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Message from the Chair

Philip H. Dixon

This has been a busy several months for the Section. Last October saw a successful Fall Meeting, held in Saratoga Springs as a joint meeting with the Municipal Law Section. The program, held at the Gideon Putnam Hotel in the beautiful Saratoga Spa State Park, drew more than 135 attorney registrants. The Section's Program Co-Chairs, Ginny Robbins and Kevin Ryan, did a wonderful job with their Municipal Law Section counterparts in coming up with exciting topics and speakers. The program included a welcoming barbeque on Friday, a half-day CLE program on Saturday morning, and optional sightseeing and recreational activities, including a bike ride, on Saturday afternoon. The Saturday CLE program offered an update on SEQRA, an overview of the new State ethics rules and a review of "hot topics" such as the development of natural gas deposits in the Marcellus Shale, trends in green buildings law, and recent land use cases.

The Section's dinner speaker on Saturday night was Michael Relyea, President of the Luther Forest Technology Campus Economic Development Corporation, who shared his views on the challenges and successes of regional high-tech economic development. The Luther Forest Technology Campus near Saratoga Springs is where Global Foundries is constructing a chip-fab plant that is described as the largest commercial capital expansion project currently under way in the United States. On Sunday morning, there was a CLE program introducing the new endangered species regulations. Continuing the Section's efforts over the past several years to attract younger

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attorneys to Section activities, the SEQRA, endangered species and ethics presentations provided CLE credit to both newly admitted and experienced attorneys.

Thanks to the efforts of program Co-Chairs Carl Howard and Michael Lesser, the Section's program for the Annual Meeting in January was also packed with timely topics, including Marcellus Shale drilling, potential improvements to the State's Brownfields Cleanup Program, climate change, and ethics. Our luncheon speaker, Joe Martens, Commissioner of the Department of Environmental Conservation, provided an overview of his first year in office and the Department's plans for the coming years. The CLE program drew 199 attendees, and the luncheon drew 182.

The Annual Meeting also provided an opportunity to take note of the unfortunate loss of a major figure in environmental protection, Constantine Sidamon-Eristoff. Connie, who was a friend and mentor to many in the Section over the years, passed away in December. Through a 50-year career, Connie served, among other things, as Commissioner of the New York City Department of Transportation under Mayor John Lindsay, as Regional Administrator of Region II of the Environmental Protection Agency, and as a member of the Board of the Metropolitan Transportation Authority. At the Annual Meeting luncheon, the Section posthumously presented Connie with the Section Award. The plaque stated: "In memory of Constantine Sidamon-Eristoff. Ardent conservationist, dedicated public servant, inspired and effective environmental leader, wise counselor, and dear friend." Former Chair Walter Mugdan, who worked with Connie at the EPA, delivered some beautiful comments in announcing the award. Representatives of the Section also attended a subsequent memorial service for Connie in New York City.

Also recognized at the Annual Meeting was the Section's Brownfields Task Force, ably and energetically chaired by Dave Freeman and Larry Schnapf. The Task Force prepared a detailed report suggesting a number of changes to improve the effectiveness of the State's Brownfield Cleanup Program, along with suggested legislative language to implement a number of those changes. The Task Force has been working with representatives of the Department of Environmental Conservation and others on these recommendations. The Task Force was awarded the annual Section Council Award for its contributions.

Over the past few months, the Section has also been taking part in a "Diversity Challenge" initiated by Vincent Doyle, the State Bar Association President. We designated the Co-Chairs of the Section's Membership Committee, Rob Stout and Jason Kaplan, as co-coordinators of our Section's response to the Initiative. The Section's commitment to diversity, however, is nothing new. For two decades the Section has co-sponsored a fellowship program for minority law students to spend summers working for government agencies or public interest organizations. At the Annual Meeting, we awarded two such fellowships for the coming summer, to Rosemary "Rosie" Ortiona of Hofstra Law School and Sanjeevani "Sunny" Joshi of Albany Law School. Rosie will be working at EPA, Region II, and Sunny will be working at DEC in Albany.

With respect to our Section in particular it is also important to foster diversity of interests and to ensure active participants in Section activities by attorneys for government agencies and public interest organizations. In this regard, over the past several years various ethical guidelines and restrictions have been imposed on State employees that make their participation in Section events more difficult. We are continuing to work with central Bar Association representatives to see if there is a way to bring more rationality to this area.

The Section's annual Legislative Forum took place on May 16th at the Bar Center in Albany. Topics included environmental enforcement, legislative initiatives and budget impacts.

As always, I want to encourage you to become involved in a Section committee if you have not already done so. If you have any questions about a specific committee, feel free to contact the Section officer who is listed as the liaison for that committee on the Section's website at www.nysba.org/environmental.

Phil Dixon

Message from the Editor-in-Chief

It is spring again. I love this time of year. The scent of the new blooms is in the just warm breeze. I took pictures of my garden this year, when the flowers began to come up and bloom. I have included a couple with my column. Both of the pictures I have included were taken on February 22, 2012. I live on Long Island. The unusually warm weather we had this winter had plants acting as if spring had arrived. Before the mid-winter wave of warmth, the U.S. Department of Agriculture was in the process of updating its national plant hardiness map. The map shows the hardiness zones and is a guide used for planting. The zones start with the coldest regions in the north and continue south. The map had not been updated since 1990. The updated map came out in January 2012, and it demonstrates that temperatures are heating up. The New York City metropolitan area has moved into a warmer zone. The coldest temperature in the City has climbed 10-degrees on average, to 5 degrees Fahrenheit. The shift puts the local climate where Raleigh, North Carolina was. Syracuse is where southern New Jersey was. David Wolfe, an expert on climate change at Cornell University, said the temperatures this past winter appeared to "represent an extreme," even within the context of climate change, but a comparison of the national plant hardiness zone guides from 1960, 1990, and 2012, demonstrate "an extremely fast pace" of change.

February 22, 2012, Long Island, NY

As I said, I love spring. However, the unusually early spring this year put me on edge. We who practice in the environmental field understand the ramifications of climate change. It does not affect only temperatures, but impacts precipitation, soil moisture, and sea level as well. Sea level rise and storm surge increase coastal flooding, erosion, and wetland loss. Heat waves impact air quality and stress energy systems. Flooding and drought, both a result of climate change, impact water supply and stress infrastructure and local ecosystems. A lack of snow cover insulation in winter affects soil temperatures and depth of freezing with complex effects on root biology, soil microbial activity, and nutrient retention, and allows for detrimental winter survival of some insects, weed seeds, and pathogens.

There is a slow but ongoing effort to address climate change. Investment in renewable energy, like solar and wind, is a step that is gaining support. New York has shown a continued interest in offshore wind development. On April 3, 2012, the Renewable Energy Task Force of the Bureau on Ocean Energy Management-New York ("BOEM-NY") met to review the state's activities for offshore wind development. One of the issues discussed was a proposal to amend the state's coastal zone management program to include wind development in the Atlantic Ocean. Another issue discussed by the Task Force was the possibility of BOEM granting a lease on the Outer Continental Shelf to the Long Island-New York City Offshore Wind Collaborative.

In addition to wind, New York continues to support solar installations with cash incentives. It is the state's goal to install 82 megawatts ("MW") of solar electric power by 2015. Incentives are granted on a first-come, first-served basis and will be accepted through December 31, 2015, or until all funds are fully committed. Generally, the incentives will cover approximately 25-35% of the installed cost of a solar photovoltaic ("PV") system, but not more than 40% after all federal tax credits (i.e., 30% tax credit from the federal government through December 31, 2016, for all solar installations) are applied.

The Solar Industry Development and Jobs Act of 2011 is another state effort in support of solar energy. Currently, New York's installed PV capacity is roughly 54 MW, which represents less than 0.02% of the state's electricity and less than 3% of the national solar market share. The Solar Jobs Act supports an effort to increase the state's solar PV capacity to 5,000 MW by 2026. The Act requires each New York retail electric supplier to procure solar renewable energy credits ("SRECs") to be used to stimulate solar development and open a trading market for electricity in New York.

The weather we have been experiencing is not "normal," but it may become the new "normal." We will have to relearn how to use and protect our plants and other resources. To prevent the effects of climate change from continuing exponentially, the Section and each of us must support the state's effort with regard to solar and wind development.

Miriam E. Villani

February 22, 2012, Long Island, NY

From the Issue Editor

This issue contains several thoughtful discussions of hydraulic fracturing ("fracking"), one of the most talked about environmental issues in 2012. David Everett and Robert Rosborough examine the issue of whether municipalities can use their zoning powers to control where natural gas drilling can occur. A number of municipalities have chosen to ban drilling and the legal issue at stake is whether such a ban is preempted by ECL section 23-0303(2), which preempts municipal laws intended to regulate natural gas drilling. Everett and Rosborough provide a thorough discussion of the recent court decisions related to these municipal provisions. Patrick Siler's article addresses the New York State regulatory scheme that addresses hydraulic fracturing and recommends specific legislative amendments. His article also examines the regulations used by other states, such as Pennsylvania, where natural gas is extracted using hydraulic fracturing. The article, which placed first in the Section's 23rd annual William R. Ginsberg Memorial Essay Contest and is also being published by the *St. John's Law Review*, is well researched and even someone familiar with the issues will learn from it.

One of the more fascinating issues related to the regulation of "fracking" is that the science is developing as the regulations are developing. That is, the potential environmental impacts of the activity are becoming better understood while the regulators are reacting to the growth of the industry. To some extent that explains the use of zoning laws to prohibit the activity. Underlying the zoning laws at issue is the uncertainty regarding what the impacts are and whether the regulators will be able to effectively address those impacts. In light of these doubts, some municipalities feel that the best way to protect residents is to ban the activity. From a statewide perspective, however, there is a need to examine the specifics and develop an approach that is protective and Patrick Siler's article provides a clear understanding of many of the key issues.

Katherine Rahill's article provides a good contrast to the above articles. While "fracking" is today's hot issue, Ms. Rahill addresses vapor intrusion, the hot issue of a couple of years ago. The Department of Health guidance on vapor intrusion was issued in 2006 and Ms. Rahill provides a good summary of what has happened in the area since 2006. Vapor intrusion is an issue that affects the daily practice of environmental law in New York and this article will be a useful reference because it gathers together much of the important information and includes a thoughtful discussion. Mr. Young's ethics article notes that while we tend to speak of legal ethics and the rules of professional responsibility as if they were the same thing, there are, in fact, significant differences. We also appreciate the work of John Parker, who provided the update on DEC activities, and Marla Wieder, Chris Saporita and Joseph Siegel, who provided the EPA update. Their contributions contain a lot of important detail on developments at the agencies.

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

Aaron Gershonowitz

From the Student Editorial Board

In anticipation of our post-law school life in the real world of attorney practice, it strikes us that the legal field that we are entering is dramatically different from the one that played reluctant host to the emergence of environmental law. What must those who made environmental legal advocacy possible think of us as new, inexperienced lawyers? Especially since, as students, we have no actual knowledge about what has already happened in environmental law. From the practitioner's perspective, these are what we see as presumably the most significant differences between then and now.

There is a new approach to finding clients, and to helping them find us. The first place we turn is the web, formerly known as the worldwide web and more formally referred to as the Internet. It is all a part of our current instant culture. Forget the Yellow Pages®. Law firms must have websites or risk becoming wholly invisible. And if there is a website, a blog is a nice feature. Clients seek out counsel based first on a semi-anonymous interaction, reading practitioner bios and ideas before even deciding to call for an initial consult. Conversely, practitioners can easily scope out activities of advocates and activists, identify trends, anticipate potential causes of action, and connect with parties proactively.

There are new best practices for researching legal issues. Again, the web is paramount and ubiquitous. Case law is almost universally available, cheaply, in quicker than an instant. Google™ has a great feature—Google Scholar™—that features case law. Many courts publish opinions right on their websites; states have statutes and legislative history online and the federal government hosts different and multiple sites for every agency. A generation after the web first emerged, everything is not as easily searchable as the electronic versions of Westlaw™ and LexisNexis,™ but neither was research and Shepardizing™ in the age of paper.

Client counseling is changing in form and function. It is conceivable we may not need to interact with clients in person. G-chat, e-mail, remote video and online conferencing and Skype™ have all changed how people interface, collaborate, and advocate for those they represent.

The use of data is evolving as a tool of legal advocacy. Scientific research and available data have grown not only in availability but also in accessibility. Proof of authenticity and rebuttal of criticism presumably grow more challenging with the myriad perspectives and mechanisms for authenticating facts and supporting arguments.

Practice areas are new, emergent, and open to legal exploration. Alternative energy was an ideal of the environmental movement that has taken a long time. Oil is still cheap and subsidized so as to serve as a barrier to the exponential growth of wind and solar options, which are plugging along nonetheless, and creating new environmental concerns in the process. Farmers are environmental partners in land use and conservation. Municipal zoning, while proclaiming the benefits of clustering and planned unit development still has yet to achieve the standard in practice, particularly in rural areas. Most importantly, new areas for legal environmental advocacy have yet to be recognized or developed.

Much has changed since the first Earth Day and the recognition of Rachel Carson's *Silent Spring*. But there is a lot that has not changed. The environment and our future generations who will rely on it for survival still need legal assistance. Technology will make us more efficient in our advocacy but cannot replace the need for persistent energy and diligence in the practice of environmental law. We have much to learn from those who have developed and nurtured environmental legal practice. Hopefully, proficiency in technology and the possibilities that technology offers to the future of environmental law will be part of our contribution.

Nikki Nielson '12
Co-Executive Editor, 2011-12 Student Editorial Board

EPA Update

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

But let me be clear: the core mission of the EPA is protection of public health and the environment. That mission was established in recognition of a fundamental fact of American life—regulations can and do improve the lives of people. We need these rules to hold polluters accountable and keep us safe. For more than 40 years, the Agency has carried out its mission and established a proven track record that a healthy environment and economic growth are not mutually exclusive.

—Administrator Lisa P. Jackson, Sept. 22, 2011[2]

I. Introduction

Chris Saporita

Marla E. Wieder

Joseph A. Siegel

With every election cycle we witness first-hand an increase in anti-environmental rhetoric. In recent months, the misinformation campaign against EPA and its policies has been staggering. Considering the palpable and significant environmental improvements made over the past four decades, the attacks seem all the more puzzling to informed individuals. For more than 40 years, the nation's economy has prospered while our environmental protections have expanded. We do not have to choose between a healthy environment and a healthy economy—we can have both. While EPA's mission is the protection of human health and the environment, many of EPA's actions have also contributed directly to job creation and economic growth. Our Administrator said it best when she said, "Americans are no less entitled to a safe, clean environment during difficult economic times than they are in a more prosperous economy."[3]

In February, the Obama Administration proposed a Fiscal Year 2013 budget of $8.344 billion for the U.S. EPA. This budget is $105 million below the EPA's enacted level for FY 2012 and reflects a government-wide effort to reduce spending and find cost-savings.[4] The budget request recognizes the importance of EPA's partners at the State, local and tribal level, as 40% of EPA's funding request is directed to the State and Tribal Assistance Grants. Specifically, $1.2 billion (nearly 15% of the request) is allocated back to the States and tribes through categorical grants (Local Air Quality Management grants, Pollution Control grants, etc.) and $2 billion (25% of the request) is directed to the States for the Clean Water and Drinking Water State Revolving Funds. Additionally, $300 million is requested for the Great Lakes Restoration Initiative and $755 million for continued support of the Superfund cleanup programs and emergency preparedness capabilities.[5] Major investments in science and technology account for $807 million (about 10% of the request). Also, as part of this request, EPA includes funding increases in key areas that include green infrastructure and hydraulic fracturing.[6] Funding requests for investments to support standards for clean energy and efficiency in this budget (*e.g.* efforts to introduce cleaner vehicles and fuels and to expand the use of home-grown renewable fuels) are also included. For more information on this budget request, visit: http://www.epa.gov/budget.

