director's responsibilities and asserts that the Director will be appointed by the Mayor of New York. Additionally, the Act amends Title 24 of the New York City Administrative Code ("Code") to include a new Chapter 9, entitled the "New York City Local Brownfield Cleanup Law" ("LBCP law"). Chapter 9 describes the eligibility criteria for entrance into the LBCP, outlines the regulations needed for the LBCP to function effectively, and enumerates the benefits of participating in the LBCP.

Amendments to the New York City Charter

Section 15(e) of the Charter prescribes that there will be a Director of OER and confers a number of responsibilities on the Director. The Director, in consultation with other city agencies and officials, will develop and oversee City policies pertaining to brownfields redevelopment and ensure that such policies are protective of public health and the environment. In collaboration with the New York City Office of Long-Term Planning and Sustainability, the Director will design programs that promote sustainable growth, particularly in brownfield opportunity areas ("BOA"). A BOA is an area that has been accepted into the New York State Brownfield Opportunity Areas Program which provides community-based organizations and municipalities with financial and technical assistance to implement area-wide strategies focused on revitalizing communities affected by the pres-

ence of brownfield sites.¹⁷ The Director is also responsible for the development of the LBCP and the administration of the program once it is fully operational. Furthermore, the Director will establish fees for programs administered by OER and will promulgate rules that are necessary to implement the LBCP.

The Act seeks to encourage community participation by amending the Charter to require that the Director promote community involvement, offer technical support, and to educate community groups, developers and property owners on the stages of brownfield redevelopment for sites located in their communities. The Act also requires that the Director support the efforts of community groups, developers and property owners when trying to utilize Federal, State and private funding throughout the brownfield redevelopment process. Finally, the Director may apply for and administer funds to support economic redevelopment of brownfield sites and can advise City agencies on any of their development projects involving brownfields.

The Charter amendments also authorize OER to enforce the E-designation program for hazardous materials,¹⁸ as defined in Section 11-15 of the New York City Zoning Resolution. The E-designation program is a collaborative program involving the New York City Department of City Planning ("DCP"), the New York City Department of Buildings ("DOB"), the New York City Department of Environmental Protection ("DEP"), and now also, OER. The E-designation program is initiated when a property owner/developer requests a zoning change for his or her site. If after undergoing an environmental review pursuant to the City Environmental Quality Review process ("CEQR"), DCP determines that there may be the presence of hazardous materials, DCP may decide to place an E-designation on the tax map for that site. DCP will notify DOB to record the E-designation and DOB will not issue building permits for that site until it has received notification from DEP that the required remediation has been implemented. However, pursuant to the Act, OER will now act as successor to DEP for the purposes of enforcing the E-designation program. Moreover, the responsibility of ensuring compliance with already existing hazardous waste restrictive covenants will also shift from DEP to OER.

Amendments to the New York City Administrative Code

The newly amended Title 24, Chapter 9 of the Code, entitled the "Local Brownfield Cleanup Program Law" ("LBCP law"), establishes OER's authority to create and implement the LBCP. To understand the elements of the LBCP, a look at the specific powers granted to OER is required. This section briefly describes certain provisions of this amendment.

Definitions

Section 24-902 of the LBCP law provides definitions for the terms used throughout the LBCP law, including what constitutes a “local brownfield site.” A “local brownfield site” is defined as real property located within New York City, “the redevelopment or reuse of which may be complicated by the presence or potential presence of light to moderate levels of contamination or any real property that meets the definition of a delegated brownfield site....” Thus there are two types of sites that can enter the LBCP: (1) sites with light to moderate contamination, and (2) delegated brownfield sites. A site is considered to

“The public interest will not be served if OER is overwhelmed with reviewing several complex sites.”

have “light to moderate contamination” when there are detectable levels of contamination at the site, but the reported level of contamination does not require mandatory governmental-supervised investigation or remediation pursuant to State or Federal law. A “delegated brownfield site” is defined by the Act as real property that requires investigation or remediation according to State or Federal law, but that may be investigated or remediated under the supervision of the City, pursuant to a written expression of authority or mutually agreed upon form of supervised oversight. Furthermore, under the definition for a “local brownfield site,” sites contaminated with historic fill and sites rejected from the BCP for failure to demonstrate sufficient environmental contamination, are specifically designated as sites that are eligible for admittance to the LBCP. In addition, the local brownfield site definition also describes sites that are excluded from the LBCP, such as sites already investigated through a State or Federal program, or sites with petroleum contamination. Currently, OER and DEC are discussing entering into a memorandum of understanding, or MOU, which may include an agreement permitting OER to oversee the cleanup of petroleum spills at LBCP sites.

Eligibility Criteria

The eligibility criteria for prospective LBCP sites are further defined in Section 24-904 of the LBCP law. Under this section, OER is authorized to accept or reject any site. However, Section 24-904 specifically states that OER shall reject a site if: (1) it fails to meet the definition of a local brownfield site; (2) there is an action or proceeding relating to the site currently pending in a civil or criminal court against the applicant; or (3) there is an order against the applicant calling for an investigation, removal, or remediation of contamination at the site.¹⁹ In addition, Section 24-904 reserves the right of OER to reject an applicant who has otherwise satisfied all the requirements

for entrance into the LBCP where OER determines that the public interest would not be served by accepting that site into the program.²⁰ The public interest justification to reject a site will be based upon OER’s capacity. The public interest will not be served if OER is overwhelmed with reviewing several complex sites. Therefore, OER may reject a few complex sites in order to preserve its ability to provide prompt remedy decisions on dozens of light to moderate contaminated sites.

Rules and Regulations

Under Section 24-903 of the LBCP law, the Director of OER is authorized to establish rules and regulations that will allow for the efficient operation of the LBCP. This section contemplates that rules need to be promulgated for the formation of a standardized process for acceptance into the LBCP. For example, rules will be required for developing an application form and an application review process, and for the creation of local brownfield cleanup agreements.²¹

Section 24-903 also foresees the establishment of rules to govern the remediation process, including requirements for remedial investigation reports, remedial action work plans, and defining the remedy selection procedures that will ensure that proposed remedies are protective of public health and the environment.²² OER is also authorized to create rules that encourage citizen participation and provide notice to affected communities of brownfield sites that have applied for entrance into the LBCP.²³ In addition, rules will be necessary to permit OER and its staff to gain site access and access to site contamination information for any site that has either requested entrance, has already been enrolled, or has received a Certificate of Completion from the LBCP.²⁴ Furthermore, OER will create rules that determine when remedial actions are complete and when a site is eligible to receive a Certificate of Completion (as discussed below).²⁵

The Act also contemplates the formulation of administrative enforcement rules. For instance, OER will ensure that sites that have completed the program continue to operate all site management controls as required.²⁶ Site management controls include physical barriers and methods (such as monitoring devices) and non-physical means (such as restrictive covenants) that limit human exposure to contamination at or emanating from the site. These controls may be required after the remediation is complete and a Certificate of Completion is issued, to ensure that the remediation remains protective of public health and the environment. Finally, rules will be formulated that require an enrollee to provide notice to OER of any change of use at a LBCP site; however, OER may prohibit that change of use if it can show cause.²⁷ Thus, once promulgated, these rules will flesh out the details of the LBCP and ensure its effective implementation.

Certificate of Completion

Section 24-906 of the LBCP law establishes the guidelines for awarding a Certificate of Completion to a property owner/developer who has successfully navigated through the LBCP. The Certificate of Completion will demonstrate that the enrollee has fulfilled the requirements of the LBCP and will include a statement affirming that the City will not take any further investigatory or remedial action against the site or the enrollee regarding the addressed contamination.²⁸ The Certificate of Completion will also contain a recommendation by the City that no other government agency take action against that site or the enrollee.²⁹ Moreover, the Director of OER is currently seeking to enter into agreements with State and Federal agencies to shield parties who clean up sites in the LBCP from liability under State and Federal laws.

Section 24-906 also describes certain circumstances where OER may retain the right to take future action against a site or an enrollee.³⁰ Specifically, the City may take investigatory or remedial action when there is a change in an environmental standard or when environmental contamination still present at the local brownfield site renders the remediation no longer protective of public health or the environment.³¹ Section 24-906 also reserves the right of the City to further investigate or take remedial action when there is non-compliance with a cleanup agreement reached under the LBCP or when there is fraud or a change in use at the local brownfield site.³²

Finally, this section further provides that the Certificate of Completion will run with the land and will extend to the enrollee's successors and assigns.³³ However, under this provision there is a duty for the successors and assigns to act with due care and in good faith to adhere to the obligations of any agreement established under the LBCP. Therefore, where the Certificate is premised on maintaining site management controls at the site, the successors or assigns will be responsible for continuing to maintain such controls in order to preserve the site's effective remedy and uphold the validity of the Certificate of Completion. Receiving and maintaining a Certificate of Completion is important because it ensures that the site's remediation remains protective and also serves as a valuable marketing tool to assure an interested buyer that the site remediation was performed in compliance with City and State standards.

Citizen Participation

The LBCP incorporates a robust citizen participation component. When a property owner/developer applies for admission into the LBCP, Section 24-905 of the LBCP law requires OER to provide notice of the application to the borough presidents, council members and community boards located in the district where the local brownfield site is situated.³⁴ Notice must also be given to residents living on or adjacent to the local brownfield site and to

all appropriate community groups. Furthermore, OER will provide the opportunity for public comment and will make documents submitted by the applicant available to the public prior to OER's decision to accept a local brownfield site into the program.³⁵ The LBCP thus reflects the intent to involve members of the community in the brownfields redevelopment process and provides interested parties with a meaningful opportunity to comment on the proposed remediation and redevelopment.

"OER has sought to make the elements of the LBCP as friendly to property owners/developers as possible, while at the same time ensuring a program that will maintain high standards for public health and the environment."

Enforcement Procedures

To ensure compliance, the LBCP contains provisions that allow for the assessment of civil penalties and the withholding of building permits under certain circumstances.³⁶ Section 24-907 of the LBCP law provides that civil penalties will be assessed against any applicant, enrollee or holder of a Certificate of Completion who is found to have misrepresented a material fact to OER regarding the local brownfield site's investigation, remediation or management.³⁷ If OER believes there has been a misrepresentation, it can seek civil penalties against the enrollee in a proceeding before the New York City Environmental Control Board.³⁸ Under Section 24-908, OER is authorized to notify DOB when a site has failed to properly maintain site management controls required by an agreement or document entered into under the LBCP.³⁹ Once notified, DOB will withhold issuing building permits for that site until the issue is resolved. Through these provisions, OER is afforded the enforcement mechanisms needed to maintain the integrity of the LBCP and can ensure that the stated remediation and redevelopment goals are achieved.

Benefits of Entering the New York City Local Brownfield Cleanup Program

The LBCP was designed to encourage the redevelopment of brownfield sites and ensure public health and environmental protection, but it also maintains a real focus on the needs of property owners/developers who are seeking to redevelop brownfield sites. Since this is a voluntary program, it is necessary that elements of the program are attractive to property owners/developers; otherwise they might be unwilling to acquiesce to regulatory oversight. As a result, OER has sought to make the elements of the LBCP as friendly to property owners/developers as possible, while at the same time ensuring

a program that will maintain high standards for public health and the environment.

OER appeals to property owners/developers by crafting a program that provides efficiency. The LBCP provides a streamlined process that allows sites to receive a remedy selection decision within three months, thereby alleviating unnecessary delay and providing property owners/developers with a considerably faster alternative to the New York State BCP. This speedy review is accomplished by having property owners/developers enter the program with a completed remedial investigation report, full categorization of the contamination on site, and a completed remedial action work plan that offers a proposed remedy for the site. With these completed documents in hand, OER staff will be able to process applications quickly, allowing for increased efficiency.

“This Act creates the nation’s first municipal program specifically designed to comprehensively address, encourage and regulate brownfields redevelopment.”

The LBCP will also provide property owners/developers with certainty because they will know that the remedies approved by OER are compliant with City and State standards. Should OER be successful in its negotiations with the State and Federal governments, the LBCP may further provide security by offering liability releases from all levels of government.⁴⁰ Moreover, with a City-approved remedy, the project is less susceptible to encountering unforeseen environmental complications that may slow redevelopment of the site. In addition, the LBCP provides certainty to financial institutions by offering assurances that the contamination on site will be cleaned adequately. In turn, property owners/developers benefit because, if financial institutions are confident that the site will undergo a regulated remediation, then those institutions will be more inclined to approve loans for project developments on brownfield sites.

To further encourage participation, OER also intends on awarding small financial incentive grants to property owners/developers looking to enter the LBCP. There will be three types of grants available: (1) a pre-development services grant, (2) a remedial investigation services grant, and (3) an environmental insurance grant. Guidelines and criteria will be established to determine what entities are eligible to receive these grants, how many grants may be awarded to a single site, and specifics on what services are included. These grants will be awarded prior to entrance into the LBCP and serve as another method to persuade property owners/developers to consider entering a regulated cleanup program.

The Future of Brownfields Regulation

The passage of this Act signals the beginning of a new era in brownfields regulation. This Act creates the nation’s first municipal program specifically designed to comprehensively address, encourage and regulate brownfields redevelopment. As such, the manner in which the Act unfolds may be telling on the future of brownfields regulation.

We should expect to find that there are many advantages associated with local regulation of brownfield sites. For example, local governments can be a source of additional funding and oversight for brownfield cleanups, local officials may be more familiar with the local brownfield sites than their counterparts at the State or Federal governments, and local offices usually are better situated to promote community involvement. In addition to the inherent benefits of local regulatory oversight, the LBCP also aims to establish a streamlined process that will allow local brownfield sites to pass through the program quickly and efficiently, and also provides certainty that the cleanup will meet all regulatory standards under Federal, State and Local laws. The efficiency and certainty of the LBCP will avoid costly time delays, which, in the past, may have dissuaded parties from participating in a brownfields regulatory program administered by the State. Given the variety of benefits facilitated by local regulation, and by the LBCP in particular, it would not be surprising to find the LBCP serving as a template for the development of similar programs in municipalities nationwide.

Endnotes

1. The Act is also officially referred to as 2009 N.Y.C. Local Law No. 27, N.Y.C. Admin. Code §§ 24-9. The local law can be found at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=445386&GUID=88072E38-4660-4413-A906-A947B94D2FA5&Options=ID%7cText%7c&Search=brownfield>.
2. The New York City Office of Environmental Remediation, *About OER*, <http://www.nyc.gov/html/oeer/html/about/about.shtml> (last visited July 22, 2009).

It should be noted that some States, for example California and Florida, have delegated authority to allow local governments to operate existing State brownfield cleanup programs. However, those programs differ from New York City’s Local Brownfield Cleanup Program because they are just extensions of authority under a currently enacted brownfield cleanup program, whereas the New York City program establishes its authority through the passage of a local law and has been tailored to meet the needs of New York City property owners, developers and environmental advocates.
3. N.Y. Evtl. Conserv. Law § 27-1405 (2).
4. The City of New York, *PlaNYC Progress Report 2009: Brownfields*, (2009) at 13.
5. N.Y. Evtl. Conserv. Law § 27-1409.
6. N.Y. Comp. Codes R. & Regs. tit. 6, § 375-3.9(e) (N.Y.C.R.R.).
7. N.Y. Evtl. Conserv. Law § 27-1421 and 6 N.Y.C.R.R. § 375-3.9(b).
8. See, e.g., *Lighthouse Pointe Prop. Assoc. LLC v. New York State Dept. of Evtl. Conservation*, 2009 N.Y. Slip Op. 878, 1 (N.Y. App. Div. 4th Dep’t 2009); and *377 Greenwich LLC v. New York State Dept.*

- of Env'tl. Conservation*, 2006 N.Y. Slip Op. 26453, 1 (N.Y. Sup. Ct. 2006). See also *Destiny USA Dev., LLC. v. New York State Dept. of Env'tl. Conservation*, 2009 N.Y. Slip Op. 4504, 1 (N.Y. App. Div. 4th Dep't 2009); and *HLP Props., LLC. v. New York State Dept. of Env'tl. Conservation*, 2008 N.Y. Slip Op. 28337 (N.Y. Sup. Ct. 2008).
9. The Federal government has enforcement authority under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") also known as "Superfund," to seek compensation or require remediation from a party or parties who are responsible for contamination at a property. These sites typically contain very high levels of contamination and the Federal government seeks to address these sites because they pose high risks to public health and the environment. However, the Federal government does not have a program similar to State voluntary brownfield cleanup programs where parties willingly apply for entrance and render the remediation subject to government oversight. Therefore, until now, the State was the only regulatory entity that operated voluntary brownfield cleanup programs.
 10. This is evident from DEC's rejection of brownfield sites from the BCP that are deemed to have insufficient contamination to adequately complicate the redevelopment of the site. See cases cited *supra* note 8.
 11. 6 N.Y.C.R.R. § 375-1.2(x).
 12. "Historic fill may be solid waste including, but not limited to, coal ash, wood ash, municipal solid waste, incinerator ash, construction and demolition debris, dredged sediments, railroad ballast, refuse and land clearing debris, which was used prior to October 10, 1962." [6 N.Y.C.R.R. § 375-1.2(x)].
 13. The City of New York, *PlaNYC 2030: Brownfields* (2007), at 47.
 14. PlaNYC 2030 is a comprehensive plan establishing sustainability goals for the City of New York to achieve by the year 2030. As part of this plan, the City seeks to clean up all contaminated land in New York City through the completion of eleven initiatives addressing brownfield site redevelopment.
 15. The City of New York, *PlaNYC 2030: Brownfields* (2007), at 41-49.
 16. The City of New York, *PlaNYC Progress Report 2009: Brownfields* (2009), at 13.
 17. New York State Department of Environmental Conservation, *Brownfield Opportunity Areas Program Fact Sheet*, <http://www.dec.ny.gov/chemical/8447.html> (last visited September 10, 2009).
 18. For the purposes of this article, an E-designation is referring to E-designations for hazardous materials and not E-designations for noise or air quality impacts.
 19. 2009 N.Y.C. Local Law No. 27, N.Y.C. Admin. Code §§ 24-904(a).
 20. 2009 N.Y.C. Local Law No. 27, N.Y.C. Admin. Code §§ 24-904(b).
 21. 2009 N.Y.C. Local Law No. 27, N.Y.C. Admin. Code §§ 24-903(a) and (b).
 22. 2009 N.Y.C. Local Law No. 27, N.Y.C. Admin. Code §§ 24-903(c) and (d).
 23. 2009 N.Y.C. Local Law No. 27, N.Y.C. Admin. Code §§ 24-903(e).
 24. 2009 N.Y.C. Local Law No. 27, N.Y.C. Admin. Code §§ 24-903(f).
 25. 2009 N.Y.C. Local Law No. 27, N.Y.C. Admin. Code §§ 24-903(g).
 26. 2009 N.Y.C. Local Law No. 27, N.Y.C. Admin. Code §§ 24-903(i).
 27. 2009 N.Y.C. Local Law No. 27, N.Y.C. Admin. Code §§ 24-903(j).
 28. 2009 N.Y.C. Local Law No. 27, N.Y.C. Admin. Code §§ 24-906(a).
 29. *Id.*
 30. 2009 N.Y.C. Local Law No. 27, N.Y.C. Admin. Code §§ 24-906(b)(1).
 31. 2009 N.Y.C. Local Law No. 27, N.Y.C. Admin. Code §§ 24-906(b)(1) (i) and (iv).
 32. 2009 N.Y.C. Local Law No. 27, N.Y.C. Admin. Code §§ 24-906(b)(1) (ii) and (iii).
 33. 2009 N.Y.C. Local Law No. 27, N.Y.C. Admin. Code §§ 24-906(c).
 34. 2009 N.Y.C. Local Law No. 27, N.Y.C. Admin. Code §§ 24-905(a).
 35. 2009 N.Y.C. Local Law No. 27, N.Y.C. Admin. Code §§ 24-905(b).
 36. 2009 N.Y.C. Local Law No. 27, N.Y.C. Admin. Code §§ 24-907 and §§ 24-908.
 37. 2009 N.Y.C. Local Law No. 27, N.Y.C. Admin. Code §§ 24-907.
 38. *Id.*
 39. 2009 N.Y.C. Local Law No. 27, N.Y.C. Admin. Code §§ 24-908.
 40. 2009 N.Y.C. Local Law No. 27, N.Y.C. Admin. Code §§ 24-906(a).

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Climate Change Considerations Under SEQRA: DEC's New Policy

By Matthew Ahrens, Oded Mizrahi, Ryan Waterman and Davon Collins

I. Introduction

On July 15, 2009, the New York State Department of Environmental Conservation ("DEC") finalized a new policy entitled "Guide for Assessing Energy Use and Greenhouse Gas Emissions in Environmental Impact Statements" (the "GHG Policy").¹ The GHG Policy, which was first proposed in March, took effect in mid-August. The GHG Policy seeks to provide DEC staff with guidance for its consideration of greenhouse gas ("GHG") emissions and energy efficiency when preparing or reviewing environmental impact statements ("EIS") pursuant to New York's State Environmental Quality Review Act ("SEQRA").²

"Consideration of GHG emissions pursuant to SEQRA can materially impact the scope, cost and timing of the environmental impact review process."

Analysis of GHG emissions may already be necessary in certain environmental reviews conducted pursuant to the federal National Environmental Policy Act ("NEPA")³ and similar laws in California, Massachusetts, Minnesota and Washington. The GHG Policy provides instruction for similar analysis in SEQRA reviews, and can be considered another step in New York's recent efforts to combat climate change. These include, among others, leadership in the Regional Greenhouse Gas Initiative ("RGGI");⁴ the creation of a state Office of Climate Change;⁵ the introduction of a Renewable Portfolio Standard;⁶ the passage, on May 5, 2009, in the state Assembly of a bill (A.7572) which would require GHG emissions reporting and an 80% reduction in GHG emissions from 1990 levels by 2050;⁷ and an Executive Order on August 6, 2009 which sets a goal of reducing GHG emissions in New York state by 80% below 1990 levels by the year 2050 and creates a Climate Action Council with a mandate to draft a "Climate Action Plan."⁸

Consideration of GHG emissions pursuant to SEQRA can materially impact the scope, cost and timing of the environmental impact review process. Parts II and III of this article provide a brief overview of SEQRA and its treatment of GHGs prior to the new GHG Policy. Parts IV through VII describe the GHG Policy, identify legal questions not addressed by the GHG Policy, discuss the analysis of GHG emissions under other environmental

impact review processes, and consider the GHG Policy's implications.

II. SEQRA Overview

SEQRA's broad mandate requires state and local agencies to incorporate consideration of environmental factors into their respective planning, review and decision-making processes, such as decisions regarding permits, zoning changes or government funding. Projects in New York requiring some form of discretionary governmental approval that may impact the environment trigger a SEQRA review. That review requires agencies to determine whether actions they directly undertake, fund, or approve may have a "significant impact" on the environment, and if so, to prepare or request an EIS that explores the potential impacts of the proposed action, as well as ways to avoid or mitigate those impacts.⁹

The SEQRA inquiry begins when an agency¹⁰ receives an application for funding or for approval of an action.¹¹ The agency classifies each application as Type I, Type II, or Unlisted.

1. Type I actions are activities specifically listed in, or that meet or exceed a threshold in, 6 N.Y.C.R.R. § 617.4, or which are included on an involved agency's Type I list.¹² Type I actions are considered likely to have a significant adverse impact on the environment.
2. In contrast, Type II actions are activities listed in the regulations that are pre-determined to not have a significant impact, or have otherwise been determined to not require preparation of an EIS, and thus are exempted from SEQRA review.¹³ Each agency can create its own list of Type II activities to supplement, though not replace, the list in the regulations.
3. Unlisted actions are those that either (1) do not meet or exceed a Type I threshold; or (2) are not included on DEC's Type I or Type II lists or the supplemental lists of an involved agency. As such, they require a determination of significance. Most actions fall into this category.

For any Type I or Unlisted action, the applicant must submit an Environmental Assessment Form ("EAF"). Type I projects must complete a "long" EAF, which contains enough information to describe the proposed action, its purpose and the potential impacts on the environment.

Unlisted projects must complete either a “short” or a “long” EAF, at the sole discretion of the lead agency.¹⁴

The lead agency then evaluates the EAF to determine if the potential environmental impacts of the proposed project are “significant” on the basis of certain defined criteria.¹⁵ The lead agency must state in writing its determination whether the project may result in significant environmental impacts. The lead agency issues a “negative declaration” if it determines that the proposed action will not result in a significant environmental impact, and a “positive declaration” if it determines there will be such an impact. As a negative declaration ends the SEQRA review process, it can become a point of contention in subsequent litigation between developers and project opponents.¹⁶

A positive declaration, on the other hand, serves as the starting point for the preparation of an applicant’s Draft Environmental Impact Statement (“DEIS”) for the proposed action, which seeks to provide a detailed evaluation of the reasonably anticipated environmental impacts associated with that action and identify alternatives and mitigation measures for any potential significant impacts. A DEIS submission may be preceded by an optional “scoping” process (which also may be required by the lead agency) in which the applicant and involved agencies, with public comment, focus the DEIS on the most relevant issues, potential significant impacts, and mitigation measures.¹⁷ After submission of the DEIS, the lead agency may then require further revisions, or accept it for public hearings and/or comment. Once a lead agency responds to all substantive public comments and accepts the applicant’s Final Environmental Impact Statement (“FEIS”), each involved agency can make a final decision regarding the application to fund or approve the project and explain how the information revealed in the FEIS affected that final determination.¹⁸

III. SEQRA Analysis of GHG Emissions Before the GHG Policy

With the increased focus on climate change in recent years, and following similar actions in other states, there have been calls to amend SEQRA to require consideration of GHG emissions and energy use.¹⁹ However, as stated in the GHG Policy, assessment of climate change impacts may have already been required prior to the GHG Policy.²⁰ In fact, in recent years a number of SEQRA reviews that pre-date the GHG Policy have considered the issue of GHG emissions and climate change.

In February 2008, DEC issued its SEQRA scoping document for the proposed expansion of the Belleayre Mountain Ski Center and for the proposed modified Belleayre Resort at Catskill Park, in which it required a comprehensive review of climate change and the projects’ carbon footprint.²¹ The scoping document calls for:

- a qualitative analysis of how climate change will potentially affect the construction and operation of both projects—for example, as a result of changes in winter seasons;
- a quantitative (where practicable) and qualitative discussion of the GHG emissions resulting from construction activities, including the manufacture and transport of construction materials;
- a quantitative estimate of emissions from both direct and indirect GHG sources during the projects’ operation;
- a quantitative and qualitative assessment of the loss of CO₂ sequestration capacity due to the loss of forested area; and
- a description and evaluation of potential mitigation measures, and where practicable, a quantitative analysis of such measures.²²

At least one appellate court has ruled on the analysis of GHG emissions under SEQRA. In 2007, the Planning Board of the Town of Ellicottville (the “Planning Board”), acting as lead agency, issued its SEQRA Statement of Findings and Decision in response to applications by Laidlaw Energy Group Inc. (“Laidlaw”) for Site Plan and Special Use Permit approval to construct a cogeneration plant using wood chips as fuel.²³ The Planning Board denied the applications, citing GHG emissions which would result in an unacceptable adverse impact. The board concluded that “[no] aspect of the proposed project is of greater concern than the potential air emissions from the new Biomass Cogeneration Plant...[which] will produce serious increases in harmful emissions....”²⁴ On March 18, 2008, the New York Supreme Court dismissed a petition by Laidlaw challenging the Planning Board’s determination. In February 2009, the New York Appellate Division, Fourth Department, upheld that dismissal, ruling that the Planning Board’s determination was not “arbitrary, capricious or unsupported by substantial evidence,” and that the Planning Board had taken the “requisite hard look at the evidence and made a reasoned elaboration of the basis for its determination.”²⁵ As a result, GHG emissions were held to be a proper consideration under SEQRA.

In its press release announcing the GHG Policy, DEC also announced that it is redesigning the EAF used in the SEQRA process to include additional questions pertaining to energy use and GHG emissions.²⁶ In September 2008, DEC had circulated a preliminary draft of the proposed revision to the EAF.²⁷ Since the EAF is included in the SEQRA regulations, however, any revisions to the EAF would require a regulatory change.²⁸

IV. The GHG Policy

The New York Environmental Conservation Law (“ECL”) authorizes DEC to issue, and the general public

to rely upon, guidance documents for DEC personnel in implementing and complying with ECL regulations.²⁹ While climate change review is not new under SEQRA,³⁰ the GHG Policy is the first such guidance document issued by DEC on the subject of climate change.³¹ Importantly, however, the GHG Policy establishes neither a threshold for significance determinations nor a standard to determine when a SEQRA review should include GHG emission or energy use analysis.³² Rather, it provides guidance for assessment if these factors have been raised as an issue in a SEQRA review. Presumably, if these factors have not been raised, then the GHG Policy would not apply.

However, once energy usage or GHG emissions have been identified as significant in a positive declaration or required through scoping to be discussed in an EIS, the GHG Policy guides DEC staff on how to prepare or review an EIS and seeks to provide greater clarity and consistency to DEC staff in five areas: (1) establishing boundaries for the assessment of GHG emissions; (2) quantifying both direct and indirect carbon dioxide (“CO₂”) emissions from the project; (3) quantifying emissions from waste generation; (4) quantifying methane emissions from landfills; and (5) providing a “menu” of possible mitigation options.³³

While the GHG Policy focuses on methodologies for the quantitative assessment of energy usage and GHG emissions, in certain situations it recommends a qualitative, rather than quantitative, review. For example, an EIS should include “a qualitative discussion of the GHG emissions resulting from the construction phase, including the manufacture or transport of the construction materials.”³⁴ The qualitative review can compare emissions due to design and construction choices without needing to quantify the emissions. For projects where the construction phase is likely to be a significant fraction of total project emissions, however, DEC may determine at the EIS scoping phase whether to require quantification of such emissions and the appropriate methodology.³⁵

Quantitatively, the GHG Policy instructs that the analyses are to be compared across site-specific and project-design options.³⁶ The GHG Policy discusses the analysis of GHG emissions and quantification methodology for six broad categories of emissions, which will generally cover all of the significant sources of GHG emissions associated with a project. The six categories, and examples of what should be discussed within each category, are:

- Direct Emissions from Stationary Sources—includes emissions from boilers, heaters and combustion turbines;
- Direct Emissions from Non-Stationary Sources—includes emissions from project-owned and operated fleet vehicles, such as freight trucks, forklifts and tractors;

- Indirect Emissions from Stationary Sources—includes emissions generated by off-site plants supplying energy used on-site during the project’s operation (e.g., electricity purchased through a utility);
- Indirect Emissions from Mobile Sources—includes emissions from non-project-owned vehicle trips associated with the project, such as trips of commuting employees, residents and customers;
- Methane Emissions from Landfills—information should be presented describing both emissions from existing landfill operations as well as projected emissions from proposed landfills; and
- Waste Generation—may include discussion of the implications of different levels of solid waste generation and differing solid waste management practices.³⁷

To aid in the quantitative assessment for CO₂ and methane emissions within each of the six categories, the GHG Policy recommends certain assessment methodologies, such as modeling software for calculating projected methane emissions from landfills or CO₂ emitted per vehicle mile traveled by project employees, residents, suppliers and customers.³⁸ For analysis of other types of GHG emissions, the GHG Policy states that quantification methodology is to be handled on a case-by-case basis and expressly refers DEC staff to a variety of other protocols, such as the California Climate Action Registry’s General Reporting Protocol and the U.S. Environmental Protection Agency’s Greenhouse Gas Inventory Guidance.³⁹

As indicated above, the GHG Policy calls for a quantitative assessment of both direct and indirect emissions. The inclusion of indirect emissions in the GHG Policy—in particular, those from mobile sources—demonstrates the broad extent of the impact the GHG Policy may have. In effect, a project having a large number of customers or employees, or a remote location, may find those factors working against it in the SEQRA analysis. Furthermore, if the GHG Policy’s assessment factors come to influence significance determinations (e.g., by agencies looking at indirect GHG emissions in evaluating the EAF), projects such as malls and remote office parks on already developed land may be required to undergo greater scrutiny under SEQRA.

The GHG Policy contains numerous examples of possible on-site mitigation measures, divided among five broad categories: (1) Building Design & Operation Measures (e.g., use of recycled building materials or green roofs); (2) Efficiency or Mitigation Measures for On-Site GHG Sources (e.g., use of energy efficient boilers or heaters); (3) Site Selection (e.g., minimizing the building footprint); (4) Transportation Measures (e.g., encouraging employee use of public transport through transport pass subsidies); and (5) Waste Reduction or Management

Measures (e.g., composting).⁴⁰ An EIS should include calculations of the proposed reductions in GHG emissions resulting from each mitigation measure, and where practicable, also include a quantification of reductions in GHG emissions that would result from mitigation measures that were considered but ultimately not incorporated into the project.⁴¹ The GHG Policy strongly favors on-site mitigation measures, and cautions that off-site mitigation measures are to be pursued only where they will result in “real, additional, verifiable, enforceable, and permanent” GHG emissions reductions.⁴²

A recent EIS shows the comprehensive review anticipated by the GHG Policy, especially for environmentally sensitive projects. In DEC’s draft Supplemental Generic EIS for anticipated natural gas drilling projects in the Marcellus Shale in southern New York,⁴³ DEC, after citing to the GHG Policy, compared GHG emissions across several different project options in a lengthy quantitative and qualitative analysis. The detailed and methodical energy use and GHG emissions analysis presented in this DEIS further underscores the seriousness with which DEC intends to consider GHG emissions and mitigation factors.

V. Difficult Legal Issues Unaddressed by the GHG Policy

Although the GHG Policy provides some useful guidance, a number of difficult legal issues remain unaddressed that lead agencies and project developers must wrestle with. Nevertheless, it is unsurprising that the GHG Policy left open questions. In California, practitioners have been and continue to be challenged by many of the same issues. At this early stage, these issues include, but are not limited to, the questions posed below. Further, DEC guidance, subsequent SEQRA reviews, and judicial interpretations may be needed. In addition, other jurisdictions may provide some precedent.

When does a project’s GHG emissions or energy use become significant?