II. Chemical & Waste News—RCRA, TSCA, CERCLA and More of Your Favorite Acronyms

A. Chemicals in the News

1. The Toxics Release Inventory (TRI) Report

In January, EPA issued its 25th annual report on the amount of toxic chemicals released into the environment by industrial facilities in New York. The latest TRI report, which covers 650 facilities in New York, showed a 15% decrease in chemical releases since the prior year.[7] EPA has improved this year's TRI national analysis report by adding new information on risks, facility efforts to reduce pollution and details about how possible economic impacts could affect TRI data. To view an area fact sheet, visit: http://www.epa.gov/triexplorer/statefactsheet.htm. In addition, EPA's first mobile Web application for accessing TRI data, myRTK, is now available at http://www.epa.gov/tri/myrtk/.

2. The results Are In…TCE Is Carcinogenic

EPA added the final health assessment for trichloroethylene (TCE) to the Integrated Risk Information System (IRIS) database in late September. IRIS is a human health assessment program that evaluates the latest science on chemicals in our environment. The final assessment characterizes TCE as carcinogenic to humans and as a human

noncancer health hazard. This assessment will allow for a better understanding of the risks posed to communities from exposure to TCE in various media and will provide regulators and policy makers with the latest scientific information to make decisions about cleanups and other actions needed to protect public health.[8]

TCE, a volatile organic compound, is one of the most common man-made chemicals found in the environment. It is a widely used chlorinated solvent and is frequently found at Superfund sites across the country. EPA has drinking water standards for TCE and cleanup standards for TCE at federal superfund sites.[9] To view the TCE Assessment, go to: http://www.epa.gov/IRIS/subst/0199.htm.

B. TSCA—EPA Publishes Rule to Improve Reporting of Chemical Information

EPA is increasing the type and amount of information it collects on commercial chemicals, allowing it to better identify and manage potential risks to our health and the environment. The Chemical Data Reporting Rule (CDR Rule), which falls under the Toxic Substances Control Act Inventory Update Rule (IUR), requires more frequent reporting of critical information on chemicals and requires the submission of new and updated information on potential chemical exposures, current production volume, manufacturing site-related data, and processing and use-related data for a larger number of chemicals. The CDR Rule also requires that companies submit the information electronically to EPA and limits confidentiality claims by companies.[10] More information about the CDR Rule is available at: www.epa.gov/iur.

C. RCRA—Finally Moving Toward an Electronic Manifest System?

President Obama's September budget plan included one environmental proposal that may actually get bipartisan support—a proposal to establish an electronic manifest system to track hazardous materials.[11] EPA currently requires carbon copy manifests to accompany hazardous materials when they are transported, as required by RCRA. The proposal would establish an electronic manifest to eliminate the carbon copies and collect fees from users of the system. Once fully implemented, the system could reduce industry reporting costs under RCRA by $77 million to $126 million per year and save the government $31 million.[12] Use of the electronic system will also allow EPA to more efficiently monitor and analyze waste shipments.

D. Superfund and Brownfields Update

1. New Sites added to the National Priorities List (NPL)

In September 2011, EPA added 15 hazardous waste sites to the NPL and proposed 11 additional sites be added to the NPL. In our area, the Garfield Ground Water Contamination Site (contaminated ground water plume) in Garfield, New Jersey and the New Cassel/Hicksville Ground Water Contamination Site in Hicksville, Hempstead, and North Hempstead, New York (contaminated ground water plume) were added to the NPL. Eighteenmile Creek in Niagara County, New York was also proposed for listing on the NPL.[13] The Federal Register notices and supporting documents for the sites can be viewed at: http://www.epa.gov/superfund/sites/npl/current.htm.

2. Phase 2, Year 2 of the Hudson River PCB Cleanup

In addition to the cleanups discussed below, Phase 2, Year 2 of the Hudson River PCB Cleanup began this spring. As you'll recall, Phase 2, Year 1 of the dredging was conducted by General Electric Co. and overseen by EPA, from June 6, 2011 to November 8, 2011, and involved removing PCB-contaminated sediment from a one-and-one-half mile section of the river south of the Town of Fort Edward. In Phase 2, Year 1, approximately 363,000 cubic yards of contaminated sediment were removed, exceeding the targeted volume. The second phase of the project targets 2.4 million cubic yards of PCB-contaminated sediment and is expected to take 5-7 years to complete. For details, see: http://www.epa.gov/hudson/.

3. Gowanus Canal Options

In January 2012, EPA released a feasibility study (FS) for the Gowanus Canal in Brooklyn, New York. The FS evaluates the technologies (including dredging and capping) that could be used to clean up the canal, and will be used to develop a comprehensive cleanup plan for the Gowanus. It is anticipated that a Record of Decision will be issued by the end of the year.

More than a dozen contaminants, including PCBs, polycyclic aromatic hydrocarbons (PAHs) and various metals, including mercury, lead and copper, were found at high levels in the sediment in the Gowanus Canal. PAHs and metals were also found in the canal water. Contamination in the Gowanus Canal poses health risks, especially to people who eat fish or crabs from the canal (and yes, people do fish and crab in its murky waters).[14] For more information, see the Gowanus Canal web page at: http://www.epa.gov/region02/superfund/npl/gowanus.

Want a firsthand look at all the Gowanus Canal has to offer? Consider a free canoe tour this spring. The Gowanus Dredgers Canoe Club is a volunteer organization dedicated to providing waterfront access and education related to the estuary and bordering shoreline neighborhoods. The organization, based on the Gowanus Canal, runs an array of events including paddling on the waterway and leading tours of the area. Check them out at: http://old.waterfrontmuseum.org/dredgers/home.html.

4. Lower Passaic River Removal Action

On October 31, 2011, EPA announced the start of construction for the removal of contaminated sediment from the lower Passaic River. The sediment in this area of Newark, New Jersey, which is adjacent to the Diamond Alkali Superfund site, is highly contaminated with dioxin.[15] Under a June 2008 agreement between EPA and Occidental Chemical Corporation and Tierra Solutions, Inc., the companies will remove 200,000 cubic yards of contaminated sediment from the river.

The cleanup of the lower Passaic River has been divided into two phases. In this first phase, about 40,000 cubic yards of the most highly contaminated sediment will be removed, processed, treated and then transported by rail to a licensed disposal facility. In the second phase of the project, 160,000 cubic yards of sediment will be removed from the same area of the river. The two-phase removal project is just one installment in a more comprehensive investigation of the contamination and evaluation of cleanup options for the lower eight miles of the Passaic River and possibly other stretches of the river and Newark Bay.[16] For more information, see http://www.passaicremovalaction.com/home.htm. Information on the removal project and other Superfund site cleanup activities is also available on the project web sites at http://www.ourpassaic.org or http://www.epa.gov/region02/superfund/npl/diamondalkali/.

5. New York City Brownfield Cleanup Program Recognized

In the Fall of 2011, EPA formally recognized New York City's Brownfield Cleanup Program. Formal recognition makes the city eligible to use federal brownfield grants for site investigation and cleanup, activities typically carried out by states. The program is being used to revitalize neighborhoods and create local jobs primarily in low-income neighborhoods, including central Brooklyn, Harlem, the South Bronx, and Williamsburg. It is estimated that redevelopment projects sponsored by the program could generate more than 1,000 new jobs.[17]

III. Water News

A. Protection and Restoration

1. Multifaceted Program Restores Shellfish Harvesting in Northern Hempstead Harbor[18]

EPA's Clean Water Act (CWA) Section 319 Program provides funding for restoration of nonpoint source-impaired water bodies. Hempstead Harbor is located off the Long Island Sound in Nassau County, New York. Stormwater runoff, boater waste, waterfowl, and failing septic systems were suspected to be the primary sources of fecal coliform bacteria, with wastewater discharges also contributing. As a result, the New York State Department of Environmental Conservation (DEC) added the northern segment of Hempstead Harbor to the state's 1998 list of impaired waters for exceeding the fecal coliform bacteria water quality standard for shellfish harvesting.

The Hempstead Harbor Protection Committee, a partnership between state and federal agencies, Nassau County, local municipalities and citizen groups, led the development of the Water Quality Improvement Plan in 1998 as well as the Harbor Management Plan in 2004. Since 1995 the committee has coordinated efforts to address the nonpoint and point sources of pollution. Significant efforts to control and manage runoff were initiated prior to the permitting of municipal separate storm sewer system entities in the surrounding watershed. Stormwater management practices carried out prior to the permitting included extensive education and outreach efforts, implementation of municipal stormwater management program plans, and waterfowl management. These nonpoint source control efforts, together with securing the designation of the Harbor as a Vessel Waste No Discharge Zone, the installation of sewers, and the addition of point source controls, helped improve the harbor's condition.

Over the past five years, water sampling has shown that fecal coliform bacteria levels meet the state's water quality standards for a certified (open) shellfishing area. As a result, DEC will propose that the northern segment of the harbor be removed from the state's impaired waters list in 2012. After being closed for 40 years, the Hempstead Harbor will reopen with shellfish harvest yields in June of this year.

2. Urban Waters Federal Partnership Launches Ambassadors Program to Support Revitalizing Urban Waterways in U.S. Communities[19]

The Urban Waters Federal Partnership, made up of 11 federal agencies, recently announced a program in seven cities that will accelerate and coordinate on-the-ground projects that are critical to improving water quality and public health, restoring forest resources and fostering community stewardship in urban watersheds. Sponsored by EPA, the U.S. Department of Agriculture and the U.S. Department of the Interior, the Urban Waters Ambassadors program will work with state and local governments,

non-governmental organizations and other local partners. The Urban Waters Federal Partnership is an effort to help urban and metropolitan areas, particularly those that are underserved or economically distressed, connect with their waterways and work to improve them.

The first Urban Waters Ambassador has been selected for the Los Angeles River watershed pilot project with additional ambassadors to follow for the Anacostia River watershed (Washington, D.C. and Maryland), the Patapsco River watershed (Baltimore, Maryland), the Bronx and Harlem River watersheds (New York City), the South Platte River (Denver, Colorado), Lake Pontchartrain (New Orleans, Louisiana) and Northwest Indiana. Each of the pilot locations was selected due to the strong local and community leadership spearheading restoration efforts under way. Lessons learned from these pilot locations will benefit communities across the country.

3. EPA Provides $15 Million to Help Small Drinking Water and Wastewater Systems Across the Country[20]

EPA announced recently that it will provide up to $15 million in funding for training and technical assistance to small drinking and wastewater systems, defined as systems that serve fewer than 10,000 people, and private well owners. The funding will help provide water system staff with training and tools to enhance system operations and management practices, and supports EPA's continuing efforts to protect public health, restore watersheds and promote sustainability in small communities.

Most of the funding, up to $14.5 million, will provide training and technical assistance to small public water systems to achieve and maintain compliance with the Safe Drinking Water Act and to small publicly owned wastewater systems, communities served by on-site systems, and private well owners to improve water quality, and EPA expects to make available up to $500,000 to provide training and technical assistance to tribally owned and operated public water systems.

Applications were due by April 9, 2012, and EPA expects to make the awards during Summer 2012. For more information, visit: http://water.epa.gov/grants_funding/sdwa/smallsystemsrfa.cfm.

4. EPA Announces Grants to Clean Up Beaches Across the Nation and Launches Improved Website for Beach Advisories and Closures[21]

On February 6, 2012, EPA announced that it will provide $9.8 million in grants to 38 states, territories and tribes to help protect the health of swimmers at America's beaches. The agency also launched an improved website for beach advisories and closings, which will allow the public to more quickly and easily access the most current water quality and pollution testing information for more than 6,000 U.S. beaches.

The website, called BEACON, has the capability to update as frequently as every two hours based on new data provided by states, territories and tribes. Users will have access to mapped location data for beaches and water monitoring stations, monitoring results for various pollutants such as bacteria and algae, and data on public notification of beach water quality advisories and closures. The grants will help local authorities monitor beach water quality and notify the public of conditions that may be unsafe for swimming. Grant applications must be received by April 6, 2012, and EPA expects to award the grants later this year.

To view EPA's enhanced beach advisory and closing information, visit: http://watersgeo.epa.gov/BEACON2/. For more information on the grants, visit: http://water.epa.gov/grants_funding/beachgrants/index.cfm.

5. EPA Releases Adaptation Strategies Guide for Water Utilities[22]

The Adaptation Strategies Guide for Water Utilities is now available on EPA's website. The guide was developed under EPA's Climate Ready Water Utilities initiative to assist drinking water and wastewater utilities in gaining a better understanding of what climate change-related impacts they may face in their region and what adaptation strategies can be used to prepare their system for those impacts. The guide contains easy-to-understand climate science and information, utility adaptation case studies, as well as an adaptation planning worksheet. The information provided in the guide will help jump start the adaptation planning process at drinking water and wastewater utilities that may not have started to consider climate change impacts or adaptation. It can also be used by any group or organization that is interested in water sector climate challenges. To read the guide, please visit http://water.epa.gov/infrastructure/watersecurity/climate/.

6. EPA Launches New Green Infrastructure Website[23]

EPA's Office of Water recently launched its new Green Infrastructure website to better communicate the "what, why, and how" of green infrastructure to municipalities, developers, and the general public. Green infrastructure uses vegetation, soils and natural processes to manage water and create healthier urban environments. The new Green Infrastructure website is a one-stop shop for resources on green infrastructure that features improved navigability and up-to-date content.

The site offers a wealth of publications and tools developed by EPA, state and local governments, the private sector, nonprofit organizations, and academic institutions. The new site emphasizes the multiple environmental, social, and economic benefits associated with green infrastructure, and provides access to the latest research developed by EPA's Office of Research and Development. To start exploring EPA's new green infrastructure website, visit: http://water.epa.gov/infrastructure/green infrastructure.

7. EPA Releases Handbook to Help Water Utilities Plan for Sustainability[24]

In January, EPA released a comprehensive handbook to help water sector utilities build sustainability considerations into their planning. "Planning for Sustainability: A Handbook for Water and Wastewater Utilities" will help utilities ensure that water infrastructure projects across the nation, including those funded through the state revolving fund programs, are sustainable and support the long-term sustainability of the communities these utilities serve.

The handbook represents an important milestone in EPA's ongoing efforts to help ensure the sustainability of the nation's water infrastructure based on the Agency's clean water and safe drinking water infrastructure sustainability policy, which was issued in September 2010. In developing the handbook, EPA worked closely with a number of utility and state program managers around the country. The handbook describes four core elements where utilities can explicitly build sustainability considerations into their existing planning processes. Each element contains relevant examples from utilities around the country and other implementation tips for utilities to consider. To view a copy of the handbook, visit: http://water.epa.gov/infrastructure/sustain/sustainable_systems.cfm.

8. Syracuse High School Students to Learn about Water Pollution through EPA Environmental Justice Grant[25]

On January 23, 2012, EPA announced that it will provide a $25,000 grant to the Onondaga Environmental Institute to teach high school students in Syracuse, New York about the serious effects of water pollution on people's health and the environment and the importance of protecting rivers, lakes and streams in central New York. Syracuse is located on Onondaga Lake, which is heavily polluted by a range of contaminants, from mercury to PCBs to untreated sewage that can lead to health problems and degrade water quality. Water pollution in low-income areas of Syracuse has made the city a focus of EPA efforts to reduce pollution in low-income communities.

The Onondaga Environmental Institute will use the environmental justice grant to give students a hands-on learning experience and provide the communications skills they need to become environmental stewards. The group will work with the Orenda Springs Learning Center to teach the students about water pollution, environmental laws and policies, and the importance of fish consumption advisories in protecting people's health. For more information about EPA's environmental justice grants, visit: http://www.epa.gov/compliance/environmentaljustice/grants/ej-smgrants.html.

9. Organizations in Northern Manhattan, the South Bronx and Jamaica to Receive EPA Environmental Justice Grants to Help Communities Prevent Lead Poisoning and Restore Wetlands[26]

In January, EPA announced that it will provide $75,000 to two New York City organizations to help them address public health and environmental problems in Northern Manhattan, the South Bronx and Jamaica, New York. West Harlem Environmental Action, Inc. (WE ACT) will receive $50,000 to test homes for lead and conduct research on the best ways to detect lead hazards in households in Northern Manhattan and the South Bronx. The Rockaway Waterfront Alliance will be provided $25,000 to train students to restore wetland habitats.

It is estimated that three-quarters of U.S. residential dwellings built before 1978 contain some lead-based paint. Lead poisoning in children can have serious, long-term consequences including learning disabilities, hearing impairment and behavioral problems.

WE ACT will use the grant funds to conduct a research project that will expand scientific knowledge on the best ways to detect lead poisoning hazards in homes. The research will identify potential sources of lead in dust particles in homes, public drinking water systems and consumer products. The organization will enlist 100 residents to have their homes tested for lead. The field testing will look at the differences between having people test for lead using an instructional DVD or being instructed by a field technician. Simple lead dust wipe tests cost $40 to perform compared to a professional lead inspection, which costs approximately $500. If the cheaper test can first be performed to reliably determine whether a more robust and expensive test is needed, this will increase the number of homes identified as having lead hazards and save money for residents.

The Rockaway Waterfront Alliance will use its grant funds to create a Rockaway Youth Marine Conservation Corps in Jamaica, New York to restore wetland habitats. The group will launch a year-long wetland restoration program that will train low-income high school and middle school students about water pollution problems around Jamaica Bay. The bay is severely impacted by sewage and chemical pollutants, which have damaged water quality. Students will participate in oyster gardening along the Sommerville and Norton/Conch Basins and design and implement projects that involve their schools and communities in the cleanup and restoration of Jamaica Bay. For more information about EPA's environmental justice grants, visit: http://www.epa.gov/compliance/environmentaljustice/grants/ej-smgrants.html.

10. EPA Releases Co-Sponsored Report: "Water Reuse: Potential for Expanding the Nation's Water Supply through Reuse of Municipal Wastewater"[27]

On January 10, 2012, the National Research Council released a report co-sponsored by EPA titled, "Water Reuse: Potential for Expanding the Nation's Water Supply through Reuse of Municipal Wastewater." The report highlights the potential that reuse of municipal wastewater can play in augmenting traditional water supplies, particularly in areas that are experiencing or expect to face

challenges in meeting demand for water. EPA agrees that advancements in water treatment processes make reuse of municipal wastewater a more viable option when risks are appropriately managed. EPA will review the findings and recommendations to determine how they can inform the Agency's ongoing efforts to promote a more integrated view of the nation's water resources. The report will also inform efforts under way to revise and update EPA's 2004 guidelines for water reuse. For more information on the report, visit: http://dels.nas.edu/Report/water-reuse/13303. To access and download a copy of the report, visit: http://books.nap.edu/catalog.php?record_id=13303.

11. Climate Ready Estuaries 2011 Progress Report Released[28]

EPA recently published the "Climate Ready Estuaries 2011 Progress Report." Climate Ready Estuaries is an EPA program intended to help the national estuary programs and coastal managers plan for climate change. Climate Ready Estuaries works with national estuary programs to: (1) assess climate change vulnerabilities, (2) develop and implement adaptation strategies, and (3) engage and educate stakeholders. Climate Ready Estuaries uses National Estuary Program examples to help other coastal managers, and provides technical guidance and assistance about climate change adaptation in support of Clean Water Act goals.

The "Climate Ready Estuaries 2011 Progress Report" describes program accomplishments and the new National Estuary Program projects that were launched during 2011. In addition, this progress report uses examples from Climate Ready Estuaries projects that started in 2008–2010 to show how the risk management paradigm can be used for climate change adaptation. The Report is available at: http://epa.gov/cre/.

12. EPA Launches Recovery Potential Screening Website to Assist Restoration Planners[29]

In January, EPA announced the release of a new technical assistance tool for state and watershed-level surface water quality protection and restoration programs: the recovery potential screening website. Recovery potential screening is a flexible approach for comparing relative differences in restorability among impaired waters across a state, watershed or other area. The website provides step-by-step screening directions, restorability indicators and literature, and tools for scoring and displaying results. EPA developed recovery potential screening to help users improve their restoration programs by revealing and comparing factors that influence restoration success. The method is applicable to watershed priority setting, impaired waters listing, TMDL implementation, nonpoint source control, healthy watersheds assessment, and watershed plan development. For additional information, visit: www.epa.gov/recoverypotential/.

B. Science and Technical Assistance

1. EPA Releases New Tool That Provides Access to Water Pollution Data[30]

Also in January, EPA released of a new tool that provides the public with important information about pollutants that are released into local waterways. The discharge monitoring report pollutant loading tool brings together millions of records and allows for easy searching and mapping of water pollution by local area, watershed, company, industry sector and pollutant. The public can use this new tool to protect their health and the health of their communities.

Searches using the pollutant loading tool result in "top 10" lists to help users easily identify facilities and industries that are discharging the most pollution and impacted waterbodies. When discharges are above permitted levels, users can view the violations and link to details about enforcement actions that EPA and states have taken to address these violations. The tool is available at: http://www.epa.gov/pollutantdischarges.

2. EPA Unveils New Website on Nutrient Pollution[31]

EPA is pleased to unveil a new website on nutrient pollution policy and data to help individuals access information on EPA actions to reduce nutrient pollution, state efforts to develop numeric nutrient criteria, and EPA tools, data, research, and reports related to nutrient pollution. Visit the website at http://epa.gov/nandppolicy. Nutrient pollution is one of America's most widespread, costly and challenging environmental problems, and is caused by excess nitrogen and phosphorus in the air and water. EPA is also pleased to unveil a new website on nutrient pollution for homeowners, students, and educators. The site features information explaining the problem of nutrient pollution; the sources of the pollution; how it affects the environment, economy, and public health; and what people can do to reduce the problem. The site also features an interactive map of local case studies in reducing nutrient pollution. Visit the website at http://epa.gov/nutrient pollution.

3. EPA Releases 2010-2011 Climate Change and Water Progress Report[32]

EPA recently released the "U.S. EPA National Water Program Strategy: Response to Climate Change 2010–2011 National and Regional Highlights of Progress." This is the third and final progress report covering the 2008 version of EPA's climate change strategy. Future annual progress reports will reflect activities related to the 2012 version that is under development. The progress report highlights the accomplishments of EPA's water programs during 2010 and 2011, and touches upon EPA activities and efforts undertaken across headquarters, regions, and the large aquatic ecosystem programs to address climate change impacts on our water programs. The report is available at: http://water.epa.gov/scitech/climatechange/implementation.cfm.

4. New Data Added to EPA's Nitrogen and Phosphorus Pollution Data Access Tool[33]

EPA has added updated U.S. Geological Survey (USGS) Spatially Referenced Regressions On Watershed attributes (SPARROW) data to the nitrogen and phosphorus pollution data access tool, a tool intended to help states develop effective nitrogen and phosphorus source reduction strategies. SPARROW is a GIS-based watershed model that integrates statistical and mechanistic modeling approaches to simulate long-term mean annual stream nutrient loads as a function of a wide range of known sources and factors affecting nutrient fate and transport.

USGS recently completed syntheses of the results from 12 independently calibrated regional-scale SPARROW models that describe water quality conditions throughout major river basins of the conterminous U.S. based on nitrogen and phosphorus sources from 2002. Two data layers of EPA's data access tool—one for nitrogen and one for phosphorus—now provide an approximate yet regionally consistent synthesis of the locations of the largest contributing sources.

The SPARROW geospatial layers can be used to prioritize watersheds for targeting nutrient reduction activities (such as stream monitoring) to the areas that account for a substantial portion of nutrient loads, and to develop state nitrogen and phosphorus pollution reduction strategies. This information is relevant to the protection of downstream coastal waters, such as the Gulf of Mexico, and to local receiving streams and reservoirs. The tool is available at: www.epa.gov/nutrientpollution/npdat.

5. EPA PCB TMDL Handbook Released[34]

EPA recently issued a technical document titled Polychlorinated Biphenyl (PCB) Total Maximum Daily Load (TMDL) Handbook, which provides EPA regions, states, and other stakeholders with updated information for addressing Clean Water Act (CWA) Section 303(d) waters impaired by PCBs. PCBs rank sixth among the national causes of water quality impairment in the country, and of the 71,000 waterbody-pollutant combinations listed nationally, over 5,000 (eight percent) are PCB-related. This handbook identifies various approaches to developing PCB TMDLs and provides examples of TMDLs from around the country, complete with online references. It aims to help states complete more PCB TMDLs and ultimately restore those waters impaired by PCBs. The Handbook is available at: http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/upload/pcb_tmdl_handbook.pdf.

C. Regulation and Compliance

1. EPA Issues Permit for Stormwater Discharges from Construction Sites[35]

In February, EPA issued a new permit, in accordance with the Clean Water Act, that will provide streamlined permitting to thousands of construction operators, while protecting our nation's waterways from discharges of polluted stormwater from construction sites. The 2012 construction general permit is required under the Clean Water Act and replaces the existing 2008 CGP, which expired on February 15, 2012.

The 2012 permit updates include steps intended to limit erosion, minimize pollution sources, provide natural buffers or their equivalent around surface waters, and further restrict discharges to areas impaired by previous pollution discharge. Many of the permit requirements implement new effluent limitations guidelines and new source performance standards for the construction and development industry that became effective on February 1, 2010, which include pollution control techniques to decrease erosion and sediment pollution. The permit will be effective in areas where EPA is the permitting authority: Idaho, Massachusetts, New Hampshire, New Mexico, Washington, D.C., and most U.S. territories and in Indian country lands. For more information, visit: http://cfpub.epa.gov/npdes/stormwater/cgp.cfm.

2. EPA Releases Permit Writer's Manual for Concentrated Animal Feeding Operations[36]

Also in February, EPA released a technical manual for concentrated animal feeding operations (CAFOs) to provide states, producers, and the general public with general information on Clean Water Act and National Pollutant Discharge Elimination System (NPDES) permit program requirements for CAFOs, information to explain CAFO permitting requirements under the Clean Water Act, and technical information to help states and producers understand options for nutrient management planning.

It is EPA's intent that this is a living document that will be updated periodically to incorporate new and emerging approaches to CAFO management, including those focused on manure reuse and recycling and use for energy generation. Interested parties are encouraged to submit questions and suggestions concerning the content of the manual at any time. EPA will consider input and update the manual periodically to ensure that it is as helpful as possible. For more information, visit: http://cfpub.epa.gov/npdes/afo/info.cfm#guide_docs.

3. EPA Proposes Updated Vessel General Permit and Permit for Small Vessels

On November 30, 2011, EPA issued two draft vessel general permits that would regulate discharges from commercial vessels, excluding military and recreational vessels. The proposed permits are expected to go into effect in 2013, and would help protect the nation's waters from shipborne pollutants and reduce the risk of introduction of invasive species from ballast water discharges.

The draft Vessel General Permit, which covers commercial vessels greater than 79 feet in length, would replace the current 2008 Vessel General Permit, when it expires in December 2013. Under the Clean Water Act,

permits are issued for a five-year period after which time EPA generally issues revised permits based on updated information and requirements. The new draft small Vessel General Permit would cover vessels smaller than 79 feet in length and would provide such vessels with the Clean Water Act permit coverage they will be required to have as of December 2013.

Public comments were received through February 21, 2012. EPA intends to issue the final permits in November 2012, a full year in advance of the proposed effective date, to allow vessel owners and operators time to prepare for new permit requirements. For more information, visit: http://www.epa.gov/npdes/vessels.

4. EPA Approves California Sewage Ban and Creates Largest Coastal "No-Discharge Zone" in the Nation[37]

In February, EPA finalized a decision and approved a state proposal to ban all sewage discharges from large cruise ships and most other large ocean-going ships to state marine waters along California's 1,624 mile coast from Mexico to Oregon and surrounding major islands. This action establishes a new federal regulation banning even treated sewage from being discharged in California's marine waters. EPA estimates that the rule will prohibit the discharge of over 22 million of the 25 million gallons of treated vessel sewage generated by large vessels in California marine waters each year, which could greatly reduce the contribution of pollutants still found in treated vessel sewage. For more information, visit: http://www.epa.gov/region9/water/no-discharge.

5. EPA Approves New York State's Petition to Designate the New York Waters of Lake Ontario a "No-Discharge Zone" for Vessel Sewage[38]

On December 16, 2011, EPA issued a final affirmative determination, pursuant to Clean Water Act Section 312(f)(3), that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels using the New York State waters of Lake Ontario are reasonably available. The New York State Department of Environmental Conservation (NYSDEC) had determined that the protection and enhancement of the quality of those waters requires greater environmental protection, and petitioned EPA for permission to completely prohibit the discharge of sewage—whether treated or not—from all vessels into those waters.

The New York State portion of Lake Ontario includes the waters of the Lake within the New York State boundary, stretching from the Niagara River (including the Niagara River up to Niagara Falls) in the west, to Tibbetts Point at the Lake's outlet to the Saint Lawrence River in the east. The No Discharge Zone encompasses approximately 3,675 square miles and 326 linear shoreline miles, including the navigable portions of the Lower Genesee, Oswego, and Black Rivers; numerous other tributaries, harbors, and embayments of the Lake including Irondequoit Bay, Sodus Bay, North/South Ponds, Henderson Bay, Black River Bay and Chautmont Bay; and many formally designated habitats and waterways of local, state, and national significance. For more information, visit: http://www.epa.gov/region2/water/ndz/lakeontario.html.

6. EPA Issues Administrative Compliance Order to the Buffalo Sewer Authority Requiring Development and Implementation of its Long Term Control Plan

On March 9, 2012, EPA issued an Administrative Compliance Order to the Buffalo Sewer Authority (BSA), requiring BSA to develop an approved Clean Water Act Long Term Control Plan (LTCP) by April 30, 2012, and implement it by December 31, 2027. BSA serves a population of approximately 600,000. Its 58 CSO points represent approximately 10% of the statewide CSO points (outside of New York City). Over 500 million gallons of untreated sewage combined with storm water are discharged from these points annually during heavy rains. Since 1999, BSA has been required, through its State Pollutant Discharge Elimination System permit, to submit an approvable LTCP, but has failed to do so. EPA's order requires BSA to develop, submit and implement an LTCP that results in water quality standards attainment for its CSO discharges. The projected cost of implementation of the LTCP is approximately $500 million over 15 years. Additionally, the order will encourage BSA to consider the use of green infrastructure, wherever feasible, to reduce CSO volumes and handle separate storm water.

7. District Court Grants United States' Motion for Summary Judgment for Failure to Develop a Spill Prevention Control and Countermeasures Plan

On March 13, 2012, the New Jersey District Court granted the government's motion for summary judgment on liability and its prayer for injunctive relief in *United States v. Greenwich Boat Works, Inc*. Greenwich Boat Works is a marina located on the shore of the Cohansey River, in Greenwich, New Jersey, with above-ground oil storage capacity of over 6,000 gallons. The government's complaint alleged that the defendant failed to develop and implement a Spill Prevention Control and Countermeasures (SPCC) Plan, as required under Clean Water Act Section 311 and 40 CFR Part 112.

IV. Air and Climate Change

A. The Clean Air Act (Non-Greenhouse Gas)

1. EPA to Award Grants to Citizen Scientists in NYC Seeking Solutions to Air-Related Environmental and Public Health Problems

EPA announced on March 2, that it will award a total of $125,000 in grants to "citizen scientists" in New York City seeking solutions to environmental and public health problems. Individuals and community groups can apply for grants to collect information on air pollution, as well

as water pollution. These grants are intended to encourage research that enlists the public in collecting data and thereby expand scientific knowledge and literacy. There will be approximately five to ten award recipients.[39]

In announcing the grants, EPA Regional Administrator Judith Enck indicated that "by providing citizen scientists with the funding needed to advance their knowledge about local air and water pollution, the EPA is expanding its own scientific base and building collaborations with communities that will lead to effective and innovative solutions."[40] Projects receiving funding through the citizen science grants will be expected to promote a comprehensive understanding of local pollution problems, identify and support activities at the local level, consider environmental justice, and engage, educate and empower communities. Applications were due April 20. Additional information on the grants, including guidance on eligibility and procedures for applying, is available at: http://www.epa.gov/region2/grants/ or through: http://www.grants.gov.