The GHG Policy expressly states that it does not establish a threshold for determining the significance of a project’s GHG emissions or energy use, and that the statutory and regulatory rules for making significance determinations—ECL § 8-0109 and N.Y.C.R.R § 617.7, respectively—should continue to be used by agencies.⁴⁴ Those rules recommend that agencies look for “significant adverse impacts to the environment”—i.e., impacts that may, *inter alia*, result in a substantial adverse change in the existing air quality, ground or surface water, a substantial increase in solid waste production, or the removal or destruction of large quantities of vegetation or fauna.⁴⁵ Moreover, in performing this evaluation, the lead agency is given very broad latitude to consider “reasonably related” long-term, short-term, direct, indirect and cumulative impacts.⁴⁶

In California, it is not yet set in stone how to perform this analysis, and environmental impact documents have

taken extreme positions—from what essentially amounts to a “one molecule rule” approach (where the emission of a single new GHG molecule can be enough to cause a significant impact) to concluding that it is impossible to analyze GHG emissions, much less establish a significance threshold—and many intermediate positions in between.⁴⁷ California’s Office of Planning and Research, the advisory body tasked with providing guidance on the California Environmental Quality Act (“CEQA”),⁴⁸ similarly eschewed setting forth a significance threshold for GHG emissions in its own guidance document, which is cited in the GHG Policy.⁴⁹

“It is not unlikely that either statewide action to set GHG emissions reduction targets, or judicial opinions approving or disapproving of GHG analyses, or a combination of both, will be required to make GHG significance determinations more clear.”

How to measure a project’s GHG emissions for significance remains unanswered by the GHG Policy. It is not unlikely that either statewide action to set GHG emissions reduction targets, or judicial opinions approving or disapproving of GHG analyses, or a combination of both, will be required to make GHG significance determinations more clear.

Should a project be allowed to take credit for reducing GHG emissions in a different location?

The GHG Policy does not expressly discuss how to address reductions in existing GHG emissions. For example, some projects replace older, less energy efficient construction with more energy and/or water-efficient construction. Other projects can improve energy efficiency, although they do not necessarily decrease on-site GHG emissions (e.g., cogeneration projects where offsite electricity use is replaced with on-site electricity generation, combined with an industrial process to capture and utilize waste heat from the electrical generation process, thereby raising energy efficiency). Thus, while a new project may lead to new GHG emissions at a given site, it may still play a part in reducing overall GHG emissions.

If such projects are not entitled to take credit for GHG emissions reductions achieved off-site, projects that reduce GHG emissions overall may run the risk of being disfavored by decision-makers.

How are other climate change effects, such as potential sea level rise, evaluated?

The GHG Policy expressly declines to provide guidance as to how a SEQRA review should address overall climate change impacts on a project, such as potential sea

level rise, increased temperatures, and impacts to natural carbon sinks through deforestation, among others. Instead, the GHG Policy states that, in such cases, “it is expected that DEC as the lead agency or other involved agencies would address those potential impacts in the EIS scoping phase on a case-by-case basis.”⁵⁰

As with the significance threshold issue, it appears that the methodology for evaluating other climate change effects, such as potential sea level rise, will be determined over time.

When should construction emissions be considered to determine whether a project’s GHG emissions will be significant?

The GHG Policy states that for projects where the construction phase or the extraction or production of materials or fuels will likely be a “significant fraction” of total project GHG emissions, DEC staff may include these during the scoping process.⁵¹ However, the GHG Policy does not conclude what constitutes a “significant fraction,” or how to perform the subsequent significance analysis. In California, construction emissions have been quantified along with operational emissions, although they have not always been included in significance analyses.⁵² Some California reviews have ignored them when determining significance, while others have tried to include construction emissions by amortizing them into estimated operational emissions over the life of the project.

To what extent could a project use GHG offsets to reduce its GHG emissions below a level of significance?

Although the GHG Policy expresses a preference for on-site GHG emissions reductions,⁵³ it does not specifically address the question of GHG offsets and how they should or should not be counted when considering the significance of a project’s GHG emissions. While New York’s membership in RGGI and the August 6, 2009 Executive Order have put New York on a path of reducing statewide GHG emissions, state policy regarding the use of GHG offsets remains, at this time, in development.

The preceding list highlights just a few of the difficult legal questions posed by the consideration of GHG emissions and energy use in EIS documents. It will take time for New York’s GHG Policy to develop, for SEQRA documents to analyze GHG emissions, and for the courts to rule on the sufficiency of those documents under SEQRA.

VI. Climate Change in Other Environmental Impact Reviews

Climate change has become an increasingly important component of the environmental review processes required under NEPA and the “Little NEPA” state laws in states like California, Massachusetts, Minnesota, and Washington. For example, in 2007, the U.S. Court of Appeals for the Ninth Circuit ruled that a NEPA review must

include an analysis of agency actions on GHG emissions and must identify possible mitigation measures to reduce GHG-related impacts.⁵⁴

In California, since the state’s passage of the Global Warming Solutions Act of 2006 (also known as Assembly Bill 32, or “AB 32”), climate change and GHG emissions have gone from being rarely discussed in Environmental Impact Reports (“EIR”) under CEQA, the state’s “Little NEPA” statute, to being analyzed in nearly every newly issued EIR.⁵⁵ In fact, climate change and GHG emissions analysis has become the subject of litigation across the state.⁵⁶ For example, in 2008, petitioners raised climate change challenges against a number of projects, including, among others, a proposed commercial composting facility in Hinkley, a large mixed-use residential, hotel, and commercial development in Desert Hot Springs, a bus rate increase in Los Angeles, and the California Public Utilities Commission’s new rule restricting the type of natural gas to be used in California.⁵⁷

Although we are not aware of any appellate court decisions that have been issued addressing how to analyze climate change and GHG emissions under CEQA, the California Legislature passed Senate Bill 97 in 2007, which directs the California Resources Agency to finalize guidelines for analyzing GHG emissions and mitigating impacts by January 1, 2010.⁵⁸ In addition, several regional air quality management agencies are in various stages of crafting GHG emission significance thresholds designed to identify at what level a project’s GHG emissions should be deemed cumulatively significant.

Most recently, both the Bay Area Air Quality Management District (“BAAQMD”) and San Joaquin Valley Air Pollution Control District (“SJVAPCD”) released draft significance threshold proposals for GHG emissions based on land use type.⁵⁹ The BAAQMD proposes that any land use project that will emit more than 1,100 metric tons per year of GHGs, and any commercial project that will emit more than 10,000 metric tons of GHGs, should be determined to have a cumulatively significant effect on climate change, while the SJVAPCD proposes to find any project that implements best performance standards or can show a 29% reduction in GHG emissions below “business as usual” (thereby achieving AB 32’s 2020 GHG reduction target) less than significant.⁶⁰

In Massachusetts, the Environmental Policy Act (“MEPA”) requires state agencies to study the environmental consequences of their actions (including permitting and financial approval of private parties’ actions) in order to minimize and prevent “damage to the environment.”⁶¹ On November 5, 2008, this section of MEPA was amended to provide that “in considering and issuing permits, licenses and other administrative approvals and decisions, the respective agency...shall also consider the reasonably foreseeable climate change impacts, including additional greenhouse gas emissions, and effects, such as

predicted sea level rise.”⁶² Thereafter, on November 24, 2008, the Executive Office of Energy and Environmental Affairs issued a revised Greenhouse Gas Emissions Policy to account for the MEPA amendment.⁶³ MEPA thus requires quantitative analysis of GHG emissions and mitigation measures (both in terms of emissions and in terms of energy savings), and consideration of project alternatives.⁶⁴

In Minnesota, on September 22, 2009, a state court of appeals upheld a climate change analysis performed by the Minnesota Department of Natural Resources (“DNR”) under the Minnesota Environmental Policy Act (“Minnesota EPA”) in a case brought by project opponents to a large taconite mining and steel production project.⁶⁵ The court rejected as without merit each of the project opponent’s challenges to DNR’s consideration of GHG emissions in the project’s environmental impact statement—for example, by upholding DNR’s determination that there existed no reliable models to evaluate the project-specific effects of GHG emissions on the regional or global environment,⁶⁶ and by finding that, while the project would contribute large amounts of GHG emissions, climate change would have to be addressed “holistically” and “not just by an individual facility.”⁶⁷ However, because the DNR clearly considered GHG emissions in this case’s EIS, the court did not reach the issue whether consideration of GHG emissions was required under NEPA or Minnesota law.⁶⁸

In Washington, on October 15, 2007, King County issued an order requiring county departments to evaluate potential climate change impacts of projects being evaluated pursuant to the Washington State Environmental Policy Act (“SEPA”).⁶⁹ The order requires identification and evaluation of “climate impacts, including but not limited to those pertaining to greenhouse gases.”⁷⁰

Table 1 (attached) identifies states with both “Little NEPA” environmental review statutes, and state-level GHG emissions reduction targets, goals, and/or legislation. As California, Massachusetts, Minnesota, Washington (King County), and now New York already consider how to integrate GHG emissions analysis into environmental documents, it appears likely that the trend will continue to grow in other states across the nation.

VII. Possible Implications of the GHG Policy

New York’s increasing focus on climate change and on consideration of GHG emissions during the SEQRA review process has numerous consequences for parties that need to undergo a SEQRA review for a proposed project. Although the GHG Policy is only binding on DEC personnel, it can be expected that state and local agencies will use it in their own SEQRA evaluations. Moreover, project opponents may use the GHG Policy to identify issues that they may allege a developer failed to consider during the SEQRA process. There is thus clearly added

incentive for project developers to undertake a thorough study of potential GHG emissions early in the development process to preempt such opposition. The GHG Policy recognizes that while the consideration of GHG emissions and energy usage early in the development process may sometimes be difficult, it serves the public policy goals of combating climate change and maximizing energy efficiency.⁷¹ Therefore, by addressing the GHG emissions issue early, developers may be able to more effectively reduce a project’s GHG emissions and minimize legal risk.

Failure to adequately consider climate change impacts is increasingly being used as an argument by project opponents to challenge projects. Such challenges can result in delays or failure to obtain the necessary approvals or permits, as well as increase costs to implement mitigation measures. Challenges seeking to achieve project delay or termination can potentially arise through litigation—for instance, by challenging a lead agency’s significance determinations and final findings in court.⁷² Arguments could potentially include that (1) the lead agency failed to properly quantify or take into account project GHG emissions and energy use, or (2) the project developer failed to adequately mitigate according to the GHG Policy guidelines.

“Although the GHG Policy is only binding on DEC personnel, it can be expected that state and local agencies will use it in their own SEQRA evaluations.”

Nonetheless, it is important to note that SEQRA does not, by statute or regulation, expressly require any climate change review. Unless and until SEQRA is amended accordingly, such regulations are authorized, or New York courts clearly interpret SEQRA as requiring such analysis, developers can potentially argue about whether, to what extent, and in what manner climate change review would be required. The GHG Policy itself states that “in certain instances an EIS will be required to include a discussion of energy use or GHG emissions,”⁷³ which implies that in other instances such a discussion will not be required. Future SEQRA amendments or regulations seeking to require or regulate climate change review may enjoy standard legislative or public notice and comment protections. As a result, unlike California’s CEQA statute which, although not described in detail, contains sections that reference climate change review,⁷⁴ public opposition to climate change issues under SEQRA could potentially face more difficult hurdles in the course of judicial review.

Additionally, due to DEC’s newfound emphasis on GHG emissions, project developers could become subject to increased scrutiny of such formerly non-controversial aspects of project design as HVAC efficiency and proximity

ty to public transportation, in addition to long-established areas of environmental concern, such as deforestation and air quality.

As noted above, the GHG Policy refers DEC staff to reference sources developed in California as a model and source of experience. Even in California, however, there is still wide-ranging debate on the proper methodology for evaluating the significance of GHG emissions on climate change, as can be seen by the recent development of the draft significance threshold proposals by the BAAQMD and SJVAPCD referenced above. Furthermore, while it is only a matter of time until California's appellate courts provide guidance through appellate decisions interpreting CEQA's requirements, projects continue to be challenged regularly on climate change grounds. New York and other states with the combination of "Little NEPA" statutes and GHG emissions reduction measures may see this type of pattern develop as well.

"The GHG Policy will likely increase the time, cost, and effort that will go into the preparation of an EIS that discusses GHG emissions or energy use."

VIII. Conclusion

While the consideration of GHG emissions is not a new requirement under SEQRA, the introduction of the GHG Policy brings greater focus to the topic, and likely increases the attention it will receive, both from DEC staff and other agencies reviewing an EIS, and from any potential project opponents. The GHG Policy will likely increase the time, cost, and effort that will go into the preparation of an EIS that discusses GHG emissions or energy use.

Inquiry into GHG emissions and energy use could expand to become a standard part of the SEQRA process and, as a result, project development throughout New York. As GHG issues become increasingly more common in SEQRA analyses (and, as can be expected, in similar reviews in other jurisdictions), project developers should be proactive in adopting strategies to position their projects positively within this developing regulatory framework.

Endnotes

1. Press Release, DEC Finalizes Greenhouse Gas Review Policy: Project Reviews to Cover Greenhouse Gas Emissions (July 16, 2009), <http://www.dec.ny.gov/press/56660.html>; NY STATE DEP'T OF ENVTL. CONSERVATION, GUIDE FOR ASSESSING ENERGY USE AND GREENHOUSE GAS EMISSIONS IN AN ENVIRONMENTAL IMPACT STATEMENT, *available at* http://www.dec.ny.gov/docs/administration_pdf/eisghgpolicy.pdf [hereinafter GHG Policy].
2. N.Y. Env'tl. Conserv. Law §§ 8 *et seq.* (2009). Corresponding regulations are located at 6 N.Y.C.R.R., Part 617 (2009).

3. 42 U.S.C. §§ 4321 *et seq.* (2009).
4. RGGI was the first mandatory cap-and-trade program in the United States to reduce GHG emissions. *See* <http://www.rggi.org>.
5. *See* N.Y. State Dep't of Env'tl. Conservation Office of Climate Change, <http://www.dec.ny.gov/about/43166.html> (last visited Oct. 10, 2009).
6. The Renewable Portfolio Standard seeks to have electric utilities and other electric service providers supply 25% of customer load with electricity from eligible renewable energy sources by 2013. *See* <http://www.nyserda.org/rps/index.asp> for more information.
7. *See* Summary of Bill A07572, *available at* <http://assembly.state.ny.us/leg/?bn=A07572> (last visited Oct. 10, 2009).
8. Exec. Order No. 24, "Establishing a Goal to Reduce Greenhouse Gas Emissions Eighty Percent by the Year 2050 and Preparing a Climate Action Plan" (August 6, 2009), *available at* http://www.ny.gov/governor/executive_orders/xeorders/eo_24.html.
9. 6 N.Y.C.R.R. § 617.1(c).
10. When multiple agencies each have jurisdiction to fund or approve a portion of a project, the agency that first receives the application may: (1) conduct an "uncoordinated" review, i.e., proceed as if it were the only involved agency, or (2) conduct a "coordinated review" through the designation as a "lead agency," which has the authority to make critical SEQRA determinations (such as whether an EIS is required) until the process is completed. When only one agency is involved, or multiple agencies act in an uncoordinated fashion, each agency is a "lead agency." However, if any agency finds that a project may have a significant environmental impact, all involved agencies must coordinate. *See* 6 N.Y.C.R.R. § 617.6(b).
11. This article will focus on SEQRA review for projects requiring agency approval, not SEQRA review of "direct actions" performed by the agencies themselves.
12. *See* 6 N.Y.C.R.R. § 617.4(a)(2).
13. *See* 6 N.Y.C.R.R. § 617.5. Examples include: routine facility maintenance, farm management practices, repaving of existing highways, and emergency actions. *See, respectively*, 6 N.Y.C.R.R. §§ 617.5(c)(1), (3), (4) & (33).
14. 6 N.Y.C.R.R. § 617.6(a)(3). The lead agency may also require other information necessary to determine significance. *Id.*
15. *See* § 617.7(c) (including such criteria as the removal or destruction of large quantities of vegetation or fauna, and major changes in the quantity or type of energy used).
16. New York courts hold agencies to a "hard look" standard. *See WEOK Broad. Corp. v. Planning Bd. of Town of Lloyd*, 79 N.Y.S.2d 373, 381-82 (N.Y. 1992) (holding that an agency must take a sufficiently "hard look" at the proposal before making its final determination and must set forth a reasoned elaboration for its determination).
17. *See* 6 N.Y.C.R.R. § 617.8.
18. *See* §§ 617.11(b)-(d).
19. *See, e.g.*, New York State Bar Association Task Force on Global Warming, Taking Action in New York on Climate Change (Jan. 2009) at 44, *available at* http://www.nysba.org/AM/Template.cfm?Section=Task_Force_on_Global_Warming_Home&Template=/CM/ContentDisplay.cfm&ContentID=26535; *see also* The Municipal Arts Society of New York, SEQRA and Climate Change (April 2009), *available at* http://mas.org/images/press-releases/MAS_SEQRA_FINAL.pdf.
20. *See* GHG Policy, *supra* note 1, at 3.
21. N.Y. State Dep't of Env'tl. Conservation, Final Scoping Document for Belleayre Mountain Ski Center Unit Management Plan—DEIS and Modified Belleayre Resort at Catskill Park Supplemental DEIS (2008), *available at* http://www.dec.ny.gov/docs/permits_ej_operations_pdf/belleayrefinalscope.pdf.
22. *Id.* at 34-36, 156-157.