2. Air Emissions of Dioxins Down by 90% Since the 1980s

On February 17, EPA released its final non-cancer science assessment for dioxins, the first such review since the 1980s.[41] The findings demonstrate a 90% reduction in dioxin emissions since 1987. The reduction of dioxin emissions over the last two decades from all the major sources of the pollutant is a result of efforts by EPA, state governments and industry. EPA has also worked with other federal partners, such as the U.S. Department of Health and Human Services and the U.S. Department of Agriculture, to address dioxin. The largest remaining source of dioxin emissions is backyard burning of household trash.

Most Americans have low-level exposure to dioxins. Non-cancer effects of exposure to large amounts of dioxin include chloracne, developmental and reproductive effects, damage to the immune system, interference with hormones, skin rashes, skin discoloration, excessive body hair, and possibly mild liver damage. The findings released by EPA conclude that, given the reduction in dioxin emissions, generally, over a person's lifetime, current exposure to dioxins does not pose a significant health risk.[42] More information on dioxin is available at: http://www.epa.gov/dioxin/.

3. EPA Finalizes Air Toxic Standards for PVC Facilities Under Section 112 of the Clean Air Act

On February 14, EPA issued final standards for polyvinyl chloride and copolymer (PVC) production facilities under the Clean Air Act's Section 112 hazardous air pollutant (HAP) provisions.[43] The new standards will improve air quality and protect human health in the communities where PVC facilities are located. The final rule sets maximum achievable control technology standards (MACT) for major sources and generally available control technology standards (GACT) for smaller sources, known as area sources. Currently, there are 17 PVC production facilities throughout the United States. All existing and new PVC production facilities are covered by the final rule.[44] More information on the final rule: http://www.epa.gov/ttn/oarpg/t3fs.html.

B. Climate Change Mitigation

1. EPA Releases First Data from National Greenhouse Gas Reporting Program

On January 11, EPA released the first data available from its Greenhouse Gas Reporting Program. The data covers emissions from large sources during 2010. The Greenhouse Gas Reporting Program was finalized by EPA in 2009 pursuant to a mandate in the FY2008 Consolidated Appropriations Act. Regulated sources with GHG emissions over 25,000 TPY were required to begin collecting data in January 2010 and must report their emissions each year. Twenty-nine source categories reported their data for 2010, including nine broad industry groups such as power plants, refineries, landfills, metals manufacturers, minerals producers, pulp and paper manufacturers, chemical manufacturers, government and commercial facilities, and other industrial facilities. These industry groups include both direct emitters and fossil fuel suppliers. Approximately another dozen categories will have to report data for 2011 later this year. The 2010 data show that power plants and petroleum refineries were the largest sources of direct stationary source GHG emissions, and CO2 represents 95% of GHG emissions in the U.S.

EPA also released a user-friendly tool for viewing the 2010 data. This online data publication tool is accessible at http://ghgdata.epa.gov/ghgp/main.do. The tool allows users to view and sort GHG data from over 6,700 facilities for calendar year 2010 by facility, location, industrial sector, and the type of GHG emitted. This information can be used by communities to identify nearby sources of GHGs, help businesses compare and track emissions, and provide information to state and local governments. Additional information is available at http://epa.gov/climatechange/emissions/ghgdata/ and http://epa.gov/climatechange/emissions/ghgrulemaking.html.

2. EPA Seeks Comment on 17th Annual U.S. Greenhouse Gas Inventory

EPA's draft report, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2010,* was released in February for public comment.[45] The draft report represents the official estimate of U.S. national GHG emissions in 2010 and is developed each year to meet our Nation's obligations under the United Nations Framework Convention on Climate Change (UNFCCC), which the U.S. ratified in 1992. According to the report, overall GHG emissions in the U.S. increased by 3.3 percent in 2010. The increase is attributed to increased energy consumption in all economic sectors, increased energy demand due to economic expansion, and

increased air conditioning use during the warmer 2010 summer. Total U.S. emissions were 6,866 million metric tons of carbon dioxide (CO_2) equivalent. Overall, emissions in the U.S. have grown by 11 percent from 1990 to 2010. In addition to tracking emissions changes, the draft report calculates carbon dioxide emissions that are removed from the atmosphere by "sinks," e.g., through the uptake of carbon by forests, vegetation, and soils.[46]

EPA prepares the report in consultation with experts from other Agencies. After responding to public comments, the U.S. government will submit the final inventory report to the Secretariat of the UNFCCC. The public comment period ended on March 28, 2012. Additional information is available at: http://www.epa.gov/climatechange/emissions/usinventoryreport.html.

3. EPA Proposes to Leave Greenhouse Gas (GHG) Tailoring Rule Thresholds Unchanged

On February 24, 2012, EPA proposed to leave unchanged the threshold for requiring Prevention of Significant Deterioration (PSD) and Title V operating permits for greenhouse gas (GHG) emitters. The proposal is consistent with EPA's common-sense, phased-in approach to GHG permitting under the Clean Air Act[47] and implements Step 3 of the Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule ("Tailoring Rule").[48] Step 3 of the Tailoring Rule was designed to determine whether it might be "possible to lower the GHG major source threshold to bring additional sources into the CAA permitting programs without overwhelming state permitting authorities."[49] Upon promulgating the Tailoring Rule, EPA had indicated that it would, in any event, not lower the threshold below 50,000 tons per year (TPY) of CO_2e (CO_2 equivalent) in Step 3.

Under Step 1 of the Tailoring Rule, which began on Jan. 2, 2011, only sources of GHG emissions that had to obtain a PSD permit anyway ("anyway sources") for non-GHG pollutants were required to get permits for GHGs, assuming their GHG emissions were above the 75,000/100,000 TYP CO_2e Tailoring Rule thresholds. Under Step 2, which became effective July 1, 2011, sources that exceeded the GHG Tailoring Rule thresholds but did not exceed other pollutant thresholds were required to get permits. EPA's evaluation for Step 3 revealed that state permitting authorities do not yet have the capabilities in place to bring additional sources into the permitting system, and so EPA proposed to not lower the applicability thresholds.[50] EPA therefore proposed to leave the Step 2 thresholds in place. EPA noted that states haven't had sufficient time to develop the necessary permitting infrastructure, increase their GHG permitting expertise, and make it administratively feasible to issue additional permits.[51]

EPA also proposed two approaches to streamline permitting. The first involves increasing flexibility and usefulness of the PSD Plant-wide Applicability Limit (PAL) procedures.[52] The second approach would provide regulatory authority to EPA, when it serves as the permitting authority, to issue synthetic minor permits. This approach would give sources a new procedural option to limit emissions of GHGs below applicability thresholds.[53]

EPA's final decision on Step 3 will not otherwise change the Agency's long-standing approach to PSD permitting. The GHG permitting program follows the same Clean Air Act process that states and industry have followed for decades to help ensure that new or modified facilities are meeting requirements to protect air quality and public health from harmful pollutants. As of December 1, 2011, EPA and state permitting authorities had issued 18 PSD permits addressing GHG emissions. These permits have required new facilities, and major modifications at existing facilities, to implement energy efficiency measures to reduce their GHG emissions.[54] More information on the proposal and other Tailoring Rule actions is available at: http://www.epa.gov/nsr/.

4. Average Greenhouse Gases from Motor Vehicles Drops to New Low

EPA reported in its March 2012 annual report, *Light-Duty Automotive Technology, Carbon Dioxide Emissions, and Fuel Economy Trends: 1975 Through 2011,* that carbon dioxide from motor vehicles decreased for the seventh consecutive year. In 2010, the latest year for which EPA has final data from automakers, the average CO2 emissions from new vehicles was 394 grams per mile.[55] Average emissions are expected to further decline from implementation of EPA's Light Duty rule, which limits greenhouse gas emissions in model years 2012–2016, such that by 2016, average emissions will be down to 250 grams per mile.[56] If finalized, EPA's proposed reductions for model years 2017-2025 will result in a decline to an average emissions rate of 163 grams per mile by 2025.[57]

V. Environmental Justice

On August 4, 2011, the Obama Administration announced that Federal agencies have agreed to develop environmental justice strategies to protect the health of people living in communities overburdened by pollution.[58] The Memorandum of Understanding on Environmental Justice and Executive Order 12898 ("EJ MOU") advances agency responsibilities outlined in the 1994 Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations." The Executive Order directs each of the named Federal agencies to make environmental justice part of its mission and to work with the other agencies on environmental justice issues as members of the EJ Interagency Working Group. The EJ MOU broadens the reach of the Working Group to include participant agencies not originally named in the Executive Order and adopts a charter for the workgroup in order to provide it with more structure and direction. Specific areas of focus include considering the EJ impacts of climate adaptation and com-

mercial transportation, and strengthening EJ efforts under the National Environmental Policy Act and Title VI of the Civil Rights Act of 1964. The MOU also outlines processes to help communities more effectively engage agencies as they make decisions. The EJ MOU is available at: http://epa.gov/environmentaljustice/resources/publications/interagency/ej-mou-2011-08.pdf.

In September 2011, EPA announced the release of Plan EJ 2014, a three-year, comprehensive plan to advance environmental justice efforts in nine areas, including rulemaking, permitting, enforcement, and science. Plan EJ 2014 aims to protect people's health in communities overburdened by pollution, to empower communities to take action to improve their health and environment, and to establish partnerships to promote sustainable communities where a clean environment and healthy economy can thrive.[59] Plan EJ 2014 is EPA's strategy to meet the mandate of Executive Order 12898, discussed above. For more on Plan EJ 2014, see: www.epa.gov/compliance/environmentaljustice/plan-ej/index.html.

On February 27, 2012, federal agencies, led by the Council on Environmental Quality (CEQ) and the EPA, released environmental justice strategies, implementation plans and progress reports, outlining steps agencies will take to protect communities facing greater health and environmental risks.[60] These strategies represent a significant step forward in the Administration's commitment to integrating environmental justice into federal decision-making and programs in areas such as transportation, labor, health services, housing, and others. For specific agency initiatives and programs, see, http://www.epa.gov/environmentaljustice/interagency/iwg-compendium.html.

VI. Pollution Prevention

A. E-Waste—New Federal Strategy to Promote U.S.-Based Electronics Recycling Market and Jobs

In July 2011, the Obama Administration released the "National Strategy for Electronics Stewardship"—a strategy for the responsible electronic design, purchasing, management and recycling that will promote the electronics recycling market. The announcement also included the first voluntary commitments made by Dell, Sprint and Sony to EPA's industry partnership aimed at promoting environmentally sound management of e-waste. The Strategy also commits the federal government to take actions that will encourage the more environmentally friendly design of electronic products, promote recycling of e-waste, and advance a sustainable domestic market for electronics recycling.[61] A key part of this strategy includes the use of certified recyclers and, in collaboration with industry, increasing effective management of e-waste. For more on this strategy, see: http://www.epa.gov/electronics strategy.

B. New Energy Star Initiative Recognizes Cutting-Edge Products

In July, EPA and the U.S. Department of Energy (DOE) announced the most energy-efficient products in their categories among those that have earned the Energy Star label. Products that receive the "Most Efficient" designation demonstrate exceptional and cutting-edge efficiency performance that environmentally minded consumers value. The Energy Star label can be found on more than 60 different kinds of products as well as new homes and commercial and industrial buildings that meet strict energy efficiency specifications. In 2010, Americans, with the help of Energy Star, saved $18 billion on their energy bills while preventing greenhouse gas emissions equivalent to annual emissions of 33 million vehicles.[62] For more information on Energy Star's "Most Efficient" products, see: http://www.energystar.gov/mostefficient.

C. Greener Products Website Goes Live

As part of September's Pollution Prevention (P2) Week celebrations, EPA unveiled a new tool, the Greener Products website, to help consumers make more informed choices about products that are better for their health and our environment. The Greener Products site will enable people to search for everyday items such as home appliances, electronics, and cleaning products—check it out at: http://epa.gov/greenerproducts.

VII. Environmental Crimes

A. Illegal Distribution and Sale of Pesticides in New York's Chinatown Thwarted

As part of a coordinated multi-agency effort, thousands of packages of illegal pesticides were seized in Chinatown in September. Federal criminal charges have been filed against two defendants, and state criminal charges have been filed against 10 defendants, for their roles in the illegal distribution and sale of unregistered and misbranded pesticides that were sold out of several locations in Manhattan.[63] In addition to the 12 arrests, federal and state law enforcement agents searched 14 locations and seized more than 6,000 packages of pesticides containing high levels of toxic chemicals that were not approved for commercial sale in the U.S. Also, as part of a citywide inspection of 47 businesses in Manhattan, Brooklyn, and Queens, EPA and DEC civil inspectors seized 350 additional unregistered pesticide products, of 16 different varieties, many with high levels of toxicity.[64] The pesticides were particularly dangerous because their packaging and appearance could lead them to be mistaken for cough medicine or food products. The pesticides were not registered by EPA and were missing required label warnings, so consumers had no way of knowing how dangerous the products were or how best to protect themselves from harmful exposure.[65] For more information about EPA's regional pesticide program, go to: http://www.epa.gov/region2/pesticides.

B. Overbilling at a N.J. Superfund Site Lands an Executive in Prison

In September, a district court judge sentenced the former executive of Bennett Environmental Inc. (BEI), a soil recycling facility, to over four years in prison after he conspired to overcharge EPA for the treatment of soil at a federal superfund site.[66] BEI received about $43 million in contracts from the prime contractor at the Federal Creosote Site in Manville, N.J. BEI executive Robert Griffiths and others submitted artificially high bids, after an employee for the prime contractor tipped them off to the bid prices of their competitors. BEI then provided kickbacks to the prime contractor's employees, including money, trips, pharmaceuticals, and electronics.[67] Griffiths pleaded guilty in July 2009, and, in addition to the jail time, owes $15,000 in criminal fines and $4.6 million in restitution, jointly with his co-conspirators. Ten individuals and three companies have also been charged in connection with the criminal activity.

C. Asbestos Abatement Contractor Sentenced to Six Years in Prison for Environmental Crimes and Making False Statements

Keith Gordon-Smith of Rochester, N.Y. was sentenced to six years in prison for knowingly violating the Clean Air Act and making false statements to an Occupational Safety and Health Administration (OSHA) inspector. Gordon-Smith was also sentenced to serve a three-year term of supervised release to follow his prison term; both he and his now defunct company, Gordon-Smith Contracting, Inc., were also ordered to pay several thousand dollars in special assessments. [68] Gordon-Smith hired a number of workers who had no training in asbestos removal. The workers did not know they were being exposed to asbestos, which they described as falling "like snow," while undertaking work in upstate New York.[69] As no level of exposure to asbestos is safe, removal by untrained workers, performed without the necessary safeguards, threatens the health of those workers and the public at large. For more information on asbestos, see: http://www.epa.gov/asbestos/. To report an environmental violation, go to: http://www.epa.gov/tips/.

VII. Conclusion

Still can't get enough information about EPA? Check out EPA's social media page and sign up for our various listserves, podcasts, mobile apps, etc. See: http://www.epa.gov/epahome/socialmedia.html.

And just in time for Summer, don't forget to download EPA's Sunwise UV Index App! The UV Index provides a daily forecast of the expected intensity of UV radiation from the sun. See EPA's App site for this and other useful tools—http://www.epa.gov/developer/existingapps.html.

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DEC Update

By John Louis Parker

DEC: Meeting Many Challenges

The Department of Environmental Conservation is fully engaged in a myriad of high profile activities and initiatives. At the same time, it is tasked with evolving to find new and more efficient ways to deliver its core mission. With the first full year into his Administration, Governor Andrew Cuomo continues to appoint new members of the executive staff to meet the growing challenges facing the agency. Commissioner Joe Martens has further developed and refined his priorities for the Department. The environmental review of major environmental projects and initiatives continues and expands to some new cases, such as a desalinization water treatment plant on the Hudson River, gas extraction methods and operations from the Marcellus Shale formation, and the recently proposed Tappan Zee Bridge replacement. At the same time, regulatory initiatives advance, including developing regulations for the recently enacted Water Withdrawal Bill, the Marcellus Shale gas extraction regulations, and the recently enacted Article X regulations for the siting of new electrical generating facilities in New York. An innovative and groundbreaking "Eco-Quality" pilot compliance program engaging local stakeholders in community policing has been completed and will soon be expanded throughout the Department's diverse nine Regional Offices.