23. Town of Ellicottville, Statement of Findings and Decision, Laidlaw Energy Group Inc. Biomass Cogeneration and Lumber Drying Kilns Applications (2007).
24. *Id.* at 14. The Planning Board further stated that, while biomass plants can, in fact, be carbon neutral, the Laidlaw proposal was not for a number of reasons, including its failure to consider the impacts of long-distance fuel source transportation, and reliance on tree limbs and utility trimmings with questionable carbon sequestration abilities instead of on growing young plants to accomplish a truly carbon neutral project. *Id.* at 29.
25. *Laidlaw Energy and Environmental, Inc. v. Town of Ellicottville*, 59 A.D.3d 1084, 1085-86 (N.Y. App. Div.2009).
26. See DEC Press Release, *supra* note 1.
27. Letter from N.Y. Dep't. of Env'tl. Conserv. to Stakeholders at 1 (Sept. 17, 2008), available at http://www.nycom.org/documents/EAF_Stakeholders.pdf.
28. 6 N.Y.C.R.R. § 617.20. The current EAF is available at http://www.dec.ny.gov/docs/permits_ej_operations_pdf/longeaf.pdf.
29. See N.Y. Env'tl. Conserv. Law § 3-0301(2)(z) (DEC Commissioner is authorized to "issue and amend guidance memoranda and similar documents of general applicability which are to be relied upon by department personnel for implementation of this chapter, and rules and regulations promulgated thereto, and for guidance to the general public in complying with the requirements of this chapter.").
30. In its responses to public comments to the GHG Policy, DEC explicitly states that "agencies are already under an obligation to consider [GHGs] in the EIS process....The [GHG] Policy simply provides methods for DEC staff to implement the existing legal requirements of [SEQRA] with respect to climate change and energy use and conservation." See N.Y. State Dep't of Env'tl. Conservation, Public Comments and Responses to Policy for Assessing Energy Use and Greenhouse Gas Emissions in an EIS, available at <http://www.dec.ny.gov/regulations/56626.html> (July 15, 2009).
31. See N.Y. Dep't of Env'tl. Conserv., Guidance & Policy Documents, <http://www.dec.ny.gov/regulations/397.html> (the GHG Policy is the only guidance document listed under "Climate Change Guidance Documents" section).
32. See GHG Policy, *supra* note 1, at 1.
33. See *id.* at 4.
34. *Id.* at 6.
35. See *id.*
36. See *id.* at 5.
37. See *id.* at 6-9.
38. See, e.g., *id.* at 8 ("To quantify these indirect emissions [from mobile sources], the first step is to estimate net new trips to be generated by the proposed project....").
39. See *id.* at 4.
40. See *id.* at 12-14.
41. See *id.* at 11.
42. See *id.* at 14.
43. See Draft Supplemental Generic Environmental Impact Statement for Well Permit Issuance for Horizontal Drilling and High-Volume Hydraulic Fracturing to Develop the Marcellus Shale and Other Low-Permeability Gas Reservoirs (Sept. 30, 2009), available at <http://www.dec.ny.gov/energy/58440.html>.
44. See GHG Policy, *supra* note 1, at 3.
45. See 6 N.Y.C.R.R. § 617.7(c)(1).
46. See § 617.7(c)(2).
47. See, e.g., County of Marin, Final Environmental Impact Report for the Marin Countywide Plan Update, State Clearinghouse No. 2004022076 (November 2007) (concluding that despite adoption of a countywide GHG emissions reduction plan more stringent than statewide goals, unavoidable significant impact related to cumulative GHG emissions based on the possibility that the GHG emissions reduction plan would not be fully implemented), available at <http://www.co.marin.ca.us/depts/cd/main/fm/eir.cfm>; California Department of Transportation, Sacramento 50 Bus/Carpool Lanes and Community Enhancement Project Environmental Impact Report, State Clearinghouse No. 2005062006 (July 2007), found inadequate in *Environmental Council of Sacramento v. Cal. Dept. of Trans.*, Sacramento Superior Court, Case No. 07CS00967 (July 2008) (minute order on file with authors); see also Governor's Office of Planning and Research, Environmental Assessment Documents Containing a Discussion of Climate Change (August 1, 2009) (list of CEQA documents issued between July 2007 and July 2009 that have addressed climate change in some fashion, and cataloging method of climate change analysis used), available at http://opr.ca.gov/ceqa/pdfs/Environmental_Assessment_Climate_Change.pdf.
48. Cal. Pub. Res. Code §§ 21000 *et seq.* (2009).
49. See Governor's Office of Planning and Research, "Technical Advisory: CEQA and Climate Change: Addressing Climate Change Through California Environmental Quality Act (CEQA) Review" (June 19, 2008), available at <http://opr.ca.gov/ceqa/pdfs/june08-ceqa.pdf>; see also GHG Policy, *supra* note 1, at 15.
50. See GHG Policy, *supra* note 1, at 5.
51. See *id.* at 6 ("For projects where the construction phase or the extraction or production of materials or fuels are likely to be a significant fraction of total project emissions, DEC staff may include these categories during scoping for the EIS.").
52. See City of San Diego, Final Program Environmental Impact Report for the Quarry Falls Project, State Clearinghouse No. 2005081018 (July 2008) (on file with authors).
53. See, e.g., GHG Policy, *supra* note 1, at 14 ("[S]taff should give preference to on-site mitigation measures.").
54. See *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172, 1217 (9th Cir. 2008) ("The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.... NHTSA must provide the necessary contextual information about the cumulative and incremental environmental impacts of the Final Rule....").
55. See Governor's Office of Planning and Research, Environmental Assessment Documents Containing a Discussion of Climate Change (Aug. 1, 2009), available at http://opr.ca.gov/ceqa/pdfs/Environmental_Assessment_Climate_Change.pdf (identifying 1,275 CEQA documents from July 24, 2006 through July 31, 2009 containing some type of climate change discussion).
56. See *Environmental Litigation: Law and Strategy* 39-45 (Cary Perlman ed., ABA 2009).
57. *Id.* at 45.
58. Cal. Pub. Res. Code §§ 21083.05(b).
59. Bay Area Air Quality Management District, CEQA Draft Air Quality Guidelines 2-2 to 2-5 (Sept. 2009), available at <http://www.baaqmd.gov/Divisions/Planning-and-Research/Planning-Programs-and-Initiatives/CEQA-GUIDELINES.aspx>; San Joaquin Valley Air Pollution Control District, Addressing GHG Emissions Impacts for Stationary Source Projects Under CEQA When Serving as the Lead Agency 5-13 (Sept. 17, 2009), available at http://www.valleyair.org/programs/ccap/ccap_idx.htm. In addition, the South Coast Air Quality Management District is actively working to develop CEQA significance thresholds for GHG emissions. See <http://www.aqmd.gov/ceqa/handbook/GHG/GHG.html>.
60. *Id.* at 2-2.

61. See Mass. Gen. Laws ch. 30, § 61 (xxxx).
62. *Id.*
63. See Executive Office of Energy and Environmental Affairs, MEPA Greenhouse Gas Emissions Policy and Protocol Revisions (Nov. 24, 2008), <http://www.env.state.ma.us/mepa/downloads/GHGPolicySum1108.pdf>.
64. Executive Office of Energy and Environmental Affairs, MEPA (Revised) Greenhouse Gas Emissions Policy and Protocol (Nov. 24, 2008), <http://www.env.state.ma.us/mepa/downloads/RevisedGHGPolicy.pdf>.
65. See *Minnesota Center for Env'tl. Advocacy v. Holsten*, No. 31-CV-07-3338, 2009 WL 2998037 (Minn. Ct. App., Sept. 22, 2009) (unpublished opinion).
66. See *id.* at *4 ("According to the [Minnesota Pollution Control Agency], there currently are not reliable analytical and modeling tools to evaluate the incremental impact of discrete emissions, such as those from the project on global and regional climate.... This statement clearly explains that the EIS does not contain an evaluation of the project's greenhouse gas emissions on regional or global climate because a reliable model does not exist.").
67. *Id.* at 6.
68. See *id.* at *3 n.5.
69. King County Exec. Order No. PUT 7-10-1 (AEO) (October 15, 2007), available at <http://www.kingcounty.gov/operations/policies/executive/utilitiesaeo/put7101aeo.aspx>.
70. *Id.*
71. See GHG Policy, *supra* note 1, at 5 ("By ensuring energy usage and GHG emissions are considered early in project design, the public policy goals of combating climate change and maximizing energy efficiency are best served.").
72. As a general matter, SEQRA significance determinations and final findings can be challenged in New York State courts through the CPLR Article 78 process. See, e.g., *WEOK Broad. Corp. v. Planning Bd. of Town of Lloyd*, 79 N.Y.S.2d 373, 379 (N.Y. 1992) (CPLR Art. 78 proceeding by project developer challenging agency SEQRA denial); *Residents Against Wal-Mart ex rel. Rice v. Planning Bd. of Town of Greece*, 875 N.Y.S.2d 691, 692 (N.Y. App. Div. 2009) (CPLR Art. 78 proceeding by project opponents challenging town's negative SEQRA declaration).
73. See GHG Policy, *supra* note 1, at 3.
74. See, e.g., Cal. Pub. Res. Code § 21083.05 and 21097 (2009). Section 21083.05 directs the California Resources Agency to adopt CEQA Guidelines (regulations) "for the mitigation of greenhouse gas emissions or the effects of greenhouse gas emissions as required by this division, including, but not limited to, effects associated with transportation or energy consumption" by Jan. 1, 2010. Those CEQA Guidelines are still in development. Section 21097 immunizes certain transportation and emergency response projects from being sued under CEQA for not studying GHG emissions.

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Table 1: Jurisdictions With Both “Little NEPA” Environmental Review Laws and Greenhouse Gas Control Measures

	Jurisdiction ¹	“Little NEPA” Citation	GHG Emissions Reduction Laws & Goals
1.	Arkansas	Ark. Stat. Ann. § 8-1-101	Act 696 established Governor’s Commission on Global Warming, which has recommended goal to reduce the state’s GHG emissions 20% below 2000 levels by 2020, 35% below by 2025, and 50% below by 2035.
2.	California	Cal. Pub. Res. Code §§ 21000 <i>et seq.</i>	Global Warming Solutions Act of 2006, Cal. Health & Safety Code § 38500 <i>et seq.</i> , requires return to 1990 GHG emissions level by 2020. Gov. Schwarzenegger’s Executive Order S-3-05 sets additional goal of 80% below 1990 GHG emissions by 2050. CA also member of Western Climate Initiative.
3.	Connecticut	Conn. Gen. Stat. Ann. §§ 22a-14 <i>et seq.</i>	Pub. Act No. 08-98 requires GHG emissions reductions at least 10% below 1990 levels by 2020, and 80% below 2001 levels by 2050. Governor’s Executive Order No. 32 goal to purchase renewable energy in increasing amounts, leading to 100% clean energy by 2050; Conn. Climate Change Action Plan 2005; Regional Greenhouse Gas Initiative (RGGI) member.
4.	District of Columbia	D.C. Code Ann. §§ 6-981 <i>et seq.</i>	Member of Metropolitan Washington Council of Governments (MWCOC) regional climate initiative (2007), which adopted a Climate Change Report (2008) that recommended 10% GHG emissions reductions from “business as usual” by 2012; 20% reduction below 2005 emissions by 2020; and 80% reduction below 2005 levels by 2050.
5.	Florida	Fla. Stat. §§ 380.92 <i>et seq.</i>	Executive Order 07-127 goal to reduce GHG emissions to 2000 levels by 2017, by 2025 reduce GHG emissions to 1990 levels, and by 2050 to reduce GHG emissions by 80 percent of 1990 levels; HB7135 authorizes the state’s Department of Environmental Protection to develop a cap-and-trade regulatory program among other policies.
6.	Hawaii	Haw. Rev. Stat. §§ 343-1 <i>et seq.</i>	2007 Haw. Sess. Laws, Act 234, develop inventory of 1990 GHG emissions; Haw. Rev. Stat. § 342B-71, reduce GHG emissions to 1990 levels by 2020, “provided that for the purposes of this Act greenhouse gas emissions from airplanes shall not be included. [L. 2007, c 234, pt of §8].”
7.	Indiana	Ind. Code Ann. §§ 13-12-4-1 <i>et seq.</i>	Midwestern Greenhouse Gas Accord member.
8.	Maryland	Md. Nat. Res. Code Ann. §§ 1-301 <i>et seq.</i>	RGGI member; Maryland Climate Change Action Plan (2008) proposing 10% GHG emissions reduction from 2006 by 2012; 15% below 2006 levels by 2015; at least 25% below 2006 levels by 2020; and 90% below 2006 levels by 2050.

	Jurisdiction ¹	"Little NEPA" Citation	GHG Emissions Reduction Laws & Goals
9.	Massachusetts	Mass. Gen. Laws Ann. ch. 30, §§ 61 <i>et seq.</i>	Mass. Global Warming Solutions Act 2008 [Chapter 298 of Acts of 2008, Chapter 21N, Climate Protection and Green Economy Act, section 3.] The Department of Environmental Protection (MassDEP) will determine the baseline emissions level of 1990 and calculate the expected 2020 emissions levels if no new controls were imposed after January 1, 2009 (the "business as usual" level). The Secretary of Energy and Environmental Affairs will set a 2020 emissions limit between 10 percent and 25 percent below 1990 levels and adopt a plan for meeting that limit by January 1, 2011. The Secretary will also set 2030 and 2040 limits, leading up to the required 80 percent reduction by 2050.; RGGI Member (Observer); Executive Order 484, GHG emissions reduction targets of 25% by 2012, 40% by 2020, and 80% by 2050 below 1990 levels.
10.	Minnesota	Minn. Stat. Ann. §§ 116D.01 <i>et seq.</i>	Next Generation Energy Act of 2007 requires GHG emissions reductions to at least 15 percent below 2005 levels by 2015, at least 30 percent below 2005 levels by 2025, and at least 80 percent below 2005 levels by 2050; Midwestern Greenhouse Gas Accord member; "Powering the Plains" Initiative; Minnesota Climate Change Advisory Group (MCCAG) Final Report for Climate Action Plan.
11.	Montana	Mont. Code Ann. §§ 75-1-101 <i>et seq.</i>	Montana Climate Change Plan (Nov. 2007); Western Climate Initiative Member.
12.	New York	State N.Y. Envtl. Conserv. Law §§ 8-0101 <i>et seq.</i> <i>See also</i> New York City Code, 43 RCNY § 6-01 <i>et seq.</i>	Exec. Order No. 24 (Aug. 2009) goal to reduce GHG emissions by 80% below 1990 levels by 2050 and prepare Climate Action Plan; State Sea Level Rise Task Force; RGGI member.
13.	North Carolina	N.C. Gen. Stat. §§ 113A-1 <i>et seq.</i>	N.C. Climate Action Plan Advisory Group Report (October 2008) recommending 56 ways to reduce GHG emissions. Full implementation would reduce GHG emissions by approximately 47%; Legislative Commission on Global Climate Change.
14.	South Dakota	S.D. Codified Laws Ann. §§ 34A-9-1 <i>et seq.</i>	Midwestern Greenhouse Gas Accord member.
15.	Virginia	Va. Code §§ 10.1-1200 <i>et seq.</i>	Executive Order 59 created the Governor's Comm'n on Climate Change, sets GHG reduction target at 30% below "business as usual" by 2025 (~2000 levels).
16.	Washington	Wash. Rev. Code §§ 43-21C.010 <i>et seq.</i>	SB 6001 (2007) [RCW 70.235.020] to reduce GHG emissions to 1990 levels by 2020; by 25% below 1990 levels by 2035; and 50% below 1990 levels by 2050; Exec. Order 07-02 [same goals as legislation]; Western Climate Initiative member.
17.	Wisconsin	Wis. Stat. §§ 1.11 <i>et seq.</i>	Midwestern Greenhouse Gas Accord member; Governor's Task Force on Global Warming (2008) agreed on GHG reduction targets: 2005 emissions levels by 2014, 22% below 2005 levels by 2022, and 75% below 2005 levels by 2050.
18.	Puerto Rico	P.R. Laws Ann. tit. 12, §§ 1121 <i>et seq.</i>	Climate Change Action Plan provides recommendations for GHG reductions, but no specific goals.

Endnote

1. The following list only includes states that have enacted an environmental review statute similar to the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347. Other states not listed here require some form of environmental review pursuant to Executive Order or state regulation.

OPEN FOR DISCUSSION

The Impact of *Burlington Northern* on New York State Jurisprudence

By David Freeman, Lawrence Schnapf and Laura Karvosky

On May 4, 2009, the Supreme Court announced its decision in *Burlington Northern & Santa Fe Railway v. U.S.*, and Superfund practitioners have since been working overtime to decipher how this seminal decision will affect pending cost recovery or contribution actions under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). While there have been many articles written on the case, none has addressed the unique issues that this decision will pose for New York environmental lawyers and their clients. This article will attempt to fill that void.

The *Burlington Northern & Santa Fe Railway* decision will have a particular impact in New York because, given the shortcomings of New York State's Superfund law, governmental and private plaintiffs in New York rely on CERCLA to a greater extent than those in other states to pursue cost recovery. After discussing the factual background of the case, we will review the potential impact of the *Burlington* decision on both arranger liability and divisibility issues, with particular emphasis on New York-related concerns. We will close with a series of questions and predictions as to what the decision might mean for New York-based environmental litigation over the next few years.

A. The Case Below

Factual Background

In 1960, Brown & Bryant, Inc. (B&B) began operating a fertilizer and agricultural chemical storage and distribution facility on a 3.8-acre parcel in Arvin, California (the "B&B parcel"). In 1975, B&B expanded its operations and leased an adjacent .9-acre parcel of land located to the west of the B&B parcel and owned jointly by the Atchison, Topeka & Santa Fe Railway Company and the Southern Pacific Transportation Company (now known respectively as the Burlington Northern and Santa Fe Railway Company, and the Union Pacific Railroad Company) (the "Railroads") (the "Railroad parcel"). B&B used the Railroad parcel to park application trucks and store pesticide containers. The activities at the site resulted in substantial chemical releases into the soil and groundwater.

The operations of B&B involved the purchasing, storage and distribution of various hazardous chemicals, including the herbicide dinoseb, sold by Dow Chemical, and the pesticides D-D and Nemagon, sold by Shell. Beginning in the mid 1960s, Shell strongly encouraged B&B to purchase D-D in bulk, which required B&B to maintain bulk storage facilities for D-D. Shell delivered the D-D to

B&B "FOB Destination," meaning that B&B did not take responsibility for the goods until they were delivered, via common carrier trucks. When the trucks carrying D-D arrived at the Arvin facility, the contents of those trucks were transferred to bulk storage tanks by hoses and then later transferred into different application trucks.

The bulk storage of the chemicals led to numerous tank failures and spills as the chemicals rusted tanks and eroded valves. Shell was aware that spills and leaks were inevitable in the process and that they occurred every time a shipment was made. Then, in the late 1970s Shell took steps to encourage the safe handling of its products, including providing distributors with detailed safety manuals, instituting a voluntary discount program for distributors that improved their bulk handling and safety facilities, and requiring distributors to obtain certifications of compliance with environmental laws and regulations.

Despite Shell's actions, B&B remained a "sloppy operator,"¹ and in 1983, the California Department of Toxic Substances Control ("DTSC"), and subsequently the EPA, found evidence of substantial soil and groundwater contamination, including a plume of contaminated groundwater that threatened to leach into an adjacent supply of potential drinking water. In 1989, B&B became insolvent and EPA and DTSC began remediation of the site, and by 1998 EPA had incurred more than \$8 million in response costs. In 1996, DTSC and EPA each filed CERCLA actions against B&B, the Railroads and Shell for reimbursement of their investigation and cleanup costs.

District Court Decision

The district court found that the Railroads and Shell were PRPs under CERCLA. The court found the Railroads liable as owners of the Arvin facility under § 9607(a)(1) and as owners or operators at the time of disposal of the hazardous substances under § 9607(a)(2). Shell was held liable as an arranger under § 9607(a)(3) since it "arranged for" the disposal of hazardous substances through its sale and delivery of D-D. The court based its reasoning on Shell's knowledge that spills were inherent in the delivery process and Shell's authority to determine the means and methods of delivery and unloading of D-D.

Although the court found both parties liable under CERCLA, it did not assign joint and several liability for the entire response costs. Instead, the court found that the site contamination was a single harm, capable of apportionment, and proceeded to "perform the equitable apportionment analysis demanded by the circumstances of the

case.” The district court held that the Railroads’ portion of liability was 9% and Shell’s was 6%.

The court calculated the proportion of the Railroads’ liability based on three figures. It multiplied (1) 19.1% (the percentage of the overall site that was owned by the Railroads), (2) 45% (the percentage of time that the Railroads leased the parcel in relation to B&B’s total operations), and (3) 66% (the fraction of hazardous products attributable to the Railroad parcel). This calculation resulted in a determination of 6% liability. Next, the court accounted for any calculation errors by assuming a 50% error rate and raising the Railroads’ proportion of the total liability to 9%.²

To determine Shell’s proportion of liability, the court estimated the percentage of D-D spills resulting from Shell deliveries by dividing 1,863 gallons (the amount of D-D spilled through Shell deliveries) by 31,212 gallons (the total amount of D-D spills). Based on this calculation, the court assigned Shell 6% of the liability.³

Ninth Circuit Decision

On appeal, the Ninth Circuit reversed the district court’s application of joint and several liability. The court found the facts present in the record insufficient to allow even a rough approximation for apportionment, and therefore held the Railroads and Shell jointly and severally liable for the governments’ response costs.

The Ninth Circuit recognized that apportionment is available at the liability stage and may occur when there exists a reasonable basis for divisibility of a single harm or when several distinct harms are present. The court determined that the harm at issue was capable of apportionment, but rejected the district court’s apportionment calculation and held that Shell and the Railroads failed to establish a factual basis for making a reasonable estimate that will fairly apportion liability. The court found that the Railroad failed to demonstrate a reasonable basis for concluding that a portion of the contamination did not originate on the Railroad parcel.

Separately, the Ninth Circuit affirmed the portion of the district court’s judgment that imposed liability on Shell as an arranger. Finding that the “useful product” doctrine did not apply in this case, the court held that Shell had sufficient control over, and knowledge of, the transfer process to be considered an arranger for the disposal of the chemicals that leaked.

The Railroads and Shell moved for a rehearing *en banc*, which the Ninth Circuit denied over the dissent of eight judges. The dissent criticized the majority’s broad definition of arranger liability and stated that “[i]t is an oxymoron for an entity *unintentionally* to make preparations for disposal.”⁴ The panel further emphasized that Shell did not have “actual control” over the transfer of D-D and, therefore, could not be held liable as an arranger.⁵ The panel also disapproved of the majority’s rejection

of apportionment because there were not “adequate records.”⁶ The dissent reasoned that no specific evidence is required for apportionment so long as the evidence and method used are “reasonable.”

Supreme Court Decision

The Supreme Court granted certiorari to determine (1) whether Shell was properly held liable as an arranger under § 9607(a)(3), and (2) whether Shell and the Railroads were properly held liable for all response costs incurred by EPA and the State of California.

The Court reversed the Ninth Circuit’s decision regarding arranger liability. The Court recognized cases with clear arranger liability, where an entity “enter[s] into a transaction for the sole purpose of discarding a used and no longer useful hazardous substance,” and cases in which there is clearly no arranger liability, such as when an entity arranges for “selling a new and useful product [and] the purchaser of that product later, and unbeknownst to the seller, disposed of the product in a way that led to contamination.”⁷ The Court noted that liability was less clear in cases where the seller has some knowledge of the buyer’s planned disposal or where motives for the “sale” of a hazardous substance are less than clear.⁸ The Court indicated that these grey areas require “a fact-intensive inquiry,” but noted that intent can be inferred from the totality of circumstances and can be based on circumstantial evidence.⁹ The Court reasoned that because CERCLA does not specifically define what it means to “arrange for” disposal of a hazardous substance, the phrase should be given its ordinary meaning, which implies action directed to a specific purpose. The Court stated that an entity may qualify as an arranger “when it takes intentional steps to dispose of a hazardous substance.”¹⁰

The Court rejected the governments’ argument that Shell’s continued participation in the delivery, with knowledge that spills and leaks would occur, was sufficient to establish Shell’s intent to dispose. The Court stated that “Shell’s mere knowledge of continuing spills and leaks is insufficient grounds for concluding that it ‘arranged for’ D-D’s disposal” and that “[i]n order to qualify as an arranger, Shell must have entered into the sale of D-D with the intention that at least a portion of the product be disposed of during the transfer process by one or more of the methods described in [the definition of disposal under] §6903(3).” The Court found it significant that Shell took steps to encourage its distributors to reduce the likelihood of spills in the process, including providing them with detailed safety manuals, requiring them to maintain adequate storage facilities, and providing discounts for those that took safety precautions. Based on this factual analysis, the Court found that Shell was not liable as an “arranger for disposal” at the Arvin facility.

Since the Court found Shell not liable as an arranger, the Court then analyzed whether the Railroads were properly held jointly and severally liable for the full cost

of the governments' response efforts. The Court reviewed § 433A of the Restatement (Second) of Torts, which sets forth the principle that "apportionment is proper when 'there is a reasonable basis for determining the contribution of each cause to a single harm.'"¹¹ The Court noted that CERCLA defendants bear the burden of proving that a reasonable basis for apportionment exists. Applying this principle, the Court determined that the district court was reasonable in using the size of the leased parcel and the duration of the lease to apportion liability. Accordingly, the Court reversed the Ninth Circuit's holding and found that the district court reasonably apportioned the Railroads' share of the site remediation costs at 9%.

B. Implications for Arranger Liability

One of the first questions that seasoned Superfund lawyers ask when they read the *Burlington* decision is whether the Court overruled the line of cases following *U.S. v. Aceto Agricultural Chemicals Corp.*¹² These cases involved tolling agreements where manufacturers sent intermediate products or chemicals to a formulator who processed them according to specifications by the manufacturer. Because a certain amount of spillage is contemplated in the formulating process and the manufacturer retains title to the chemicals and final product, courts have held the manufacturers liable as CERCLA arrangers.

The *Burlington* decision does not address liability under the *Aceto* cases, but the issue was briefed and addressed in oral argument. Counsel for Shell, Kathleen M. Sullivan, argued that the *Aceto* cases involved disposal of wastes—in contrast to the sale of a product—and since the shipment in *Burlington* was FOB Destination, Shell relinquished ownership of the product. Justice Ginsburg expressed concern that parties could transfer liability under CERCLA through a UCC mechanism, but apparently the rest of the Court was satisfied, since the issue was not even addressed in the opinion.

The oral argument then shifted to the scope of the useful product exclusion for arranger liability. The justices asked a series of questions relating to the moment when a spilled useful product becomes a waste. Shell's counsel responded that at the time of the transaction, Shell's intent was to sell a useful product. Sullivan went on to tell the Court that this was the first and only case in the country where arranger liability had been applied to a "mere sale of a useful product because a third-party purchaser after acquiring possession and control spilled the product."¹³ To affirm the Ninth Circuit decision, she continued, would disrupt commerce across a wide range of industries: unlike the disposal cases, there was no economic benefit to Shell from the subsequent leakage at the B&B facility.

While the Court seemed to agree with this analysis, the opinion did not simply clarify the contours of the useful product exemption, but instead struck a dagger at the heart of nearly 30 years of CERCLA arranger jurisprudence. The opinion discusses the spectrum of arranger

liability, ranging from the sale of a new, useful product which is disposed of by the purchaser without knowledge of the seller to the intentional disposal of a used, no longer useful hazardous substance. In the former, the Court indicated that there would be no liability, whereas in the latter, liability is clear. Although the two examples clearly delineate a standard for determining liability, the Court recognized that the facts of *Burlington* demonstrate the gray areas that require a fact-intensive inquiry into whether a PRP is liable.

In performing its analysis, the Court noted that "knowledge without intent [to dispose] is not enough." Shell, though, did not merely have "knowledge without intent." Shell in fact took affirmative steps to prevent disposal and encourage better practices, including safety manuals, requirements to maintain adequate storage facilities, and providing discounts to customers for safety precautions. Shell's situation is different than most cases, which typically involve ignorance of the transferee's disposal practices, or knowledge (express or implied) coupled with no action, or only half-hearted attempts to have the transferee correct the problem.

In short, it is hard to argue that Shell intended to dispose of anything, since it took extensive steps (even if unsuccessful) to prevent or mitigate such disposal. One could even argue that the *Burlington* opinion only holds that knowledge, if accompanied by attempts to address the problem, cannot establish the requisite intent to dispose. Indeed, at oral argument, Shell's counsel argued that "it would be terribly impractical and terribly perverse" to penalize a manufacturer for telling third-party purchasers how to handle products more safely.¹⁴

At least one case decided after *Burlington Northern* lends some support to that thesis. In *Frontier Communications v. Barrett Paving Materials*, 2009WL1941920 (D.Me. July 7, 2009), the Court denied a motion to dismiss where an environmental report indicated that the PRP was guilty of "negligence, apathy and inappropriate testing of equipment." The PRP, Maine Central Railroad, clearly had knowledge of the disposal; the Court inferred intent from its negligence and failure to address the potential releases. Therefore, although *Burlington* stands for the proposition that knowledge without intent is insufficient for arranger liability, practitioners will need to wait and see how courts interpret this phrase and what types of factual scenarios allow courts to infer intent to dispose.

Now that plaintiffs must allege and prove intent, there are major implications for both the pleading, discovery and trial stages of Superfund cases. As for pleadings, we have the twin cases of *Bell Atlantic Corp. v. Twombly*, 550 US 5440 (2007) and *Ashcroft v. Iqbal*, 129 Sup. Ct. 1937 (May 18, 2009). *Iqbal*, a Pakistani Muslim who was detained after 9/11, filed suit against Attorney General Ashcroft and others, alleging that he was deprived of constitutional rights by his detention. In a 5-to-4 decision, the Supreme Court granted Ashcroft's motion to dismiss,

holding that pleadings may not simply recite the elements of a cause of action; one must plead with specificity and present facts that plausibly support a claim.

In the Superfund context, most of us are accustomed to bare-boned pleading standards: the site is a facility; there was a release of hazardous substances; the defendant arranged for disposal; and response costs were incurred consistent (or not inconsistent) with the National Contingency Plan. Can such a complaint survive *Iqbal*? The jury is still out (if one can use that metaphor with respect to non-jury Superfund cases). At least there remains a serious question as to whether formulaic pleading can now survive a motion to dismiss. If one takes *Iqbal* seriously, the plaintiff must not only plead intent, but facts to support that allegation. This will often be quite challenging, especially in a multi-party disposal site cases where typically plaintiffs have little more than ledger entries or invoices regarding materials sent to the site and very little, if any, information that would give a clue about the defendants' intent.

On the other hand, the fact that intent can be inferred will keep some claims viable. *Frontier* demonstrates that the existence of a contemporaneous report regarding improper disposal, and the defendants' indifference to it, might be enough to get past the motion to dismiss stage of the litigation.

The *Burlington* holding also has implications regarding discovery. It is no longer sufficient to show that defendants' wastes ended up at a site to prove an intent to dispose. Plaintiffs will need to focus their discovery, and defendants their internal investigations, on such issues as:

- The level of knowledge of the existence of hazardous substances in the materials to be disposed;
- The goal of the transaction;
- Whether the material was a waste or a useful product;
- Whether there was a market for the material that was the subject of the transaction;
- The level of knowledge of the site owner's practices; and
- Whether any attempt was made to find out about the site owner's practices and if so, any attempt to ameliorate problematic practices.

So there will be significant new discovery required. These matters were arguably relevant even in the pre-*Burlington* era in connection with equitable allocation of liability. But, typically, by the time Superfund cases get to the allocation phase, parties are sufficiently exhausted by the process that they are prepared to divvy up the liability by volume as a form of "rough justice."

By contrast, intent now goes to liability, which is typically decided at an earlier stage of the litigation. By push-

ing these inquiries further forward chronologically in the litigation process, it increases their significance and urgency. This is especially so if discovery or trial is bifurcated or trifurcated, as it often is in Superfund matters.

The net result is that litigation will likely become more complicated, expensive and fact-intensive. It will make multi-party litigation, already often a logistical nightmare, even more difficult. It will make early resolution of cases more challenging. Many of us have seen the latter result already, in matters where settlement agreements were about to be signed but parties are now backing out in light of the defenses afforded them under *Burlington*. We have already seen several advanced cases where parties are now briefing the intent issue. For example, in *U.S. v. General Electric Corp.*, No. 06-CV-00354 (D.N.H), the defendant has filed a motion arguing that a prior opinion of the court holding the company liable as an arranger, even though it lacked specific purpose to dispose of scrap pyranol, should be a basis for dismissing it from the case. The government appears to be arguing that the court should find that GE's knowledge that spills would occur during unloading of its materials created a "constructive" intent to dispose.

There will be at least one positive impact of *Burlington*'s focus on intent: it will increase the emphasis on environmental stewardship with respect to disposal of hazardous wastes. The government tried to argue that Shell retained control over the product and thus should be responsible for the spillage at the site by requiring its customer to implement certain storage practices. Indeed, it was argued that these changes allowed Shell to increase the volume of materials and therefore the amount of spillage. The government came close to asserting that Shell's influence over its customer's chemical and waste management operations rendered it liable as an operator.

However, the Court recognized the perverse incentives of such a holding. The opinion stressed the measures that Shell required of its customer to minimize spillage.¹⁵ It is now clear that anything a party disposing of materials can do to negate the implication of intending improper disposal will be helpful to a liability defense. As a result, forward-thinking companies will do inspections of intended recipients of their hazardous materials, will provide guidance regarding handling of those materials, and will want to create contemporaneous records documenting those efforts.

C. Implications of Divisibility Holding

The other prong of the *Burlington* decision is the newly announced standards on divisibility. For better or worse, the case sets a remarkably low threshold for establishing divisibility.

Neither the plaintiff nor the defendants in *Burlington* put in evidence to establish an appropriate share of liability, so the Court was left to its own devices. It engaged in

its own form of rough justice, using what appears to be almost a back-of-the-envelope calculation. Instead of remanding for a fuller development of the record, as Justice Ginsburg argued in her dissent should have been done, the Court simply approved the District Court's rudimentary calculus.