There are many significant items under way, but everyday work at the Department continues and is sometimes profoundly interrupted. For example, in the Lower Hudson Valley/Catskill Region (Region 3), Department staff remain very busy, processing 1,800 permits in the past twelve months. Despite the need and obligation to make all of the Department's efforts more efficient and effective, there comes a time when everyone pulls together. The Hurricane and Tropical Storm this past year placed historic challenges on communities in a large section of the Hudson Valley. The environmental devastation was significant, but Department staff played an important role in assisting New York communities in the disaster response. This issue's DEC Update provides some of the many stories that have become the everyday experiences for the dedicated staff of the Department of Environmental Conservation.

Major Staff Additions to the Department

Christopher Walsh
Deputy Commissioner for Regional Affairs

Chris Walsh served as the Assistant Secretary for Appointments in the Governor's Office before his appointment as Deputy Commissioner for Regional Affairs. Mr. Walsh's new responsibilities are considerable. In addition to overseeing diverse challenges in each of the Department's nine Regional offices, his responsibilities include overseeing the Division of Environmental Permits and the Office of Public Protection. Mr. Walsh also spearheads the Department's cooperative interactions with the Governor's Regional Economic Development Councils around the State. He will also play an important role in decisions about the future management and operation of the Department's Belleayre Mountain and its ski facilities in the Catskill Mountains. Mr. Walsh has extensive governmental experience including serving as Vice President for Upstate Regional Offices and its subsidiaries at Empire State Development, as Assistant Deputy Attorney General for Regional Offices for Attorney General Eliot Spitzer, and as Assistant Counsel to Governor Mario Cuomo. Mr. Walsh has practiced law in New York and New Hampshire for a number of years. He earned his J.D. from Cornell Law School and a Bachelor's Degree from Hartwick College.

Kathleen Moser
Deputy Commissioner for Natural Resources

Kathy Moser was the Managing Director for Strategic Initiatives at World Wildlife Fund before her appointment as Deputy Commissioner for Natural Resources. Ms. Moser's responsibilities there were many and significant. Her efforts included coordinating the WWF/US effort for the Alianza Mexico, a collaboration of WWF, Fundación Carlos Slim and the Mexican government; developing environmental partnerships between United States financial institutions and Chinese investment banks; and increasing United States' corporate investment in WWF's forest carbon endeavors. Prior to joining WWF in May 2009, Ms. Moser was a senior conservation professional at The Nature Conservancy for seventeen years. She established the Conservancy's Central America program, was Director of the Eastern New York program, Senior Advisor in Government Relations, Deputy State Director of Conservation and Policy for New York, and acting New York State Director. Ms. Moser was also a Board member on both the Mohawk Hudson Land Conservancy and the New York League of Conservation Voters, Capital District Chapter. Ms. Moser also served as an Environmental Spe-

cialist while volunteering for the Peace Corps. She earned a Master's Degree in Forestry and a Bachelor's Degree in Botany, both from Duke University, and is married with three children.

Melvin Norris
Executive Director
Office of Environmental Justice
Office of General Counsel

Mel Norris had a history of working with government and community leaders before his appointment as an Executive Director for the Department's Office of Environmental Justice. Mr. Norris served as a Senior Account Executive at Yoswein New York where he actively handled a wide variety of grassroots campaigns and provided strategic advice and project management to clients. Prior to joining Yoswein New York, he was Deputy Director of Public Policy and Communications at Verizon Communications, Inc. where his responsibilities included building coalitions with government and community leaders to develop a progressive policy agenda. Mr. Norris spent nearly a decade in public service—serving as Deputy Chief of Staff for Congressman Charles B. Rangel. He earned a Bachelor's Degree in Public Policy from Syracuse University and is happily married.

Robert Stegman
Regional Director DEC Region 5

Bob Stegman had a lengthy career in natural resources management and policy before his appointment as Regional Director for the Department's Eastern Adirondacks/Lake Champlain Region in Ray Brook. He also has extensive experience in government, association management, and the forest industry. Mr. Stegman has held positions at the Tug Hill Commission, the Empire State Forest Products Association, and International Paper. In addition to a broad range of experience in environmental policy matters, he played an active and instrumental role in placement of conservation easements on International Paper lands in the Adirondacks. Mr. Stegman also served as a trustee to the Adirondack Conservancy/Land Trust Board. He earned a Master's Degree in Resources Management and Policy from the SUNY College of Environmental Sciences and Forestry and a Bachelors' Degree in Economics from Union College. Mr. Stegman is married with two grown children, and his wife Eileen is the Assistant Editor of the Department's **Conservationist** magazine.

Robert W. Schick, P.E.
Acting Director, Division of Environmental Remediation

Bob Schick was Assistant Director of the Division of Environmental Remediation in 2010, when he accepted the title of Acting Director for the Department's remediation programs. Since 1979, he has worked in various programs and has been a manager overseeing the State's remedial programs since 1987. Mr. Schick oversees the State's remedial programs, Spill Response Program, Bulk Storage Program, Hazardous Waste Management Program (RCRA Program), and the Radiation Program. In 2006, he was instrumental in developing the revisions to the Part 375 regulations for the remedial programs, in creating the Brownfield Cleanup Program, and in developing subsequent guidance for these important statewide programs. One of his most notable accomplishments was his work on DER-10—the Technical Requirements for Site Investigation and Remediation. Mr. Schick also had a major role in the development of the soil cleanup objectives and related guidance. Since the September 2010 reassignment of the RCRA Program and Radiation Program, he has been streamlining the business practices of both the regulatory and remedial aspects of these two programs. Mr. Schick also led the effort in developing a comprehensive approach for addressing the cleanup of former manufactured gas plants, which represent significant brownfield sites in cities and towns across the State—the results have become a model for other states.

Commissioner's Priorities for the Department

In February, Commissioner Martens established the priorities for the Department for 2012. For the full text of the priorities, please visit the DEC's website at: http://www.dec.ny.gov/about/243.html.

Emphasizing Core Environmental Programs

The Department's core environmental programs focus on protecting and improving water and air quality; remediating contaminated properties; reducing solid and hazardous waste generation; promoting sound materials management; preserving the State's natural resources and open space; renewing forests; protecting fish and wildlife; and expanding outdoor recreational opportunities. In addition, the past decade has seen the birth of important new programs, including those aimed at redeveloping contaminated brownfields, promoting product responsibility, reducing greenhouse gases, and promoting watershed-based environmental protection. Environmental protection and responsible management of our natural resources create the conditions necessary for a healthy economy. The Department will continue its focus on its core statutory mission in order to protect public health and the environment.

Implementing the New York Works Program

Governor Cuomo's New York Works Program is designed to invest in critical infrastructure to spur job creation and economic development statewide. The program also recognizes the importance of environmental infrastructure. The Governor's recommended Executive Budget provides $102 million of the NY Works Program funds to repair, rebuild, and enhance DEC's flood control projects and dams, and to support important coastal erosion projects in partnership with the U.S. Army Corps of Engineers. Implementing the NY Works Program is a high

priority for DEC in 2012, to maximize both the environmental protection and economic development benefits of this program. This effort will require intense work across several Divisions—especially the Divisions of Operations, Water, and Management and Budget Services. These investments will yield increased public safety and environmental protection as well as job creation.

Ensuring Clean Water, Air, and Land for a Healthy Public and a Vibrant Economy

Clean water, air, and land are basic necessities and serve as the foundation for a healthy economy and facilitate sustainable economic development and technological innovation. DEC will ensure that its environmental remediation programs continue to achieve environmentally protective cleanups by responsible parties and volunteers consistent with applicable regulatory standards including those for groundwater, soil, and vapor. These results will be achieved by an agency that will rededicate itself to its basic environmental responsibilities embodied in the Clean Air Act, Clean Water Act, Solid Waste Management Act, Resource Conservation and Recovery Act, and Petroleum and Chemical Bulk Storage programs.

Greening New York's Economy

The Department will continue its work supporting Governor Cuomo's Regional Economic Development Councils. Department staff will work to establish a regulatory climate that furthers the Governor's efforts to grow jobs and support sustainable economic growth including encouraging the cleanup of brownfields for redevelopment; facilitating timely regulatory decisions including permitting and enforcement; assisting communities to address water and wastewater infrastructure needs; reducing solid waste management costs; and encouraging businesses to use fewer toxic materials.

Protecting Natural Resources and Promoting Outdoor Recreation

By ensuring that the State's abundant natural resources are managed wisely, DEC safeguards public and ecological health, while also increasing the State's ability to attract new businesses and people. DEC is continuing its efforts and partnerships with state, local, and federal governments to further the recovery efforts from last year's summer storms. Earlier this year, DEC partnered with Empire State Development to make stream restoration grants available to counties to protect property and stream habitat in future storm events. DEC will work with counties to ensure that their applications meet the grant criteria. DEC will carefully review the grant applications and work with Empire State Development to award money where it can be most effective.

New York is home to world-class outdoor recreation opportunities and, as both a landowner and resource manager, the Department will continue to promote recreation and tourism. DEC protects our natural heritage and the health and sustainability of New York's ecosystems, in part, through acquisition of land and easements identified through the Open Space Planning process and careful stewardship. New York's wealth of high-quality open space and the activities it supports—hunting, fishing, trapping, hiking, camping, canoeing, kayaking, snowmobiling, and wildlife watching—provide environmental, social, and economic benefits to those who visit and live in New York

Each year, more than 4.6 million people avail themselves of the opportunity to hunt, fish, or view wildlife in New York's great outdoors along with thousands more who hike, camp, or ski in the State. New York's natural resources generate $11.3 billion in revenue for businesses throughout the State. New York's hunters and anglers are a key DEC constituency. The Department continues to explore ways to enhance outdoor sporting, recreation, and tourism and ensure that physically challenged New Yorkers have the same opportunities. The Department's partnerships with sportsmen and the conservation community, local governments, non-profit organizations, and others will continue to explore new management models that recognize the need for shared responsibilities and resources.

Working for Environmental Justice and Community Revitalization

DEC will partner with environmental justice and other communities to improve the quality of life in those communities that bear a disproportionate environmental burden. DEC will work to ensure that environmental justice communities receive the benefits of environmental and natural resource protection. By promoting urban forestry and open space, and by facilitating urban revitalization, better transportation options, and smart growth, DEC can simultaneously enhance the economic life of communities and the health of its residents.

DEC is actively supporting the Governor's Cleaner, Greener Communities Program, which in 2012 will fund the development of sustainability plans for seven coalitions of municipalities across New York. During 2012, Department staff will seek input from Environmental Justice advocates and assess its Environmental Justice Policy, complete the environmental justice regulations under Article X of the Public Service Law, and explore ways to enhance the Environmental Justice Grants Program.

Working to Address Climate Change

New York is a national leader on addressing the impacts of climate change. The Department recognizes the current and future adverse impacts on people and resources from a changing climate, as well as the clean air and public health benefits of reducing greenhouse gas emissions. The Department will continue to integrate climate change mitigation and adaptation into all of its activities and remain committed to programs that reduce greenhouse gas emissions and promote energy and trans-

portation efficiency, as well as encourage local governments to take similar action.

Examining High-Volume Hydraulic Fracturing

The Department is continuing to review and assess the issue of high-volume hydraulic fracturing, which presents significant legal, regulatory, environmental, and community resource issues that we will continue to examine closely. The Department's analysis will serve as the foundation for a New York State regulatory framework that protects public health and the environment and, if allowed to proceed, would provide potential economic benefits, promote energy independence, and reduce greenhouse gas emissions.

Moving Beyond Waste

Department staff will continue to pursue the future of materials management by looking "upstream" at how materials that would otherwise become waste can be more sustainably used to capture economic value, conserve imbedded energy, and minimize pollution while creating green jobs. *Beyond Waste,* the State Solid Waste Management Plan released in 2010, contains a variety of recommendations that will achieve these goals by preventing waste and increasing recycling through better tracking and expanded product stewardship. The Department will continue to provide financial and technical assistance to communities to carry out recycling programs, and implement the new electronics and rechargeable battery recycling laws.

Leading by Example

The Department will continue to co-chair and staff the Interagency Committee for Executive Order 4 for Agency Sustainability and Green Procurement, in partnership with the Office of General Services. Department staff continues to explore ways to harness the purchasing power of the State and spur the growth of green businesses in New York by developing green procurement specifications for various products and commodities in New York. The commitment to Executive Order 4 is one that will also be focused on Department operations with an annual department-wide strategic planning process and everyday changes, such as improving fleet fuel economy, increasing energy efficiency of Department buildings, and reducing waste generation from our offices and public facilities.

Department Developing Article X Regulations

On August 4, 2011, Governor Cuomo signed into law the Power NY Act, which reauthorized the Article X process for siting electric generating facilities. Specifically, Power NY streamlines the process for issuing a certificate authorizing the construction and operation of major electric generating facilities or modified or repowered facilities in New York State having a capacity of 25 megawatts or more. The Environmental Justice provisions of Article X require more stringent review requirements for environmental impacts of a proposed major electric generating facility, including an evaluation of any significant and adverse disproportionate environmental impacts resulting from the construction or operation of the proposed facility in Environmental Justice communities.

The regulations being developed are newly proposed 6 NYCRR Part 487, *Analyzing Environmental Justice Issues in Siting of Major Electric Generating Facilities Pursuant to Public Service Law Article X.* The Department held three public hearings—one each in Albany, New York City, and Buffalo. The proposed regulations are intended to enhance public participation and review of environmental impacts of proposed major electric generating facilities that affect Environmental Justice areas and reduce disproportionate environmental impacts in overburdened communities. If a proposed facility's potential significant adverse environmental and public health impacts may affect an Environmental Justice area, the applicant must undertake an Environmental Justice analysis. An Environmental Justice area, consistent with the definition of a "potential environmental justice area" in Commissioner Policy 29, Environmental Justice and Permitting, is defined as a minority or low-income community that may bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.

The public comment period closed on March 15, 2012, and the law requires that the regulations be adopted by August 4, 2012.

DEC Response to Hurricane Irene and Tropical Storm Lee

The summer of 2012 closed with quite a fury—Hurricane Irene and Tropical Storm Lee presented New York with two of the most severe natural disasters in recent history. Hurricane Irene prompted Commissioner Martens to issue an Emergency Declaration because of damage from heavy rain and high water. The Director of the Emergency Management Unit, and many Department personnel, including Spill Responders, Forest Rangers, and Environmental Conservation Officers, were all engaged in the emergency response. Division of Environmental Permits and Habitat staff also played an active role in the emergency and its aftermath. The Department developed an Emergency Authorization and a General Permit approach to the situation to repair and address damage caused by Hurricane Irene. The Department's response represented one branch of governmental response among many, and was joined by many State, County, and Town officials who responded to aid their communities.

Department Impacts: Region by Region

Region 3 had severe flooding in its Catskill region, damaging most stream-side communities, incurring road

and bridge washouts and threats to dams. Despite New York City reservoirs being prepared for a surge of water, spillovers remained at record levels. Some private dams were strained to near failure, but no major impoundment failed.

Region 4 experienced the worst of flooding and damage from Tropical Storm Irene. Greene, Schoharie, and Delaware counties had several communities almost completely destroyed. Rensselaer, Montgomery, Schenectady, and Albany had some flash flooding, but were heavily affected by record flood stages of the Schoharie Creek, Mohawk River, and Hudson River. Many wastewater treatment plants were heavily damaged. The storm also created a major debris problem. This included major petroleum spills, household hazardous wastes scattered throughout the countryside, and debris affecting the flow of streams and rivers.

Region 5 had severe flooding and destruction in the Towns of Keene and Jay, as well as extensive flooding throughout its eastern counties. A closure of campgrounds immediately prior to Tropical Storm Irene was a life-saving action because several campsites experienced trees blown down on campsites that would have normally been occupied. State Routes 73 and 9N in Keene were severely damaged as was the valley communities of Keene and Keene Valley. Many houses and businesses were damaged by the flash flooding, while household hazardous substances and wastes were swept downstream and deposited at many locations along the Ausable River.