In its briefs, the petitioners argued that the law on apportionment had evolved since CERCLA was enacted, as evidenced by Section 26 of the Restatement (Third) of Torts.¹⁶ Comment 'a' to this section states, "No party should be liable for harm it did not cause, and an injury caused by two or more persons should be apportioned according to their respective shares of comparative responsibility." Section 17 of the Third Restatement also explains that "joint and several liability has been substantially modified in most jurisdictions both as a result of the adoption of comparative fault and tort reform during the 1980s and 1990s."¹⁷ The petitioners went on to assert that courts have increasingly permitted fact finders to assess comparative fault in cases where different defendants are liable for reasons that are not commensurate with the degree of fault and causation, such as strict liability, and that the Third Restatement had embraced this trend.¹⁸

The petitioners also pointed out that even under § 433A of the Second Restatement of Torts, pollution was the "paradigmatic" divisible harm (see comment 'd'). The governments' response to this argument was to assert that the Second Restatement should apply because it was contemporaneous with CERCLA and pointed to comment 'i' of § 433A, referring to harms that are theoretically incapable of apportionment. As is evident from the decision, the petitioners successfully argued that the geographic distribution of the contamination, the timing of the disposal and the different types of contaminants made the harm at the site capable of apportionment.

That low threshold has been picked up in at least one case decided since *Burlington*. *Reichhold v. U.S. Metals Refinery Company*, 2009 WL1806668 (D.N.J., June 27, 2009) concerned allocation of liability at a site where two successive actions by different parties necessitated the placement of a cap. U. S. Metal Refinery Company ("USMRC") disposed of a significant amount of slag at the site, and a subsequent owner added contaminated fill. The Court found that either disposal would have independently required a cap to be constructed. But rather than engaging in any kind of relative measurement of responsibility, the Court simply split the cost 50/50, even though it acknowledged that USMRC contributed the majority of contamination.

The approach of relying on thin factual records to establish divisibility is a problem that will likely solve itself over time. Now that parties know that courts will take divisibility arguments seriously, they will diligently seek discovery on such topics as:

- how much waste each party sent to the site;

- over what time period;
- the geographic area where wastes were deposited or come to be located;
- media that are impacted (e.g., soil vs. groundwater);
- its toxicity; and
- the extent the specific waste drove response costs.

Prior to *Burlington*, many environmental lawyers used the terms "apportionment" and "allocation" interchangeably. Post-*Burlington*, these terms have much more concrete meanings. It is now clear that apportionment is an affirmative defense to joint liability, while allocation refers to determining how such liability is to be calculated among the jointly liable parties. What is confusing is that some of the so-called "Gore factors" that courts have used to *allocate* liability in 113(f) contribution actions may also be used to establish *apportionment* for divisibility purposes. Now, though, some of these issues go to liability, not merely equitable allocation, which increases their importance and focuses it at an earlier point in the case. This shift will be even more pronounced in cases which are bifurcated or trifurcated for discovery or trial. Because divisibility is a question of fact, we will likely see less summary judgment decisions on joint liability.

Volume used to be the touchstone for *allocating* liability. Now, other factors such as toxicity and type of hazardous substances will play an increasingly important role. The importance of ownership to allocation may also be downgraded. Simply owning land that is contaminated by a tenant or arranger may no longer result in significant liability, especially in the case of absentee landlords with triple net leases.

Increased likelihood of finding the harm divisible means that governmental and private plaintiffs will have to be more inclusive in their selection of defendants. If a court finds a basis for divisibility, plaintiffs will not reap the benefit of joint and several liability, such that the entire cost will be split among the existing defendants. They will only obtain judgments for each named defendant's individual share. The effect, again, will be to complicate litigation and make it more expensive.

D. Other Possible Implications

Practitioners will certainly be challenged to define the scope of the "damages" for which divisibility is being sought: do the "damages" include contamination or the response costs? When Chief Justice Roberts raised this issue during the oral argument, Shell's counsel suggested that the cost of a remedy is driven by the *mass* of the contamination. The Chief Justice did not seem convinced, and the opinion does not directly resolve the issue.

Even in the wake of *Burlington*, the traditional land-fill, co-disposal or commingled sites may still present the quintessential indivisible harm situations that satisfy even

the Third Restatement of Torts. During the New York State Bar Association teleconference program on July 21, 2009, it appeared that the New York State Department of Environmental Conservation (DEC) believes that most of these sites have already been identified and that there are not many more in the pipeline.

Burlington will likely have significant impacts on recycling facilities, drum reconditioning operations, transformer refurbishing sites, battery cracking locations and other scrap metal sites that do not otherwise qualify for the SREA¹⁹ exemption for arranger liability. It will also have an impact on defendants whose operations fall within the liability net cast by the *Aceto* cases, although it is not clear that those cases have been completely overruled.

Another issue for practitioners to follow is the impact *Burlington* will have on state agencies as compared to the federal government. The U.S. Environmental Protection Agency has more enforcement levers in its toolbox than the DEC to compensate for any limitations imposed by *Burlington*. EPA is authorized to seek unilateral administrative orders (UAOs) under § 106 of CERCLA (42 U.S.C. § 9606) and to impose liens on contaminated property under §§ 107(l) or (r) of CERCLA (42 U.S.C. §§ 9607(l), 9607(r)) in lieu of filing cost recovery. Of course, there remains the question of whether potential for divisible harm is “sufficient cause” to refuse to comply with a § 106 UAO. EPA may also seek injunctive relief under § 7003 of RCRA (42 U.S.C. § 6973) by showing that the defendants “contributed to” the past or present disposal of hazardous waste that may present an imminent or substantial endangerment.

DEC, on the other hand, may find itself having to resort to common law nuisance actions, with all of their attendant causation issues, or perhaps using the citizen suit provisions of RCRA § 7002 (42 U.S.C. § 6972). Insofar as § 7002 provides only for injunctive relief and not cost recovery,²⁰ DEC may find itself pursuing PRPs to perform cleanups, rather than performing cleanups itself, more frequently than it has in the past.

Our final comment relates to the issue of transaction costs and resource constraints. By making intent relevant and increasing the number of facts courts must consider in ruling on apportionment questions, *Burlington* has the potential to increase the cost and complexity of Superfund litigation. This impact, if realized, will affect all litigants. But it may have its greatest impact on governmental plaintiffs like DEC, which already are resource-constrained because of budget cuts at the state level. The holding in *Burlington* will clearly force all plaintiffs, but perhaps especially governmental ones, to choose their cases and defendants more carefully and, where possible, to diligently engage in their factual investigation prior to initiating litigation rather than waiting for post-complaint discovery.

Conclusion

Some may believe that *Burlington Northern & Santa Fe Railway v. U.S.* is simply an extension of the useful products cases or represents little more than deference to the divisibility findings of the district court. However, we believe it stands for much more and, in fact, marks a watershed in federal Superfund litigation. The opinion enunciates new standards for determining arranger liability and apportionment among PRPs. Perhaps more importantly, in combination with the Supreme Court’s decisions in *Twombly* and *Iqbal*, it may fundamentally change the way Superfund cases are litigated. We can expect to see more motions to dismiss, more searching discovery, a greater difficulty in reaching early settlements, and higher transaction costs in general.

Although these impacts will affect all litigants, they will likely affect plaintiffs more acutely. They will particularly impinge on governmental plaintiffs, who are often resource-constrained and have come to rely on settlements as a key to their enforcement efforts. And they will have special impact in states like New York, where both governmental and private plaintiffs have used CERCLA to a greater extent in cost recovery litigation than in other states with more robust state superfund statutes.

It remains to be seen how dramatic a sea change this case signifies. Much depends on how the lower courts interpret the Supreme Court’s language. Among the open questions are:

- What about settlements with EPA where the PRPs both reimburse the agency for past costs and agree to perform remedial work on a going-forward basis? Do such PRPs have claims under both §§ 107 and 113, or only under § 113?
- Will governmental and private plaintiffs be more selective in whom to sue (because they need to have more facts available to support their allegations), or will they cast a wider net (because divisibility means that they are more likely to be stuck with any orphan share)?
- Will plaintiffs rely more heavily on RCRA, state and common-law causes of action as seriously litigated claims, rather than (as is often the case now) ones which are added to the complaint for purposes of completeness but never really litigated?
- Will these cases sound the death knell for plaintiffs at multi-party disposal sites, where available evidence is often minimal (e.g., invoices or ledger books) and may not be sufficient to establish intent? Or will courts be generous in allowing intent to be inferred from such fragmentary evidence?
- Will defendants find it harder than before to organize collectively, now that there may be significant distinctions among them—leading potentially to

conflicts of interest among defense group members—in terms of divisibility and evidence of intent?

No matter how these issues are ultimately resolved, one thing is clear: we are in for several years of upheaval in the way Superfund cases are litigated, as courts and litigants struggle to adapt to the new dynamic set in motion by the *Burlington* decision.

This issue is now open for discussion. Visit our blog at www.nysba.org/environmental to continue the conversation.

Endnotes

1. *United States v. Atchison, Topeka & Santa Fe Ry. Co.*, No. CV-F-92-5068 OWW, CV-F-96-6226 OWW, CV-F-96-6228 OWW, 2003 WL 25518047, at *56 (E.D. Cal., July 15, 2003).
2. *Id.* at *90.
3. *Id.* at *91.
4. *United States v. Burlington Northern & Santa Fe Ry. Co.*, 520 F.3d 918, 961 (9th Cir. 2008) (Bea, J. dissenting).
5. *Id.* at 962.
6. *Id.* at 958.
7. *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1878 (2009).
8. *Id.* at 1879.
9. *Id.* at 1879-80.
10. *Id.* at 1879.
11. *Id.* at 1881 (internal citations omitted).
12. 872 F.2d 1373 (8th Cir. 1989); see also *Jones-Hamilton Co. v. Beazer Materials & Servs., Inc.*, 973 F.2d 688 (9th Cir. 1992); *United States v. Vertac Chem. Corp.*, 966 F. Supp. 1491 (E.D. Ark. 1997); *Mathews v. Dow Chem. Co.*, 947 F. Supp. 1517 (D. Colo. 1996); *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 781 F. Supp. 1448, 1451 (N.D. Cal. 1991).
13. Transcript of Oral Argument at [], *Burlington*, No. 07-1601.
14. *Id.*
15. One could argue that even if the Court found Shell liable as an arranger, it could have used the measures it required of its customer as evidence of the exercise of due care under the CERCLA third-party defense. Of course, the fact that Shell had a contractual relationship with B&B would have prevented it from successfully asserting this defense. Query if the third-party defense would have been available if Shell or another manufacturer used a jobber or otherwise out-sourced the sales of its product to a third party, thereby eliminating the contractual relationship.
16. Division of damages by causation had been addressed in § 433A of the Restatement (Second) of Torts. Section 26 replaced that section, along with §§ 433B (Burden of Proof), 879 (Concurring and Consecutive Independent Acts) and 881 (Distinct or Divisible Harms).
17. Restatement (Third) of Torts, § 17 cmt. a. In § 10, cmt. a, the authors state:

the primary consequence of what form of joint and several or several liability is imposed is the allocation of the risk of insolvency of one or more responsible tortfeasors. Joint and several liability imposes the risk that one or more tortfeasors

liable for the plaintiff's damages is insolvent on the remaining solvent defendants, while several liability imposes this insolvency risk on the plaintiff. The adoption of comparative responsibility, which permits plaintiffs to recover from defendants even though plaintiffs are partially responsible for their own damages, has had a significant impact on the near-universal rule of joint and several liability. The rationale for employing joint and several liability and thereby imposing the risk of insolvency on defendants—that as between innocent plaintiffs and culpable defendants the latter should bear this risk—does not coexist comfortably with comparative responsibility. Joint and several liability has also been justified on the ground that each defendant's tortious conduct is a legal cause of the entirety of the plaintiff's damages. Of course, with the adoption of comparative fault, the plaintiff who is comparatively negligent is also a legal cause of the entirety of the damages.

18. Indeed, the petitioners brief argued that the § 881 of the First Restatement of Torts mandated apportionment of nuisances like pollution and that the illustrations following this section adopted the view expressed by William Prosser that courts were required "to attempt some rough apportionment of the damages" in pollution cases. William L. Prosser, *Joint Torts and Several Liability*, 25 Cal. L. Rev. 413, 442-43 (1937).
19. The Superfund Recycling Equity Act (SREA) § 127, 42 U.S.C. § 9627.
20. See *Meghriq v. KFC Western, Inc.*, 516 U.S. 4790 484 (1996) (finding that "RCRA's citizen suit provision is not directed at providing compensation for past cleanup efforts").

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Recent Decisions in Environmental Law

Anderson v. Town of Chili Planning Board, __ N.E.2d __, 2009 WL 1850972 (N.Y.), 2009 N.Y. Slip Op. 05372

Anderson v. Town of Chili Planning Board, 59 A.D.3d 1017, 873 N.Y.S.2d 796, 2009 N.Y. Slip Op. 00880

Facts

Metalico Rochester, Inc., owner of a scrap metal processing facility, sought permission from the Town of Chili Planning Board to install a metal shredder at the Metalico site in Chili. Following a public hearing, the Planning Board voted to proceed with a review under SEQRA, identifying itself as the lead agency. Metalico informed the Board at the hearing that explosions “can occur” inside the shredder if sparks and gasoline are present at the same time.¹ Sparks are normally created by the friction of the shredding process. Gasoline could be introduced by vehicles, which comprise approximately 25% of the material the shredder would handle. Metalico advised the Board that its procedures are designed to reduce explosions by draining gasoline from vehicles before they enter the shredder, as well as by injecting a water-and-soap mist into the shredder to displace oxygen and reduce the incidence of sparks.

Metalico’s scrap metal processing facility is located near the Rochester International Airport. During the review process, the Board received letters from Petitioner Rochester Air Center, LLC, and from La Bella Associates, P.C., expressing concerns about the risk to aircraft of explosions and flying metal shrapnel from the shredder. Planes are required to fly over the Metalico site at fairly low altitude in order to use one of the airport’s runways.

The Board also received information from the town’s Fire Marshal and the Monroe County Department of Planning and Development. Both submitted letters to the Board during the SEQRA review, prior to the letters submitted by Rochester Air Center and La Bella Associates. The Fire Marshal advised the board that Metalico should be required to install a fire suppression system in the shredder, along with water mains and hydrants on the property, and that the size of stacks of material should be limited to 28 feet high and 90,000 square feet in area. The Department of Planning and Development addressed the proposed shredder’s proximity to the airport, but only in

terms of the height of possible obstructions caused by the facility’s physical plant. The Department of Planning and Development noted that installation should be limited to 49 feet high and any use of cranes or other equipment over 100 feet high should be coordinated with the airport. The Department also anticipated excessive dust from the operation, and recommended the use of water to control fugitive dust emissions.

The Planning Board in due course received a commissioned environmental review, which concluded that the project’s impact on the environment would not be significant. The Environmental Assessment Form made note of a risk of explosion and a risk of release of hazardous substances, but not in relation to any risk to aircraft. The Board issued a negative declaration and approved Metalico’s application.

Petitioners commenced a CPLR Article 78 proceeding, seeking to annul the Planning Board’s decision. The Board’s motion to dismiss was granted in Supreme Court in Monroe County. Petitioners appealed, and in February 2009, the decision to dismiss was affirmed 3-2 by the Appellate Division, Fourth Department. The majority in the Appellate Division opined that a lack of attention to “the precise concern raised by petitioners”² is excusable “in light of a rule of reason;”³ that is, given that “the degree of detail with which each environmental factor must be discussed will necessarily vary and depend on the nature of the action under consideration,”⁴ it is not reasonable to expect careful attention to an event as unlikely as an explosion throwing a piece of metal into the air so that it would hit an airplane.

Issue

The issue in this case is whether the Planning Board properly identified the “relevant areas of environmental concern” when it failed to explicitly address the risk of flying shrapnel colliding with passing planes in its consideration of the proposed installation.

Reasoning

The standard of review for a court in examining a SEQRA review is deferential. Following *Jackson v. New York State Urban Dev. Corp.*, the court should determine whether the lead agency “identified the relevant areas of environmental concern, took a hard look at them, and

made a reasoned elaboration of the basis for its determination.”⁵

The Court of Appeals unanimously reversed the decision below, citing the dissenting opinion of Judges Smith and Pine. The Court reasoned that the improbability of the posited event was diminished by the proximity of the airport, by the situation of a flight path above the proposed shredder, and, perhaps, by the existence of the concerns of Petitioners, who may be accustomed to thinking carefully about airspace and what may pose a risk within it. The dissent in the Appellate Division decision calls Petitioners’ concerns “sufficiently serious that they should have been addressed explicitly.”⁶ Once this assessment is made, the failure of the Planning Board to document a request to the Fire Marshal and the Department of Planning and Development to revisit their information and specifically address the risk pointed out by Petitioners becomes a flaw that is reviewable by the Court. “It is not enough that the Planning Board considered the views of the Fire Marshal and the Department, inasmuch as it appears that neither had considered the risk to airplanes using nearby runways.”⁷

Conclusion

The act of identifying the relevant environmental factors for review under SEQRA is a lead agency decision subject to judicial review. The Court of Appeals, by reference to the Appellate Division dissent, seems to consider that the environmental factors at issue in this case should not have been ignored both because they were specifically presented to the lead agency during review, and because they seem “sufficiently serious” to warrant attention. The Planning Board’s decision was annulled in order to allow a fuller review.