Region 7 received record rainfalls to the Upper Susquehanna River watershed by the remnants of Tropical Storm Lee. The storm brought the Susquehanna River to record flood levels that inundated the low-lying communities and infrastructure. Wastewater treatment plants in Broome and Tioga Counties were severely damaged as were several major industries along the river.

DEC Storm Response Statistics

Region 3:	321 general permits, 295 emergency authorizations, and 666 site visits.
Region 4	723 general permits, 368 emergency authorizations, and 964 site visits.
Region 5:	127 general permits, 17 emergency authorizations, and 149 site visits.
Region 7:	75 general permits, 50 emergency authorizations, and 15 site visits.

In terms of dollars spent by the Department, the response cost for both storms is projected to be over $13.6 million. The Department's emergency response effort involved thousands of staff hours assisting the impacted Regions. The human toll—the loss of property, dislocation of people, and the psychological cost of the destruction of entire communities—cannot be known, but is likely substantial. The Department staff performed above and beyond the many hours of need, and their coordinated efforts contributed heartily.

Operation Eco-Quality

Department staff developed Operation ECO-Quality to focus compliance and enforcement resources to prevent environmental health and quality of life violations of the Environmental Conservation Law in environmental justice communities. This landmark effort combined community policing patrols, public health data, and community consultation and involvement to identify potential environmental trouble spots in selected communities. The Program built, in part, upon the Department's highly successful 2008 Stop Smoking Trucks and Idling Vehicles Program that was launched in New York City as a response to the high incidence of asthma documented in certain neighborhoods. In September 2010, the Operation ECO-Quality Pilot Program began, focusing on three areas within Potential Environmental Justice Areas in Peekskill, Yonkers, and Mt. Vernon in Westchester County in the Department's Lower Hudson Valley/Catskill Region–Region 3.

Operation ECO-Quality has proven to be a great success, promoting greater environmental compliance utilizing scarce resources more efficiently. The results show that between initial and follow-up visits, compliance rates hit over 90 percent. These results were possible by a conscientious and thoughtful approach to compliance efforts by a diverse team of Department staff—the Office of Environmental Justice, the Division of Law Enforcement, the Office of General Counsel, and key program staff partners from Air, Water, Solid Waste, and Pesticides. Department staff making effective community outreach and consultation efforts with stakeholders, local government officials, and the regulated community created a new mechanism for communication and new relationships that will enable the Department and the community to work effectively together well into the future. The Department continues to review the results of Operation ECO-Quality as it prepares to take the landmark approach to compliance efforts in the other eight Regions of the Department.

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

Member Profiles

Long-Time Member: Michael B. Gerrard

For this issue of *The New York Environmental Lawyer*, the Environmental Law Section focuses its long-time member profile on one of our most outstanding members, Michael B. Gerrard. It is no exaggeration to say that Mr. Gerrard is among the world's most distinguished environmental lawyers. His accomplishments, as numerous and impressive as they are, become even more impressive when one learns the sincerity and depth with which Gerrard believes in the pursuit of improving environmental policy.

Mr. Gerrard's aptitude for understanding and communicating important environmental issues is longstanding and sincere; his undergraduate thesis, "The Politics of Air Pollution in West Virginia," won him the Alan J. Willen Memorial Prize for the best thesis on American politics. After earning his B.A. from Columbia College (where both of his parents and both of his children have received degrees) in 1972, he earned his J.D. as a Root Tilden Scholar from New York University School of Law in 1978. He has been on the cutting edge of environmental law ever since.

Up until 2008, Gerrard led the New York office of Arnold & Porter LLP's environmental practice; he is currently senior counsel to the firm. As a litigator and consultant, Mr. Gerrard has over three decades of practice experience at the federal, state, and local levels. He has been ranked by Who's Who Legal and in the *Guide to the World's Leading Environmental Lawyers* as one of the top environmental lawyers in the world. Attorneys surveyed by "Best Lawyers" named Mr. Gerrard the 2010 New York Environmental Lawyer of the Year.

Mr. Gerrard had previously served as an adjunct professor at Columbia, and has taught at the Yale School of Forestry, but his greatest academic achievement came when he was given the opportunity to create the Center for Climate Change Law (CCCL) at Columbia University, where he currently acts as its director. The Center is among the most focused schools on advancing an effective legal response to climate change, and on pushing forward changes in environmental approach of the government, corporations, non-profits, and individuals.

Even if Mr. Gerrard did not head Columbia's CCCL, practice at Arnold & Porter, lecture to attorneys and industry professionals, consult with the City of New York, and teach courses at several institutes of higher education, he would be regarded as a superstar for his publications alone. He has authored or edited nine books on environmental law, including the first and definitive volume on U.S. climate change law. Two of his books were named "Best Law Book of the Year" by the Association of American Publishers. He has been an environmental law columnist for the *New York Law Journal* since 1986, and he formerly chaired the American Bar Association's 10,000-member Section of Environment, Energy and Resources.

When asked what recent projects he finds most interesting, Mr. Gerrard pointed to his work with the Republic of Marshall Islands. Rising seas pose an imminent threat of unprecedented ethical and legal questions for the Marshall Islands, such as: "Where would their citizens go, with what citizenship status, if and when their country becomes uninhabitable? Would the country retain fishing and mineral rights? Would it still be a country at all?"[1] To help the country develop legal strategies to help fight global warming and cope with its impacts, he convened a global networking conference where representatives from some of the world's most remote island nations gathered to discuss the threat posed by rising sea levels to their nations' continued existence.

Few individuals on earth can truly match Mr. Gerrard's understanding of the legal and environmental "big picture," yet it must not go unappreciated that he is equally influential in his own backyard. In his hometown of Chappaqua, New York, he has chaired the town's Solid Waste Advisory Board. This position has allowed him to play a significant role in a serious hometown issue. He also sits on several nonprofit boards, and for 10 years was the pro bono general counsel of the Municipal Art Society of New York.

If reading this makes you think that Michael Gerrard is an "environmental machine," you may be on to something. He even had his nose "certified" by the West Virginia Air Pollution Control Commission. "They trained people to detect the characteristics of chemicals in the air. If I smelled something terrible, I would call them and they would investigate," he said.[2]

After 9/11, Silverstein Properties consulted Gerrard as an environmental guide to help rebuild the towers. He helped stop the building of a Donald Trump luxury golf course where pesticides threatened to contaminate nearby drinking water, and represented the Metropolitan Museum of Art in battling neighbors over building a new exhibition space. Mr. Gerrard has spent the past 14 years at Arnold & Porter, most recently as managing partner of the 110-attorney New York office and partner in its Environmental Practice Group.

Justin Birzon

Endnotes

1. *Guru of Climate Change Law*, Shira Boss, Columbia College Today, May/June 2011, available at http://www.college.columbia.edu/cct/may_jun11/features1.
2. *Mike Gerrard Leads New Center for Climate Change Law*, Press Release, Columbia Law School, February 2009, available at http://www.law.columbia.edu/media_inquiries/news_events/2009/february2009/michael-gerrard.

* * *

New Member: Robert A. Stout Jr.

This issue of *The New York Environmental Lawyer* proudly showcases Robert A. Stout Jr. as one of its brightest new members. Rob practices environmental, municipal, and real estate law. As an associate at Whiteman Osterman & Hanna LLP, Rob advises clients on many aspects of environmental law and commercial real estate, focusing largely on regulatory compliance and redevelopment. This is a natural progression from his background in brownfield redevelopment in New Jersey, where he focused on complex commercial real estate transactions including leasing, lending, land use, and environmental issues. In fact, Rob's superior legal talents and ambition have been recognized on numerous occasions. *New Jersey Super Lawyer Magazine* identified him as a "2010 Rising Star," and *Real Estate New Jersey Magazine* named him as one of "Tomorrow's Leaders" in 2009.

Rob brings a long history of bar leadership experience to the Section. While in law school, he served as a law student member of the ABA's House of Delegates. He has served as council member for the ABA Section of Real Property, Trust and Estate Law and for the ABA Young Lawyer's Division. He currently chairs the Environmental Law Committee of the ABA RPTE Section.

Rob immediately joined the NYSBA Environmental Law Section upon relocating to New York in 2010. He quickly began making meaningful contributions to the Section as its Membership and Diversity Challenge Committee Co-Chair and liaison from the Young Lawyer's Section. He regularly contributes a column on DEC administrative decisions to *The New York Environmental Lawyer*.

Reflecting on the profound role of environmental law, Rob said that he is motivated by witnessing the practical results of hard work. Rob observes that the environmental field in particular is ripe with opportunities for practitioners to have a proactive, positive involvement in shaping responsible and sustainable development. This opportunity is present throughout the state, and particularly in the Capital Region, where the potential for growth is plentiful. In fact, Rob notes, it is this opportunity for growth that contributed to his decision to relocate back to New York (and New York is happy to have him back).

Since law school, Rob has sought to use his legal training to fulfill his civic interests. The Capital Region is ideal for Rob's goals as its sense of community, coupled with its burgeoning growth, have created a hotbed of civic pride and activity. Rob also points to this sense of community as a major draw for his relocation. He notes with pleasure that he feels the same sense of community within the Environmental Law Section, where he has been impressed with the robust participation of its diverse members.

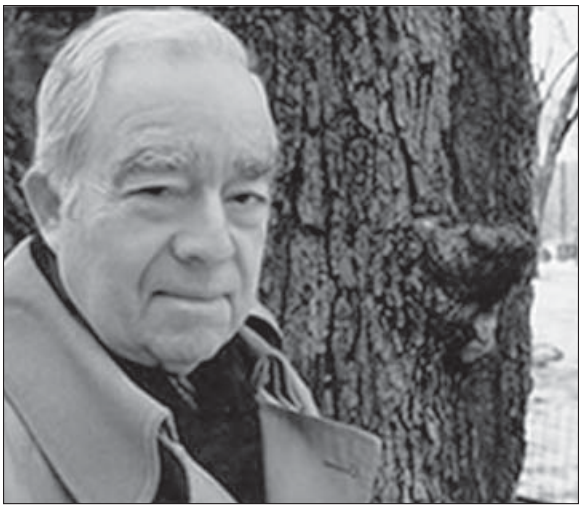
In his first year in Albany, Rob has become an active community volunteer, using his educational training at Siena College to become a classroom volunteer in local schools with Junior Achievement. He has pledged himself as a member and pro bono counsel to Capital District Community Gardens, a civic group that is devoted to helping residents improve their neighborhoods through community gardening, healthy food access and urban greening programs. Rob's appreciation of community and history, coupled with his leadership experience, have resulted in his nomination to the board of the Historic Albany Foundation, a private, not-for-profit organization working to promote the preservation and appreciation of the built environment in and around the city of Albany. Rob is also an active member of the Albany Institute of History and Art.

Rob has a keen eye for the progress and future of environmental law. He is working to develop program materials to educate property owners on the benefits of investing in energy efficiency and green technology for the long term. He sees the Section as a key element in the preparation of effective practitioners for sustainable economic development. We look forward to his leadership for years to come.

Justin Birzon

Farewell to the Prince of Region 2

We have lately lost a prince of a man. Constantine Sidamon-Eristoff was the Regional Administrator of EPA Region 2 from 1989-93. He died on December 26, 2011, at the age of 81.



Constantine Sidamon-Eristoff

Few other public figures were so universally admired and respected. Ask anyone who knew him and it's likely the first thing said about Connie is that he was a true gentleman. You'll also hear about his devotion to conservation, his environmental leadership, his unimpeachable integrity, and his long career of public service in government and with a variety of NGOs. But mostly you'll hear about his decency and civility.

Connie's government service started in the 1960s when he was New York City Transportation Commissioner. A strong proponent of mass transit, he went on to serve for 15 years as a member of the MTA Board of Directors.

In 1989, newly elected President George H.W. Bush selected William Reilly to be EPA's Administrator. Reilly knew exactly the right person to be RA for Region 2—Connie Eristoff. But the then senior senator from New York had a different candidate in mind, a man of no apparent qualifications for the position. Reilly took his case directly to the President, and won.

With his avuncular style and obvious dedication to EPA's mission, Connie brought out the best in everyone around him. He wasn't a micro-manager, but he was deeply and crucially involved in two decisions of extraordinary and lasting importance.

Connie authorized the reassessment of PCB contamination in the Hudson River. EPA had decided half a decade earlier that the river should not be dredged. The reassessment culminated in the Region's 2002 decision calling for dredging of 2.6 million cubic yards of contaminated sediment. That work, now under way, will yield unparalleled benefits.

And it was Connie who championed the landmark Filtration Avoidance Determination (FAD) for the upstate watersheds from which New York City draws 90% of its drinking water. Surface water supplies must be filtered unless a FAD is issued. Much of EPA's professional staff—especially in Headquarters—opposed such a determination for the New York City system, the nation's largest. Connie recognized the enormous opportunities for conservation that a FAD for the City would create. To avoid having to spend many billions of dollars on a filtration plant, New York City would be required to invest one or two billion on programs to ensure the continued high quality of its drinking water. Chief among these was a program to dramatically increase the amount of undeveloped watershed land in public ownership. Connie understood the incredible conservation and recreational benefits of those lands, and knew this was a once-in-a-lifetime chance.

Connie personally persuaded Administrator Reilly to authorize the FAD. Reilly said recently: "I thought I was buying two or three years for New York City. He brokered the deal, and to my astonishment it worked. It works today."

Indeed it does. Two decades later we take the FAD and its marvelous results for granted. New York City has spent nearly $400 million to protect 120,000 acres of undeveloped and agricultural land, increasing by more than 60% the amount of protected land in the watershed. Hundreds of millions more have been spent on numerous other water quality protection programs. The FAD is rightly seen as a model of innovation. But none of that would have happened without Connie.

This unpretentious man left an amazing legacy of accomplishments (for more, see: http://www.nytimes.com/2011/12/30/nyregion/constantine-sidamon-eristoff-environmental-advocate-dies-at-81.html).

I trust you will agree that I am right in calling him a prince of a man. And, oh yes, he was in fact also a real Prince…Prince Constantine Sidamon-Eristoff of the Kingdom (now Republic) of Georgia. No kidding.

—Walter Mugdan

Sidamon-Eristoff: Prince in Georgia, NY Commissioner, Environmentalist, 15 Years on MTA, Highly Regarded

By Henry J. Stern, December 29, 2011, StarQuest@nycivic.org

One of New York's most distinguished and dedicated public citizens has passed away.

Constantine Sidamon-Eristoff, whose career spanned over fifty years of public service, private practice, and non-profit leadership, died on December 26 at 81.

Sidamon-Eristoff was a remarkable person in many ways. Exceptionally high-spirited, extremely kind to others, generous with his time, attention and resources and devoted to a great variety of environmental causes, some of which had few friends before he became involved. We link here to a biography and a video about his environmental activities produced by Audubon New York, an organization he chaired.

Some environmentalists are personally cold fish, more interested in bygone species than in living organisms. Connie Eristoff was a warm person and that attitude characterized his work of saving the planet and its creatures. We appreciate his enormous contributions to the health of the people of this region. We wish there were more examples of successful professionals who shared his love of the earth, the sky and the land. He had certain similarities with Theodore Roosevelt: love of the outdoors, roots in the land and liberal Republicanism.

As a young man, he was transportation commissioner in the John V. Lindsay administration. A generation later, under the first President Bush, he was regional administrator for the EPA, an agency that did not exist when he first went to Washington D.C. He was in and out of public service and non-profit leadership for over a half century. There is a backlog of worthwhile projects on Eristoff's plate, which must now be accomplished by others.

Who will step forward?

* * *

Section Members Remember Constantine "Connie" Sidamon-Eristoff

I have just received the sad news of the passing of our dear friend Constantine Sidamon-Eristoff. Connie's distinguished career in public service included stints as Regional Administrator of EPA Region II, Commissioner of the New York City Department of Transportation, and member of the board of the Metropolitan Transportation Authority. He also served as Chairman of the Board of Audubon New York; Phipps Houses, and the Tolstoy Foundation, and was a board member of the New York League of Conservation Voters Education Fund, a very long-time member of the Environmental Law Section of the New York State Bar Association, and, I'm sure, many other civic organizations.… Connie was one of the warmest and most public-spirited people in New York, and he will be sorely missed.