Jennifer Rowe,
Albany Law School, 2011

Endnotes

1. *Anderson v. Town of Chili Planning Board*, 59 A.D.3d 1017 at 1017.
2. *Anderson*, 59 A.D.3d at 1019.
3. *Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668 at 688, citing *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400 at 417.
4. *Id.*
5. *Gernatt*, 87 N.Y.2d at 688, citing *Jackson*, 67 N.Y.2d at 417.
6. *Anderson*, 59 A.D.3d at 1020.
7. *Id.*

* * *

Association for the Protection of the Adirondacks, Inc. v. Town Bd. of Town of Tupper Lake, 64 A.D.3d 825, 882 N.Y.S.2d 534, 2009 N.Y. Slip Op. 05659

Facts

Appellants, Association for the Protection of the Adirondacks (“Association”) and owners of property

adjacent to Respondents’ land, brought an action under CPLR Article 78 to challenge Tupper Lake Town Law No. 2 (2006), an act of the Town Board of the Town of Tupper Lake (“Board”), which rezoned the Respondents’ land to a planned development district (“PDD”).

Respondents, Preserve Associates, LLC, Big Tupper LLC, and Tupper Lake Boat Club, LLC (hereinafter referred to collectively as “Developers” or “Respondents”), planned to develop more than 6,000 acres in the Town of Tupper Lake to create the Adirondack Club and Resort, “one of the largest [projects] ever proposed for New York’s six million acre Adirondack Park.”¹ In 2005, the Developers applied for review and approval to the Adirondack Park Agency (“APA”), the primary government agency responsible for development within the Adirondack Park. The APA deemed the project a class A regional project, requiring the strictest level of review under their regulations. Developers’ application was deemed incomplete, however, pending the rezoning of the project property to a PDD.

The Board rezoned the development area as a PDD without environmental review, as the Board considered “the rezoning to be one step in the overall project or ‘action,’” as defined by the State Environmental Quality Review Act (SEQRA).² The Board reasoned that because the project as a whole was subject to class A review under the APA’s regulations, “the rezoning was a type II action and no SEQRA review was required on its part.”³

The Association challenged the action under Article 78 on the grounds that the Board’s failure to conduct an environmental review for the rezone application constituted a violation of SEQRA. The Supreme Court of Franklin County upheld the Board’s finding that the rezone was exempt from independent SEQRA review. The Court granted the Board’s motion to dismiss and petitioners appealed.

Issues

In its opinion, the Third Department addressed three issues: (1) whether the rezoning of the land was a separate action requiring additional SEQRA review, or simply a step in the overall action of the project; (2) whether SEQRA provided an exemption for the Board’s actions; and (3) whether the APA’s review would be functionally equivalent to the SEQRA review.

Reasoning

SEQRA requires that projects which may affect the environment be evaluated with an environmental impact statement, balancing social, economic, and environmental concerns so that, “to the maximum extent practicable,” deleterious environmental effects may be avoided.⁴ SEQRA duties are triggered by an “action.”⁵ The Association argued that any exemption from SEQRA that might apply to the APA review should not extend to the separate and distinct authority of the Board to grant a rezone. How-

ever, citing *Defreestville Area Neighborhood Assn. v. Town Bd. of N. Greenbush*,⁶ the Court held that “the entire set of activities must be considered the action”⁷ and that the zoning enacted by the Board was “coextensive” with the main project, representing only one step in a single action under the APA’s purview.⁸ Hence, the Board’s rezoning action was not a separate “action” for SEQRA purposes.

The Court further reasoned that even if the rezoning and the project were not part of a single action, the action of the Board would be exempt from an additional SEQRA review pursuant to SEQRA regulations themselves⁹ and under New York Environmental Conservation Law (“ECL”). The ECL provides that exemptions from review include “actions subject to the class A or class B regional project jurisdiction of the Adirondack Park Agency or a local government.”¹⁰

The Court also rejected petitioners’ contention that the APA review might not be sufficiently thorough to be functionally equivalent to SEQRA review. The Court noted that the APA’s primary job is to make sure that development does not damage the Adirondack Park. The APA, according to the Court, is “more protective of the environment” than SEQRA and to require additional review would be “unnecessary duplication;”¹¹ under Executive Law, the APA must determine that the project will “not have an undue adverse impact upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the park,” and must consider “the commercial, industrial, residential, recreational, or other benefits that might be derived from the project.”¹² Additionally, the Board conditioned the rezoning upon the APA’s approval of the project so that in the event of denial the zoning would revert to its previous state.

Underlying the issues addressed by the Court, according to the concurrence, was the problematic notion of transferring an exemption between agencies. Although the APA may be exempt from SEQRA’s procedural requirements in class A and B regional projects, the concurrence emphasized that state and local agencies should not be exempt from SEQRA’s substantive requirements and must “act and choose alternatives, which consistent with social, economic, and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects.”¹³ The Town of Tupper Lake, then, should still have “remained bound” to ensure the environmental impacts of the project were mitigated as much as possible.¹⁴ Though the concurrence contended that the Town Board was not exempt from SEQRA’s substantive requirements, it did believe that those requirements had been satisfied because the APA is subject to a stricter standard of review than that set forth by SEQRA.¹⁵

Conclusion

According to the Court, the Board correctly determined that the rezoning could be considered a single step in the action of the Respondents’ project. Additionally,

the Court found that exemption from additional SEQRA review was supported by statutory authority and that the APA’s review was sufficient to ensure environmental protection. Accordingly, the Court affirmed the judgment of the Supreme Court in favor of the Developers. Though the concurring opinion disagreed with the majority’s finding of the APA’s substantive requirement exemption from SEQRA, it did agree that the requirements had been satisfied as a matter of course, and that the judgment of the lower court should be affirmed.

Matthew Berardino
Albany Law School, 2011

Endnotes

1. 882 N.Y.S.2d 534 at 535.
2. *Id.* at 536.
3. *Id.*
4. ECL 8-0109(1).
5. ECL 8-0109(2).
6. 750 N.Y.S.2d 164 (2002).
7. 6 N.Y.C.R.R. § 617.3(g).
8. 882 N.Y.S.2d 534 at 537.
9. Specifically 6 N.Y.C.R.R. § 617.5(c)(27) and 6 N.Y.C.R.R. § 617.5(c)(36).
10. ECL 8-0111(5)(c).
11. 882 N.Y.S.2d 534 at 537.
12. N.Y. EXEC. § 809(9).
13. *Id.* at 538-39.
14. *Id.*
15. *Id.* at 539.

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Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, 129 S. Ct. 2458

Introduction

Although this opinion is cast in the light of agency deference, the larger issue at stake is the degree of leniency afforded agencies to interpret the Clean Water Act (“CWA”) in a manner that may not have been intended by the drafters, simply for ease of agency application. The consequences of allowing agencies to effectively confer jurisdiction upon one another by regulation in a manner consistent with, but not intended by, the statutory language carries the danger of thwarting Congressional intent.

The purpose of the CWA is to protect the nation’s waters from degradation for safe human and wildlife use by regulating the discharge of pollutants. However, not all of the dangers to waterways come in the form of pollutants. Waterways can be damaged by addition of materials that change their structure and character, such as fill. Aware that the expertise for this issue does not lie with the Environmental Protection Agency (“EPA”), but rather with the Corps of Engineers (“COE”), permitting jurisdiction for

this danger is vested with the COE. This case addresses the line between pollutants and fill and which agency controls when a discharge from a mining facility is both.

Facts

Respondents Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation (collectively hereinafter “SEACC”) brought this action against the COE under the Administrative Procedure Act challenging issuance of a CWA § 404 permit for Coeur Alaska’s proposal to reopen a gold mine at a site 45 miles north of Juneau, Alaska. Coeur Alaska proposed using a “froth flotation” technique to reopen the mine. This technique creates slurry, a mixture of water and crushed rock mining tailings, which qualifies as a pollutant under the CWA¹ but is classified by regulation as “fill material.”² Notably, also in effect was a regulation promulgated under CWA § 306 stating that “there shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process” for mining gold.³ Coeur Alaska planned to pump 4.5 million tons of tailings into Lower Slate Lake, a 23-acre navigable water body, which would raise the lakebed and increase the surface acreage of the lake. Coeur Alaska also planned to dam the downstream shore and divert creeks and runoff around the lake. Eventually the lake would be purified and allowed to flow into a stream.

The COE issued a permit for the discharge of slurry into the lake pursuant to its authority under CWA § 404(a), which authorizes the COE to issue permits for the discharge of “dredged or fill material”⁴ that “has the effect of...[c]hanging the bottom elevation” of water.⁵ The EPA issued a permit for the discharge of water from the lake into nearby Slate Creek, but did not assert jurisdiction over the discharge of slurry into the lake or exercise its veto power over the COE permit for the discharge, even though § 404 permitted it to do so.

Issues

There are two issues addressed in this opinion. The first issue concerns whether it is the authority of the COE or the EPA to issue a permit for the discharge of slurry into navigable waters. This is an issue of heavy import, as Justice Ginsburg in the dissent notes, because there can only be one issuing agency. By allowing the COE to issue, the discharger would avoid numerous EPA new source performance standards (“NSPS”). This Court also addressed whether the COE permit was properly issued.

Reasoning

The Court first looked to the language of the CWA to determine whether the EPA or the COE has permitting authority for Coeur Alaska. Although Justice Ginsburg, writing for the dissent, agreed with the Ninth Circuit that § 306(e)⁶ should be the touchstone as § 404 does not create an exception to § 306(e)’s “plain command,” Justice Kennedy’s majority opinion reasoned that the CWA is

best understood to vest the COE with the authority to issue the permit for the discharge, as CWA § 402 expressly forbids the EPA from exercising the authorities delegated to the COE by § 404. The Court relied upon the fact that the EPA and the COE have interpreted the CWA, promulgated regulations, and found that the COE is the proper agency to regulate the slurry discharge as slurry has been deemed “fill.” However, the EPA still governs the permitting standards for the discharge of fill,⁷ and the EPA may prohibit any decision by the COE to issue a permit.⁸

While the Court indicated that this is sufficient to resolve this issue, it also reflected on 40 CFR § 122.3, which states that “[d]ischarges of dredged or fill material into waters of the United States which are regulated under section 404 of the CWA...do not require [§ 402] permits” from the EPA. Further, the Court pointed to the CWA’s language forbidding the discharge of crushed rock “[e]xcept as in compliance” with the Act.⁹ Although the SEACC would have had the Court read the regulation as only implying that a subset of fill materials would be subject to the regulation, the EPA advocated a plain reading and the Court accepted it as it is not “plainly erroneous or inconsistent with the regulation.”¹⁰

Justice Ginsburg feared that the interpretation of § 404 would lead to abuse from regulated industries who may add solid matter to their point source discharges to instead be categorized as fill. She suggested a simple rule that “[d]ischarges governed by the EPA performance standards are subject to the EPA’s administration and receive permits under [§402]”, not § 404.¹¹ Justice Breyer outlined the procedural safeguards against this danger, including the EPA’s authority to veto a § 404 plan with an unacceptable adverse impact on water supplies or fish and wildlife. Further, the EPA never suggested interpreting § 404 in such a way as to allow this loophole to appear.

After determining that the COE is the appropriate agency to issue permits for the discharge of this fill, the Court turned to the question of whether the COE correctly issued the permit. The SEACC argued that the permit violated the EPA’s § 306 NSPS regulations¹² forbidding mines from discharging process wastewater. Ultimately deferring to the agencies’ interpretation and practice, the Court held that (1) the federal agencies may rely upon § 404’s silence with regard to § 306—that is, that nothing in § 404 requires the COE to consider the EPA’s NSPS prohibitions—and (2) that § 404(p), which protects § 404 permittees from EPA enforcement actions, does not mention § 306. The Court determined that Congress’ selective omission of § 306 from § 404, but inclusion in other sections, evidenced a Congressional intent to exclude § 306(e) from the reach of § 404. However, the CWA was ambiguous on the issue, and in the absence of clarifying regulations, the Court relied upon an internal memorandum.¹³ The memorandum, which was written by the EPA’s Office of Wetlands, Oceans and Watersheds Director, Diane Regas, to Randy Smith, the Director of the

EPA's regional Office of Water (which has responsibility for the mine in question), relies on 40 C.F.R. § 122.3 and concludes that the EPA's new source performance standard does not apply to the discharge because it is regulated under § 404.

The Court deferred to this interpretation because of five factors: (1) the memorandum does not invalidate the EPA's performance standard, but preserves it; (2) it acknowledges that the discharger has not attempted to evade regulation; (3) it preserves the COE's authority to determine whether a discharge is in the public interest; (4) it does not allow for other toxic pollutants to enter the waters; and (5) the memorandum is sensible and rational in its reconciliation of §§ 306, 402, and 404.

Conclusion

Despite the likely status of Coeur Alaska as a new source and the existence of a NSPS specifically forbidding the discharge as a point source, the Court identified the operation as a discharge of fill material as defined in 40 C.F.R. § 232.2, over which the COE had authority under § 404 of the CWA. Further, the Court, relying on a memorandum, overcame ambiguities in the regulations and determined that the COE properly issued the permit in accordance with agency practice and procedure.

Andrew B. Wilson
Albany Law School, 2010

Endnotes

1. 33 U.S.C. § 1362(6).
2. 40 C.F.R. § 232.2 (2008).
3. 40 C.F.R. § 440.104(b)(1).
4. 33 U.S.C. § 1344(a).
5. 40 C.F.R. § 232.2.
6. 33 U.S.C. § 1316(e) (“[I]t shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.”).
7. CWA § 404(b); 33 U.S.C. § 1344(b).
8. CWA § 404(c); 33 U.S.C. § 1344(c).
9. CWA § 301(a), 33 U.S.C. § 1311(a).
10. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).
11. *Coeur Alaska v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458, 2483 (2009).
12. 33 U.S.C. § 1316(b).
13. *Coeur Alaska*, 129 S. Ct. 2473-74.

* * *

Dean M. Cordiano, Special Master, Simsbury-Avon Preservation Society, LLC and Gregory Silpe v. Metacon Gun Club, INC, 2009 WL 2341924 (C.A.2(Conn.))

Facts

The Plaintiffs-Appellants Simsbury-Avon Preservation Society, LLC, (SAPS), a group of homeowners and its

members, sued to enforce the provisions of the Resource Conservation and Recovery Act (RCRA) and the Clean Water Act (CWA) against the Defendants' discharges of ammunition from a shooting range. The Defendants-Appellees are Metacon Gun Club, Inc. and its members and guests (hereinafter collectively referred to as “Metacon”), who operate the shooting range.

Metacon has operated a shooting range on its 137-acre property for over 40 years. The property contains woods, meadows, wetlands and a floodplain of the Farmington River. The wetlands are close to, if not overlapping, with a berm used for bullet containment. A vernal pond is located directly behind the backstop berm, and wetlands border the range for a considerable distance. The wetlands are adjacent to the Farmington River.

In May 2005, SAPS commissioned Advanced Environmental Interface, Inc (AEI) to test and report on soil, sediment and water samples from the range and area surrounding the berm. The report concluded that “spent ammunition from typical firing range activities has contaminated various environmental media on the Metacon Gun Club site.”¹ Although the report noted that “firing range related contaminants on the site represent a potential exposure risk to both humans and wildlife[,]” it concluded that “a risk assessment utilizing the data obtained during this investigation would be necessary to evaluate the degree of risk to humans and wildlife.”²

SAPS commenced litigation at the United States District Court for the District of Connecticut, alleging that Metacon was violating RCRA and the CWA by discharging lead munitions onto its property. The trial court dismissed SAPS's claim of a RCRA permit violation and entered summary judgment in Metacon's favor on remaining claims. SAPS sought review in the Second Circuit Court of Appeals.

Issue

SAPS appealed on the following grounds: (1) whether spent munitions constituted “solid waste” under RCRA; (2) whether lead discarded on the firing range presented an imminent and substantial endangerment to health or environment; (3) whether on-site wetlands constituted navigable waters under CWA; and (4) whether the berm and firing range constituted point sources.

Reasoning

SAPS pursued two claims against Metacon under RCRA. First, SAPS alleged that Metacon was operating an unpermitted hazardous waste facility under RCRA.³ Second, SAPS asserted that the spent lead munitions disposed of on Metacon's site presented an imminent and substantial endangerment to health or environment.⁴ The court first recognized that in order for waste to be classified as “hazardous” under RCRA, it must first qualify as “solid waste,”⁵ which generally requires that the materials are discarded. “Discarded material” is any material

that is “abandoned” by being disposed of or by being “accumulated, stored, or treated before or in lieu of being abandoned by being disposed of.”⁶ The court’s conclusion largely relied on the EPA’s interpretation of its own regulations, under which lead shot ought not to be considered a RCRA-regulated hazardous waste because “at the time it is discharged from a firearm...it is used for its intended purpose,” and also because that normal usage generally does not constitute abandonment, or the discard of such materials.⁷

The appellants alleged in their second RCRA claim that the AEI report should have precluded summary judgment as to whether the spent ammunition presents an imminent and substantial endangerment. The appellants relied on AEI’s findings that some soil samples from the Metacon site showed pollutant levels in excess of Connecticut’s pollutant concentration standards.

Under RCRA, a finding of “imminent and substantial endangerment” must be supported by evidence of “a reasonable prospect of future harm so long as the threat is near-term and involves potential serious harm.”⁸ The court noted that proof of actual harm is not required: the endangerment standard is broad and requires merely a reasonable prospect of future harm. Nevertheless, in the court’s view, SAPS’s argument that soils at the Metacon site exceed Connecticut’s environmental standards does not alone indicate a RCRA violation. Moreover, AEI’s conclusion that additional research would be needed to demonstrate the threat revealed that SAPS had merely alleged a speculative prospect of future harm. The court concluded that SAPS failed to introduce sufficient evidence from which a reasonable jury could find that the potential harm rose to the requisite level of endangerment.

The court also affirmed summary judgment against SAPS on the allegations that operations at the firing range constituted the unpermitted discharge of pollutants into navigable waters under the National Pollutant Discharge Elimination System (“NPDES”). The CWA prohibits the discharge of a pollutant from a point source to navigable waters except when authorized by a NPDES permit.⁹ “Discharge of any pollutant”¹⁰ refers to “any addition of any pollutant to navigable waters from any point source.”¹¹ A “point source” is “any discernable confined and discrete conveyance.”¹²

Of course, jurisdiction under the CWA is triggered by a discharge into “navigable waters,” which include “wetlands adjacent to jurisdictional waters.” To meet this standard, the appellants introduced evidence of prior building permits to illustrate that the berm was extended in 1990 onto a wetland and that part of the shooting range itself contained wetland soils. The court concluded that although SAPS was able to prove that a portion of the shooting range and the berm may have contained wetland soils, SAPS failed to raise a material issue of fact as to whether the range activities discharged pollutants directly into jurisdictional wetlands.¹³

SAPS also failed to demonstrate that the berm or other on-site artificial conditions transformed the shooting operations at the range into a point source discharge. SAPS alleged a hydrogeological connection between the Farmington River and on-site wetlands and claimed that the lead in the berm on Metacon’s site was leachable and, over time, may have posed a threat to groundwater quality.¹⁴ The appellants also pointed to potential surface water runoff and windblown dust from the berm, alleging that pollutants discharged in these fashions could reach jurisdictional wetlands. Yet, the court rejected SAPS’s characterizations, noting that the CWA requires at least some man-made channelization to meet the “point source” requirements.

Although the court did not reach the issue of whether a firing line can constitute a point source discharge, it did note that SAPS failed to adduce specific evidence that lead shot was fired into a jurisdictional wetland, and therefore failed to raise an issue of material fact on whether the firing range qualified as a “point source.”

Conclusion

From the court’s view, SAPS’s appeal was unsuccessful largely because it failed to meet evidentiary standards necessary to support its claims. The appellants’ inconclusive environmental report required too much speculation to raise a material issue of fact.

Sebastian Fanai-Danesh
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Endnotes

1. *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 202 (2009).
2. *Id.*
3. 42 U.S.C. § 6925(a) (1976).
4. 42 U.S.C. § 6972(a)(1)(B) (1976).
5. 42 U.S.C. § 6903 (5, 27) (1976).
6. 40 C.F.R. § 261.2 (2008).
7. United States Supp. Amicus Br. 5-6.
8. *Dague v. City of Burlington*, 935 F.2d at 1356.
9. 33 U.S.C. §1362 (2008).
10. *Raponos v. United States*, 547 U.S. 715, 723, 126 S. Ct. 2208, 165 L.Ed.2d 159 (2006).
11. 33 U.S.C. § 1362 (2008).
12. 40 C.F.R. § 230.3 (1972).
13. 33 U.S.C. §1362 (2008).
14. *Cordiano*, 575 F.3d at 222.

* * *

Metropolitan Taxicab Board of Trade v. City of New York, F. Supp. 2d, 2009 WL 1748871 (S.D.N.Y.)

Facts

On October 31, 2008, the federal district court granted a preliminary injunction against New York City’s prior taxicab and limousine commission (TLC) regulations that

required that all new taxicabs meet a specific miles-per-gallon rating of 25 mpg by October 2008, and 30 mpg by October 2009 (known as the 25/30 Rules).¹ Interpreting the federal Energy Policy and Conservation Act (“EPCA”), the court found that taxicab owners in New York City had to purchase vehicles that had either hybrid or clean-diesel engines. The City, under direction from Mayor Bloomberg, then decided to pursue a policy of encouraging, rather than requiring, fleet owners to acquire hybrid vehicles.

The new TLC regulations had several elements. (1) They “eliminated the prior requirement that determination of lease rates and changes thereof be based on costs, and substituted policy concerns as the key criterion for determining lease rates.”² (2) The new regulations described both the incentives (higher lease rates) for purchasing hybrids and disincentives (lower lease rates) for purchasing conventionally powered taxicabs (the Crown Victoria). (3) The new regulations did not grandfather taxicabs purchased by owners subsequent to 2001. Under these new rules the monetary rate at which a hybrid vehicle could be leased to a taxi driver for a 12-hour shift is increased by \$3. On the other hand, if an owner leases out a car with a traditional engine, the maximum lease rate an owner may charge a driver is reduced by \$4 effective immediately, \$8 in May 2010, and \$12 in May 2011. These new rules encourage the phasing out of inefficient vehicles, thereby reducing New York City’s carbon emissions, and improving air conditions.

The Plaintiffs, operators of taxicab fleets (Fleet Owners), sought to enjoin the City’s enforcement of the revised regulations. They argued that the proposed rules force fleet owners to buy hybrid vehicles to sustain economic viability. They further argued that if they have no choice, the new regulations would constitute a mandate which, under the Supremacy Clause, would be preempted by both the federal Clean Air Act (CAA) and EPCA. The Defendant, New York City, responded that the new lease cap rules do not mandate certain vehicles, but instead provide an incentive which is not preempted by federal law.

Issue

There are two issues discussed in this case: first, whether the TLC’s new rules require taxicab owners to purchase only hybrid or clean-diesel vehicles; second, if the rules are considered a mandate, whether that mandate is preempted by the CAA or EPCA under the Supremacy Clause of the Constitution.³

Reasoning

A preliminary injunction may be granted “upon showing of irreparable harm, and because this matter involves a challenge to a New York City statutory or regulatory scheme, Plaintiffs must also demonstrate a likelihood of success on the merits.”⁴ The court recognized that, for the reasons given in the court’s previous decision on the 25/30 Rules, the Plaintiffs have shown that they will suf-

fer irreparable harm without an injunction. The Plaintiffs argued that they were likely to succeed on the merits because the Lease Cap Rules are preempted by federal law. Under the Supremacy Clause, “state laws that interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution are invalid.”⁵ Yet, because the Lease Cap Rules did not require any particular action de jure, the court sought to determine whether the new rules constitute a de facto mandate to Fleet Owners to purchase hybrid vehicles. “[I]f the Lease Cap Rules present only a single ‘real’ option for Fleet Owners, then the Rules are a mandate and the Court will then determine if that single option is preempted.”⁶ ⁷ On the other hand, if the Lease Cap Rules presented viable options to the Fleet Owners to either purchase a hybrid or a traditional vehicle, then the Rules would not be considered a mandate.

In considering whether the Lease Cap Rules were a mandate, the court found no controlling cases. Both parties, however, cited precedent involving the Employee Retirement Income Security Act of 1974 (“ERISA”). In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, the Supreme Court addressed the issue of preemption where a state law gave the appearance of having a choice but still mandated an outcome that is preempted by federal law. The court found that the ERISA statute was not preempted because of two factors: (1) it did not force only one, preempted, choice; and (2) the manner in which the law indirectly affected ERISA’s plan decision was not part of Congress’ preemptive object.⁸

In *Metropolitan Taxi*, the district court recognized that indirect economic pressures of a state law could force a party to adopt a scheme that would be preempted. Ultimately, the court established that “the rule derived from these cases is that a local law is preempted if it directly regulates within a field preempted by Congress, or if it indirectly regulates within a preempted field in such a way that effectively mandates a specific, preempted outcome.”⁹

It then sought to apply the facts to the previously established “mandate” test and determined that although the TLC’s rules were adopted only to encourage the purchase of hybrid vehicles, the court was persuaded that the encouragement could not be refused by a reasonable business person. Under the initial lease cap rates, hybrid vehicles produced (on average) \$3,400 less in profits than a standard Crown Victoria. As the lease cap regulations mature over the three-year period, hybrid vehicles will average a competitive advantage of \$6,500 per vehicle. In the court’s opinion, the size of the profit difference was so great that no rational Fleet Owner would choose to take such a loss. The court rejected the Defendant’s contention that Fleet Owners had a reasonable choice because the return on their investment would be greater than zero. The court concluded that “the combined effect of the lease cap changes, and even the disincentive alone, constitutes

an offer which cannot, in practical effect, be refused.”¹⁰ It was clear to the court that the Lease Cap Rules did not present viable options for the Fleet Owners but were instead an effective mandate to switch to cleaner vehicles.

The court then turned to the issue of federal preemption. First, the court found that the goals of EPCA were to improve motor vehicle efficiency and to decrease dependence on foreign oil. The EPCA preemption clause says that “[w]hen an average fuel economy standard prescribed under this chapter...is in effect, a State or political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.”¹¹ The court found that it was clearly the intent of Congress to make the establishment of fuel economy standards solely a federal concern. Additionally, the court looked at the recent changes in federal fuel economy standards, including President Obama’s proposed new Corporate Average Fuel Economy (CAFE) standards, and ruled there was no question that the federal government is actively pursuing regulations that would impact national fuel efficiency standards. Because of the express language of the EPCA preemption clause, paired with the current fuel efficiency standards being proposed, the court found that fuel economy standards are a federal matter and, therefore, the TLC’s Rules are preempted under EPCA.

In a similar approach to preemption under EPCA, the court then looked at preemption under the CAA. The Preemption Clause of the CAA provides that “no state... shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines...”¹² When read with the Lease Cap Rules’ stated purpose of creating incentives for taxicab owners to buy cleaner vehicles, the court found it clear that the CAA preempts the TLC regulations related to emissions control.

Conclusion

The court ultimately found the Lease Cap Rules were a de facto mandate upon the Plaintiffs to purchase hybrid taxicabs. Additionally, the court found that the Plaintiffs had demonstrated irreparable harm and a likelihood of success in showing that such a mandate is preempted by EPCA and the CAA. The Lease Cap Rules relate to fuel economy and emissions regulation, which are substantially federal concerns. The Plaintiffs’ motion for a preliminary injunction was granted.

**Kyle Christiansen
Albany Law School, 2011**

Endnotes

1. TLC Rule § 3.03(c)(10)-(11).
2. *Metropolitan Taxicab Board of Trade v. City of New York* 2009 WL 1748871 at *2.
3. U.S. Const. Art. 6, cl. 2.

4. *Id.* at *8.
5. *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 604 (1991).
6. U.S. Const. Art. 6, cl. 2.
7. *Metropolitan Taxicab*, at *8.
8. *New York State Conference of Clue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 662. (1995).
9. *Metropolitan Taxicab*, *11.
10. *Id.* at *14.
11. 49 U.S.C. § 32919(a) (emphasis added).
12. 42 U.S.C. § 7543(a).

* * *

United States of America v. Apex Oil Company, Inc., 579 F.3d 734, (7th Cir. Aug. 25, 2009)

Facts

Defendant-Appellant in this case, Apex Oil Company, the corporate successor-owner of a contaminated oil refinery site located in Hartford, Illinois, was the subject of an enforcement action under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901 et seq.¹ The District Court found defendant responsible under RCRA for a “hydrocarbon plume” that created human and environmental hazards by contaminating drinking water and emitting noxious fumes.² The district court judge granted an injunction requiring Apex to clean up the contaminated site.³ The injunction order required Apex to install a vapor-control system that has “adequate capacities and efficiencies” and that “all work required by this injunctive order shall be subject to U.S. EPA oversight and approval.”⁴ However, the injunction did not provide any specific criteria or benchmarks for the approval of Apex’s compliance efforts.⁵

On appeal to the Seventh Circuit, Apex argued that any liability it might have incurred under RCRA was discharged in prior bankruptcy proceedings. Apex argued that the injunction was functionally equivalent to a claim for money damages, given that it lacked the internal capability to clean up the listed site and would be required to retain a third party to perform the work at an estimated cost of \$150 million.⁶ Apex also argued that the specificity requirements in Civil Procedure Rule 65(d) rendered the order unenforceable as written.

Issues

This appeal concerns (1) whether a party’s contamination liability is dischargeable in bankruptcy and cannot be revived in a subsequent enforcement proceeding under RCRA, and (2) whether the terms of the injunction were so vague as to be unenforceable under Civil Rule 65(d).

Reasoning

A judicial confirmation of a claim in a Chapter 11 bankruptcy proceeding discharges the debtor from “any debt that arose before the date of confirmation,”⁷ with limited exceptions. Pursuant to the Bankruptcy Code,

“debt” is defined as “liability on a claim.”⁸ A claim is defined, in relevant part, as a “right to an equitable remedy for breach of performance if such breach gives rise to a right to payment....”⁹ Apex argued that contamination liability at issue in the injunction was discharged in bankruptcy; the first issue in this case turns on the meaning of the phrase, “gives rise to a right to payment”¹⁰ as defined by § 101(5)(B) of the Bankruptcy Code.

The court interpreted the statutory language, as a general rule, to provide a party entitled to an equitable claim, relief by way of money damages, should the equitable remedy turn out to be unobtainable.¹¹ As the court noted, the notion that “equitable remedies are always orders to act or not to act, rather than to pay, is a myth; equity often orders payment.”¹² Here, however, the court refused to understand RCRA liabilities as a monetary liability.¹³ Relying on *AM Int’l, Inc. v. Datacard Corp.*,¹⁴ the court focused its decision on the unique nature of environmental cleanup: RCRA provides the foundation for the government’s equitable claim in this case, but does not entitle the plaintiffs to payment of the expected cleanup costs in exchange for the performance of the required actions.¹⁵ The court recognized that defendant’s argument, if accepted, could lead to the illogical position of encouraging polluters to refrain from maintaining the requisite financial capabilities to clean up their pollution, even where hiring outside parties to do so would be less cost-effective.¹⁶

The premise for Apex’s second argument—that the injunction was written in vague terms—was essentially uncontested. Defendant stated, and the court accepted, that the injunction failed to comply with the requirement that an order should “state its terms specifically,” and “describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.”¹⁷ Nevertheless, the court refused to grant Apex relief from the injunction, as Apex failed to provide reasonable terms for rewriting the injunction to correct the alleged defects.¹⁸ As the court noted, “A degree of ambiguity is unavoidable in a decree ordering a complicated environmental cleanup.”¹⁹ In such circumstances, parties subject to injunctions would not likely be held in contempt for failure to comply after seeking either a modification or clarification from the district court.²⁰ Furthermore, the injunction contemplated judicial review of EPA oversight and approval in the event of disputes over cleanup methods and technologies.²¹

Conclusion

According to the court, the EPA acted properly in requiring the defendant, Apex Oil Company, to clean up the contaminated site. The court crafted a rule that where RCRA provides the foundation for an injunction requiring parties to act, the costs associated with that performance are not dischargeable in bankruptcy. Furthermore, even where the injunction ordering the act fails to meet the standard under FRCP Rule 65(d), parties will have recourse by going to the courts for interpretation or modification of the requirements, but will not have relief from the injunction.²²

Rachel Mamis
Albany Law School, 2010

Endnotes

1. *United States of America v. Apex Oil, Inc.*, No. 05-CV-242-DRH, 2008 WL 2945402, at *1 (S.D. Ill. July 28, 2008).
2. *United States of America v. Apex Oil, Inc.*, 579 F.3d 734, 735 (7th Cir. 2009).
3. *Id.* at 735.
4. *Id.* at 739.
5. *Id.*
6. *Id.* at 735. Apex also appealed the findings and conclusions giving rise to the liability, but the court did not entertain this appeal (“the challenge has no possible merit”).
7. 11 U.S.C. § 1141(d)(1)(A).
8. 11 U.S.C. § 101(12).
9. 11 U.S.C. § 101(5)(B).
10. *Id.* at 736.
11. 579 F.3d at 736.
12. *Id.*
13. *Id.*
14. 106 F.3d 1432, 1348 (7th Cir. 1997).
15. *Id.*
16. 579 F.3d at 738.
17. Fed. R. Civ. P. 65(d).
18. 579 F.3d at 739.
19. *Id.* at 740.
20. *Id.*
21. *Id.*
22. *Id.*

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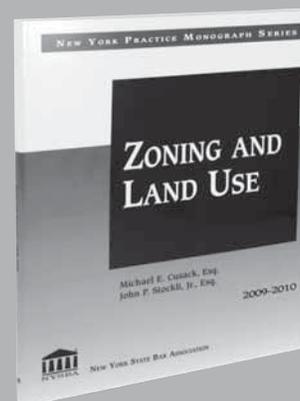
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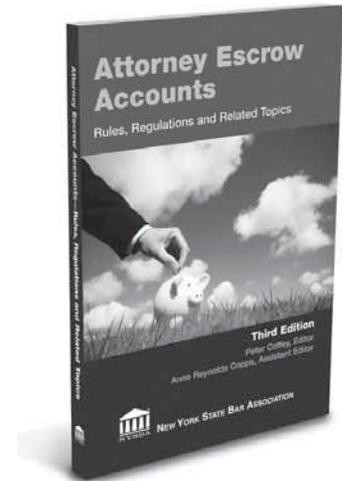
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PRODUCT INFO AND PRICES

2010 / 330 pp., softbound
PN: 40269

NYSBA Members	\$45
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Copyright 2009 by the New York State Bar Association
ISSN 1088-9752 (print) ISSN 1933-8538 (online)

THE NEW YORK ENVIRONMENTAL LAWYER

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

Miriam E. Villani, Editor-in-Chief



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