—Michael B. Gerrard

We'll always remember Connie as a faithful friend who helped make our environmental programs work better.

—Peter Bergen

A Prince in every sense.

—Phil Weinberg

I had the nice experience of sitting with Connie during Section dinners on a few occasions and always found him to be good company. I had dinner with him during last year's Fall meeting when most people were at a different event. He was, as always, gracious, generous, talkative and engaging. During that conversation he discussed his ambitions to bring shipping back to New York harbor, about which he was very enthusiastic. He also explained his family's aristocratic background in Georgia, which was fascinating, and informed me that the South Osetians, over whom Georgia was in a standoff with the Russian Federation, were remnants of the Alans, one of the Iranian peoples on the steppes whom I thought had disappeared from history. Whenever I had the good fortune to speak with him, I made a point of listening, because he always managed to ground the conversation in interesting information which stretched my own imagination. I had not appreciated all of his background, which was set forth in the obituary, and I now reflect with increased appreciation on the warmth and generosity that characterized his personality.

—Kevin Reilly

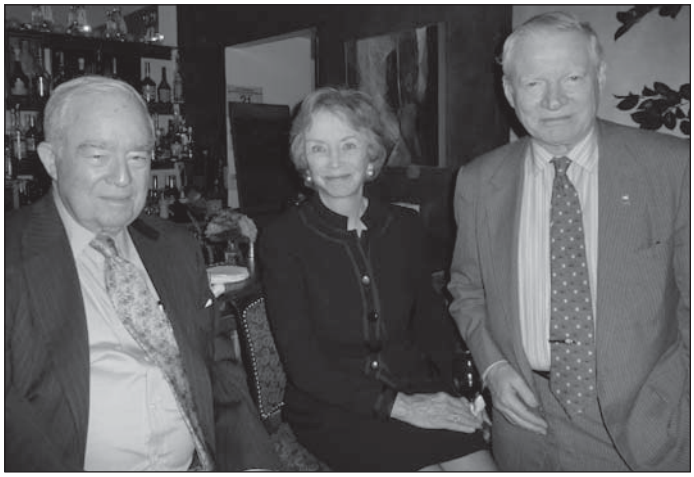
As Phil noted, Connie was a prince in every sense. In addition to the many, many ways in which he served the environment and both the New York and Georgian communities, Connie also served briefly as Subtenant-in-Chief of Berle, Kass & Case, a position he relinquished to become EPA Regional Administrator. In doing so, however, he left behind a handsome mahogany desk that he refused to reclaim when his government service was over and was delighted to learn, some years later, that we had donated it to the Centro Hispano in White Plains, where it was used for English language courses for adult immigrants from Latin America. In truth, Connie will not only be missed in the future; his brand of character, self-effacing intelligence, genuine concern for the environment and generosity toward those less fortunate than he was are characteristics already badly missing from today's public (and private) discourse, particularly within the Republican tradition that he, along with Rockefeller, Javits, Case, and a few others, represented so honorably and so constructively. His death is a loss for all of us, and for our entire community.

— Stephen L. Kass

I can't add to the eloquent praise provided by others except to share a personal note—when I read the small obit notice in the *NY Times* the Monday after Christmas, I gasped so loud my wife asked me what was wrong. I was overcome with a deep sadness and prayed that he had the kind of peaceful passing that he so deserved. My mind was flooded with memories of late night evenings at Section meetings sharing drinks with him around a table and being captivated along with the others at the table by his stories and wisdom.

Connie was a mentor to many of us. I not only treasured my time with him, but always seemed to learn something new every time we talked. He was the kind of person you could never get enough of—truly a prince among men.

—Larry Schnapf



Constantine Sidamon-Eristoff (left) with Carol and John French

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I was terribly saddened to hear about Connie. We have been friends for many years and he and I were both Regional Administrators at EPA. Connie was loved by the staff at EPA and by all who worked with him. He was a terrific public servant and was extremely generous with his time and resources in many environmental causes. We worked together on the Boards of the New York League of Conservation Voters. Connie was passionate about the environmental cause and a real gentleman. He will be greatly missed.

—Charles S. Warren

I second everything people have said. Connie made a difference, and he made it without show. The world is a better place for his having been with us.

—Dick Brickwedde

We have lost a Prince of a man. May he rest in peace.

—Gail S. Port

The world has lost an exceptional human being. We must carry on Connie's wonderful environmental legacy.

—Joel Sachs

In Memoriam: Constantine Sidamon-Eristoff

NEW YORK STATE BAR ASSOCIATION EXECUTIVE COMMITTEE MEETING SECTION ON ENVIRONMENTAL LAW
January 27, 2012

In Memoriam: Constantine Sidamon-Eristoff
(1930-2011)

TO: **Executive Committee, NYSBA Environmental Law Section**

FROM: **Prof. Nicholas A. Robinson**

RE: **NYSBA Sponsorship for *The Constantine Sidamon-Eristoff Award for Environmental Conservation in Georgia***

Connie Sidamon-Eristoff's passing at the end of last year is a loss for us in New York and for his friends in Georgia and abroad. Connie has a legion of friends in the Environmental Law Section of the New York State Bar Association, and among his many other civic endeavors. His memory and professional legacy is well served by the decision of the International Union for the Conservation of Nature and Natural Resources (IUCN, see **www.iucn**.org) to establish in its offices in Tblisi, Georgia, **The Constantine Sidamon-Eristoff Award for Environmental Conservation in Georgia.**

The Statute governing the Award, designed to conform to international norms and standards to ensuring legitimacy and merit in the award process, is attached. The funds for the award will be secured in a dedicated account in the IUCN offices in Tblisi, to be used only for the award. IUCN's international auditing procedures will ensure that the fund is applied as intended. The Statute anticipates that donations to support the award will be sought annually, to ensure the perpetual functioning of the award.

This award would have pleased Connie, because it simultaneously encourages environmental stewardship, strengthens support for environmental law and the rule of law, and equally builds capacity among non-governmental environmental groups in Georgia to cooperate to do more to protect the environment in Georgia, and in the regions around Georgia.

It is proposed that the NYSBA Environmental Law Section join with IUCN in becoming one of the founding organizations for this Award. If the Section agrees, IUCN has agreed to amend the sixth line of the Statute attached to read "(IUCN), the Environmental Law Section of the New York State Bar Association, and others, have."

Individuals are invited to make contributions to the fund, either directly by sending checks to the IUCN Caucasus Cooperation Centre (Attention Ramaz Gokhelashvili, Director), 8 King Mirian Street, Didi Digomi, 0131 Tbilisi, Georgia (tel: +995 232 59 69 31/ 32/ 33 (fax +95 232 59 69 31), or wire transfer via SWIFT to a dedicated account now being established. If donors wish to receive a tax exemption for their donations to the extent allowed under federal law in the USA, a check may be made out to Pace University, earmarked for the *Constantine Sidamon-Eristoff Award*, and sent to the Pace University School of Law, Attention Prof. Nicholas A. Robinson, 78 North Broadway, White Plains, New York 10591 (tel: +914 422 4226, attention Lorraine Rubich); Pace will acknowledge the gifts and transmit all the funds to the IUCN CCC in Tblisi. Donations may also be made to the IUCN-US Office in Washington, D.C. (Attention Mary Beth West), but this office will deduct a 5% overhead fee for handing the funds.

If the Section wishes, it may also wish to consider making a contribution from the budget of the Section to honor Connie in the establishment of this award.

I shall be pleased to provide any further information that may be requested by the Executive Committee. I have advised Ann Sidamon-Eristoff, and Connie's family, of the IUCN decisions to create the award. I have not mentioned that this proposal is coming before the NYSBA Environmental Law Section also. As appropriate, the officers of the Section may wish to be in touch with Connie's family to convey condolences and communicate any decisions taken today about this Award.

The following three decisions are recommend for the Executive Committee's consideration:

1. **Resolved:** The NYSBA Environmental Law Section mourns the passing of Constantine Sidamon-Eristoff and requests its Officers to extend deep condolences to his wife and family. We have lost a good friend and his memory will inspire us always.
2. **Resolved:** The NYSBA Environmental Law Section Executive Committee decided to become a co-sponsor for the founding of the Constantine Sidamon-Eristoff Award for Environmental Conservation in Georgia, and welcomes the initiative by IUCN in honoring the professional and ethical legacies of Constantine Sidamon- Eristoff through the establishment of this Award in his ancestral homeland of Georgia. The officers are requested to communicate this decision to the IUCN Caucasus Coordinating Center in Georgia.
3. **Resolved:** The Executive Committee of the NYSBA Section on Environmental Law resolves to contribute an amount to be determined to help establish the fund for the Constantine Sidamon-Eristoff Award for Environmental Conservation in Georgia, and requests its officers to transmit the donation to the IUCN CCC for support of this Award.

Respectfully submitted,
Nicholas A. Robinson

The Constantine Sidamon-Eristoff Award for Environmental Conservation in Georgia

(Established 2012)

Statute for the Award

Constantine Sidamon-Eristoff (1930-2011) made outstanding contributions to the protection of nature and the environment and to advancing environmental law as a foundation for environmental protection. He was equally dedicated to his ancestral homeland of Georgia. In his honor, the Commission on Environmental Law (CEL), through its Chairperson, of the International Union for the Conservation of Nature and Natural Resources (IUCN), and others, have established The Constantine Sidamon-Eristoff Award for Environmental Conservation in Georgia, to be conferred by an independent Jury, upon an individual who has distinguished herself or himself in the conservation of nature and protection of the environment of Georgia. The Award may be conferred annually or bi-annually.

Contributions in support of The Constantine Sidamon-Eristoff Award for Environmental Conservation in Georgia are maintained in a dedicated fund established by the IUCN Caucasus Cooperation Centre (CCC) in Tblisi, Georgia. The CCC is the host organization for the fund and for convening annually the Jury. In 2012, the CCC will commission the artistic design of the permanent Award in Georgia. In the autumn of 2012, the CCC will convene the first Jury composed of no less than five and no more than nine individuals, nominated to serve as Jurors by each of the following environmental organizations in Georgia: The Caucasus Environmental NGO Network (CENN, an IUCN Member), the Center for Biodiversity Conservation & Research (NACRES, an IUCN Member), the Biological Farming Association (ELKANA, an IUCN Member), the Environmental Education Center of Ilia State University, the Law Faculty of Tblisi Javakhishvili State University, Green Alternative, WWF Caucasus Office, The Regional Environmental Centre for the Caucasus (REC Caucasus), and the Centre for Strategic Research and Development of Georgia (CSRDG). If any of these organizations withdraws from the Award Jury, or is otherwise unable to nominate a Juror, the CCC or the IUCN CEL Chairperson shall nominate one or more successor organizations in Georgia to do so.

Terms of reference to the Jury: Each Juror shall be a person with experience in and knowledge of the environmental conditions in Georgia, and have a willingness to serve for two years to solicit nominations of candidates for The Constantine Sidamon-Eristoff Award for Environmental Conservation in Georgia, and to deliberate in good faith in the Jury to select an awardee. The CCC shall convene the jury and serve, ex officio, as the non-voting chair for the Jury. The award shall be given out no less than once every two years, and may be given annually to one or more meritorious candidates. Every two years, the CCC will invite organizations to nominate or renominate Jurors.

Award Ceremony: The CCC shall invite one or more organizations to host a ceremony at which The Constantine Sidamon-Eristoff Award for Environmental Conservation in Georgia will be conferred in Georgia. Organizations and individuals interested in environmental conservation in Georgia shall be invited to the ceremony, along with those contributing to the establishment of the fund for this Award. CCC also may invite individuals, organizations and companies to become Patrons of the Award ceremony and to contribute financially to the fund for this Award.

Rosters of Awardees: The CCC and IUCN CEL and other organizations shall maintain a roster of all the individuals who receive The Constantine Sidamon-Eristoff Award for Environmental Conservation in Georgia, in order to honor the legacy of Constantine Sidamon-Eristoff and to promote the conservation of nature and protection of the environment in Georgia. The web service at http://www.portraitofgeorgia.com/newspost presents a biography of Constantine Sidamon-Eristoff.

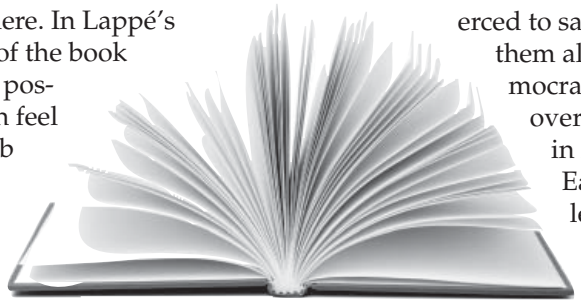
Book Review

EcoMind: Changing the Way We Think, to Create a World We Want

By France Moore Lappé

Reviewed by Andrew B. Wilson

EcoMind: Changing the Way We Think, to Create a World We Want, by France Moore Lappé, is a lozenge with the potential to become a cure for what ails more and more environmentally minded people today: despair. Its message of possibility is one that should be re-etched in the hearts and minds of people everywhere. In Lappé's words, the central (daunting) thesis of the book can be summarized as "[m]ight it be possible to transform something that can feel so frightening as to make us go numb into a challenge so compelling that billions of us will eagerly embrace it?" As a self-described "possibilist," Lappé asks whether we can move forward creatively *with* fear. In 194 pages of prose, 15 pages of synopsis and networking tools, and 77 pages of notes, Lappé develops a foundation for what I hope will be a growing message of optimistic scholarship and discourse that can help steer constructive conversation nationwide.



"Might it be possible to transform something that can feel so frightening as to make us go numb into a challenge so compelling that billions of us will eagerly embrace it?"

—France Moore Lappé

I read *EcoMind*, published in 2011 by Nation Books, at exactly the right time. At the end of 2011, I found myself in the grips of my own despair concerning climate change. Partially, it was based on continued reports of detrimental climate change. More, my cause for alarm and numbness was a perceived lack of movement in politics on all levels concerning plans to push for a greener economy during a time of economic turmoil. If anything, the discourse seemed to be backpedaling to return to a status quo, which led us into this very turmoil instead of pushing forward into a green economy. I found my feelings popularly echoed by those around me. At Christmas, this feeling peaked after a conversation with my now-retired Environmental Studies Professor father brought us both to the conclusion that we have probably passed the tipping point and it will be decades far too late before any sort of action will be taken in the United States. According to Lappé, I became a victim of, primarily, "Thought Trap" 7, but also elements of "Thought Traps" 4 and 5.

There are seven "Thought Traps" that Lappé identifies as snares that people fall prey to when confronting the enormity of the problems of climate change. I mentioned three traps which can be summarized respectively as "humans are greedy," "humans have to be coerced to save the planet," and, the biggest of them all, in my opinion, "It's too late! Democracy has failed." I've fallen into them over time, and became truly ensnared in 2011, but that is ok, soothes Lappé. Each snare also has a productive release, or "Thought Leap," which is a re-framing of the issue that allows for progress. There are tools that exist to address most of the issues, such as "technical potential" for green sources of energy to far exceed the electricity needs of the United States (sixteen times more, actually), that the government is not entirely "locked up" through an "intimidating global corporate stranglehold whose grip, not our actions, feel all-determining," and, perhaps most importantly, that people do actually still care.

Reassurances such as these are parts of what makes *EcoMind* notable. It glosses over whether climate change is happening and instead speaks to the majority of the population, which has accepted the evidence and explored its direness to the point of reaching despair. This book is written to help move past the numbness back into action, and it does so with finesse. It is this hope that is derived from the messages in *EcoMind* as Lappé shows us how to use the tools that are often used against us and instead turn them around for our cause. It is taking the tools that those working for the public interest have to fight against on a nearly daily basis. Quoting perhaps the most famous advertiser of our time, Don Draper of *Mad Men*, "Advertising is based on one thing: happiness. And do you know what happiness is? Happiness is the smell of a new car. It's freedom from fear. It's a billboard on the side of a road that screams with reassurance that whatever you're doing is OK. You are OK." This is a primary tool, that of reassurance, that Lappé uses to win over the reader and simultaneously demonstrates how to effectively use it as an advocacy tool.

Conversely, as Lappé points out, guilt and blame are ineffective motivators for change. Instead of saying that going out and buying new things is bad, the goal is to enforce a diversion of people's energies into endeavors which are more rewarding and thus eclipse the feelings of

"need" when the neighbor rolls up in a new car or shows off the new flat screen TV. It is being able to tap into "good" human traits—Lappé hastily admits that we can be "cravenly cruel"—that allows for progress. In particular, there are six traits—cooperation, empathy, fairness, efficacy, meaning, and creativity—that make us capable as a species of coming together and combating challenges of epic proportions.

"I recommend this book to anyone mired in doubt, despair, or lethargy…"

As epic as the challenges may be, as daunting and enticing bait for several traps, the message of hope remains clear throughout. Perhaps the largest challenge is, as Al Gore is quoted as saying, "the democracy crisis." This crops up in the book in several places under several guises, including corporate personhood—a timely topic—as well as government accountability and campaign financing. Without giving away the nuances of Lappé's arguments, I can say that she leaves the reader feeling that there is the ability to frame these struggles to speed "an evolving and immensely liberating ecology of hope."

I recommend this book to anyone mired in doubt, despair, or lethargy and urge readers to make their own thought leaps from whatever trap they have fallen into. For me, it spurred me to look for the good and remind myself that 2011 was not a total political loss. Upon further reflection, I remembered that, for instance, grassroots organizers working with Bill McKibben effectively stalled the Keystone XL pipeline until 2013. I also remembered that the United Nations continued the Kyoto Protocol, Bali Action Plan, and Cancun Agreements in Durban. New York passed promising legislation including the Power NY Act, which, among other facets, enables homeowners and small businesses to obtain a loan to retrofit and then pay the loan back through their utility bills. New York also passed water withdrawal permitting legislation and re-passed Article X of the Public Service Law which concerns siting of energy generation facilities. As Lappé urges us to find, there are continuing possibilities!

Environmental Law Section 2011 Fall Meeting

(Joint Meeting with the Municipal Law Section)

October 21–23, 2011 • Gideon Putnam • Saratoga Springs New York

Fall Meeting Guest Speaker, Michael Relyea, President of the Luther Forest Technology Campus Economic Development Corporation

Former Chair Walter Mugdan and First Vice-Chair Carl Howard at the cocktail reception

Chair of the Section's Annual William R. Ginsberg Memorial Essay Contest, Miriam Villani, with Third-Place Winner of the 23rd Annual William R. Ginsberg Memorial Essay Contest, Olympian Caryn Davies

Chair Phil Dixon at the Fall Meeting dinner

Remarks Made at 2011 Fall Meeting

By Olympian Caryn Davies
Third-Place Winner of the 23rd Annual William R. Ginsberg Memorial Essay Contest

I must admit I am a little uncomfortable about getting up here to speak tonight. The reason is if I were to compare winning Olympic gold with graduating law school, I would say law school is harder. And thus, almost everyone in this room has done something more impressive than I have, seeing as I have not yet graduated.

Success in both athletics and academics take three things: talent, hard work, and discipline. I thought my rowing career had prepared me for the challenge of law school. I was wrong.

Former Chair Barry Kogut with Olympian Caryn Davies, Third-Place Winner of the 23rd Annual William R. Ginsberg Memorial Essay Contest

Part of what makes the Olympics so magical is that so few people are capable of those feats of speed, strength, endurance, or agility. It takes an innate talent that few people possess. Frankly, we are freaks of nature. Just look at me: I'm 6'4". I was lucky enough to be born with the genetics to grow big and strong. All I had to do was drink a lot of milk and wait.

When I got to law school I realized it was nothing like the Olympic Training Center. I did not belong there merely because of who I am: because everyone looked up to me. I had to earn my place with my academic performance every day.

I knew how to work hard when I got to law school. There were weeks of training when I sat in the car after every practice and just cried. I cried because I was so tired, and because I had no idea how I was going to make it through the end of the week.

Yet, it is easy to work hard when you have a coach telling you when to show up, what workout to do, and how hard to do it. You merely do your best in each workout, and then you go home to bed knowing that what you did that day was enough.

In law school, on the other hand, you can always work harder. You can always crack the books once again late at night. You can always study more for an exam. You can always revise your paper.

That essay I wrote could have been better, I admit. In fact, the committee has two versions of that essay. After I mailed off the hard copy, I went home and reread my conclusion, and I thought, "Oh no, this won't do." So I rewrote it and sent the revised version along with my email submission.

When I told my mom I wanted to return to rowing for the 2012 Olympics, she sniffed and declared, "I think you want to be treated like a child." I thought for a moment and said, "Yes, you're absolutely right. Childhood is so simple, and so is training. All you have to do is exactly what you're told."

Training takes discipline, but that is easy when you have a clear goal. My goal was Olympic gold, and that guided every choice I made. All I had to do was ask whether it took me closer to my goal.

So when 8:00 pm rolls around I don't stay up reading another chapter in my book. I go to bed because I know I need nine to ten hours of sleep to perform at my best. And the next morning when my alarm goes off at 5:30 am, I never press snooze because there will be 30 women with the same goal waiting for me at the boathouse. In the 10 years I've been rowing with the national team, I can count on one hand the number of times I've been late to practice.

Discipline in law school is harder because you have competing goals. I wanted good grades, so I studied hard. I also wanted to learn everything I could, so I had to put down my books and go see guest speakers. I wanted a good job, so I spent hours licking stamps and folding resumes. Each step toward one of these goals infringes partly on another.

In my second year of law school I found myself longing for the simplicity of life that comes with a singular goal. That is why I decided to return to training. My goal is now to stand on the podium in 2012, hear the national anthem, and think, "Yes, today not only was my effort enough, it was the best in the world."

Whenever a new acquaintance finds out I'm an Olympic gold medalist, I get one of two questions:

The first is, "Where do you keep your medal?" The answer is I usually keep it right here in my purse. And I'm thinking now I should also keep this essay contest certificate in my purse, because I am equally as proud of my academic accomplishments as my athletic ones.

The second question is, "Have you met Michael Phelps?" Now I can pull out this certificate and say, "The REAL question is, has Michael Phelps met ME?!?" And yes, he has.

Environmental Law Section 2012 Annual Meeting: Presentation of Environmental Law Section Award

Text of Remarks by Walter Mugdan

January 27, 2012

It is my privilege to announce the Section Award this year. This Award is for individuals or organizations with a record of significant achievement, meaningful contribution and distinguished service to the environment over an extended period of time. Our Section has been presenting this award since 1981, and the list of past honorees is impressive. To this honor roll, we are proud today to add the name of our dear friend and esteemed colleague, the late Constantine Sidamon-Eristoff.

Ask anyone who knew him, and it is likely that the *first* thing said about Connie is that he was a true gentleman. Then you will hear about the attributes that this award recognizes: his lifelong devotion to conservation, his environmental leadership, and his long career of public service.

Connie's work in government dates back to the 1960s, when he was Transportation Commissioner for New York City Mayor John Lindsay. A strong proponent of mass transit, he went on to serve for 15 years as a member of the MTA Board of Directors, chairing several of its committees.

He was appointed by the first Governor Cuomo to the Governor's Council on the Hudson River Valley Greenway; and he was appointed by the Chief Judge of the State of New York as a Commissioner of the New York State Judicial Commission on Minorities. And from 1989 to 1993 he served as Regional Administrator of the U.S. EPA Region 2.

Connie's strong sense of public service was expressed, as well, through involvement in a remarkable number of non-governmental organizations. Notable among these many, he was Chairman of the Board of Audubon New York, and a Board Member of The National Audubon Society. He was Chairman of the Board of Trustees of Phipps Houses, the oldest New York City non-profit corporation, created in 1905 to build and manage low- and middle-income housing. And Connie was the founding Chairman of American Friends of Georgia, formed to provide educational and humanitarian aid to the people of the fledgling Republic of Georgia, the ancestral home of his family.

It is my good fortune that for nearly four years I was able to work for Connie, when he served as EPA Regional Administrator. With his genial, avuncular style and his obvious dedication to the Agency's mission he brought out the best in everyone around him.

Connie was deeply and crucially involved in at least two decisions of extraordinary and lasting importance. He authorized the reassessment of PCB contamination in the Hudson River. EPA had decided half a decade earlier that the river should *not* be dredged. The reassessment that began with his decision culminated a decade later in the 2002 decision that called for dredging of over two-and-a-half million cubic yards of contaminated sediment. That work, which is now successfully under way, will yield unparalleled benefits for generations to come.

And it was Connie who made possible the landmark Filtration Avoidance Determination (or FAD) for the Catskill and Delaware watersheds, from which New York City draws 90% of its drinking water. Under EPA rules, every public supply that uses surface water for drinking must filter that water unless a FAD is issued. Much of the EPA professional staff—especially in Headquarters—strongly opposed such a determination for New York City's system, which is by far the largest in the nation. Connie recognized the enormous opportunities for conservation that a FAD for the City would create. To avoid having to spend many billions of dollars on a filtration plant, New York City would be required to invest in programs to ensure the continued high quality of its water. Chief among these was a program to dramatically increase the amount of undeveloped watershed land in public ownership. Connie understood the incredible conservation benefits of those lands, and knew this was a once-in-a-lifetime chance.

Connie personally persuaded EPA Administrator William Reilly to authorize the FAD. Bill Reilly recently said of this matter: "When I sided with Connie…I thought I was buying two or three years for New York City. He brokered the deal, and to my astonishment it worked. It works today."

Indeed it does. Two decades later we take the FAD and its exceptional results for granted. The City has spent nearly $400 million to protect 120,000 acres of undeveloped and agricultural land, increasing by more than 60% the amount of protected land in the watershed. Hundreds of millions more have been spent on other water quality protection programs. The FAD is rightly seen as a model of innovation. And none of that would have happened without Connie.

His legacy of accomplishments is unparalleled. The only possible criticism about our bestowing this Section Award on Connie Eristoff is that we have waited too long

to do so. For our neglect in that regard, we apologize to his wife Ann and his entire family.

Regrettably, Connie's family could not be here today, as they had obligations elsewhere. We will send to Ann the plaque, which bears this inscription:

Environmental Law Section Award

In Memory of Constantine Sidamon-Eristoff

Ardent conservationist, dedicated public servant, inspired and effective environmental leader, wise counselor, and dear friend.

Chris Saporita and Marla Wieder Presenting the EPA Update at the 2012 Annual Meeting

Chair Phil Dixon with Minority Fellowship Winners, Rosemary "Rosie" Ortiona of Hofstra Law School and Sanjeevani "Sunny" Joshi of Albany Law School

Member News

On November 17, 2011, Parks & Trails New York honored 23 of "New York's Pioneers of Environment Law" with its annual George W. Perkins award. The ceremony was held at the University Club in Manhattan. Parks & Trails is an organization that supports the development and improvement of parks, trails and related greenways across New York State. **Arthur Savage**, the first chair of the Environmental Law Section when it was established in 1981, served as honorary chair of the awards ceremony. Among those honored were three former commissioners of the Department of Environmental Conservation: **Henry Diamond, Langdon Marsh** and **Pete Grannis**. The others included: **John Adams, Martin Baker, Al Butzell, Stephen Gordon, Drayton Grant, Robert Hallman, John Hanna Jr., Ragna Henrichs, Robert Kafin, Stephen Kass, William Kissel, Alice Kryzan, Rosemary Nichols, David Paget, Gail Port, Daniel Riesel, Nicholas Robinson, Joel Sachs**, and **David Sive**. In addition to **Art Savage**, 17 members, including 9 other former chairs of the Section, were among the honorees.

Michael Diederich, Jr. is serving a 10-month tour in Afghanistan as the legal advisor to the garrison commander of the largest multi-national base in the country. Mike welcomes email. Drop him a note at Michael.Diederich@us.army.mil.

Melody Scalfone, who currently practices in Syracuse, has earned her master's degree in Environmental Science from SUNY College of Environmental Science and Forestry. She focused her research on the hydrogeologic and legal issues surrounding hydraulic fracturing for shale-bed methane.

We are saddened to announce the passing of our dear friend **Constantine Sidamon-Eristoff** on December 26, 2011. Connie was a very longtime member of the Section, and served on its Executive Committee and as Co-Chair of its International Environmental Law Committee. For more about Connie and his long and distinguished career in public service and protection of the environment, please see our In Memoriam pages in this issue of *The New York Environmental Lawyer*.

It is also with profound sadness that we announce that our dear friend and colleague **Alice Kryzan** passed away on June 3, 2012, after a courageous battle with esophageal cancer. Alice was a longtime member and a former Chair of the Section. Please see our In Memoriam in our next issue.

Report on the May 16, 2012 Legislative Forum

Environmental Enforcement, Legislative Initiatives and Budget Impacts Sponsored by the Legislation Committee

By Michael Lesser, Committee Co-Chair

On the morning of May 16, 2012, the Section's annual Legislative Forum convened in the Bar Association's Great Hall in Albany. The topic was one touched on but not explored in recent Forum sessions: environmental enforcement. Like most of our recent Forums, attendance surpassed more than one hundred members of the public and the Section. The Section's luncheon speaker was Robert Hallman, Deputy Secretary to the Governor for Energy and the Environment (a member of the Environmental Law Section). He added to the Forum's theme by describing the Governor's environmental, energy, and economic development agendas. The Forum panel included five knowledgeable speakers currently involved in state environmental policy. These experts anchored the morning's panel and addressed the audience with their views and legislative concerns on enforcement policy.

The **Honorable Senator Mark J. Grisanti**, Chairman of the New York State Senate's Environmental Committee, commenced the proceedings as he did last year. The Senator was born and raised in Buffalo and as Senator from New York's 60th District, he is addressing such local issues as the redevelopment of the University of Buffalo and the Niagara Falls airport.

Legislative issues of particular interest to the Senator included: limits on water withdrawal from state waterways; improved sewage release reporting requirements, and horizontal hydraulic fracturing, or "fracking," as it relates to natural gas drilling. In general, due to the high level of current public interest, the regulation and enforcement of fracking regulations was a major concern of all of the speakers.

In regard to regulation of fracking, the Senator noted a plethora of bills on the subject including: the ability of publicly operated treatment works ("POTW") to accept waste water generated by fracking; tracking fracking wastes like hazardous waste; waste spill reporting; and greater spacing between drilling wells.

Other important subjects of concern to the Senator included: maintaining and enhancing the current funding of the Environmental Protection Fund using proceeds from the State's bottle bill and the need to extend the deadline for state tax credits available under the State's Brownfields law. These important tax credits are scheduled to expire in March 2015, at this writing.

Peter G. Fanelli, Director of the New York State Department of Environmental Conservation's Division of Law Enforcement ("DLE"), also spoke and explained the general organization of the State's environmental police force. Director since May 2007, he oversees a sworn police force of approximately 290, working out of nine regional offices around the State. Among other honors, he holds a BS in Natural Resources from Cornell and is a graduate of the FBI Academy in Quantico, Virginia.

Director Fanelli was candid about significant staff and funding reductions that have reduced the force of Environmental Conservation Officers ("ECO") in recent years. However, he emphasized that despite these challenges, DLE has accomplished several high profile and successful law enforcement initiatives including "Operation Shell Shock," which combatted the illegal interstate traffic in endangered species, and regular diesel truck inspections in environmental justice areas to improve air quality and public health.

Panelist **Kate Sinding** is senior attorney and deputy director of the New York urban program for the Natural Resource Defense Council ("NRDC"). Her work includes advancing recycling programs for used electronics (e-waste) and ensuring the proposed natural gas drilling in New York State is subject to the most stringent environmental and health protections. She has taught Environmental Law at Columbia and Fordham law schools and graduated from New York University Law School. Among the NRDC legislative goals are: the Solar Industry Development & Jobs Act to create green energy and jobs; seeking a meaningful state greenhouse emissions cap; and seeking to have fracking wastes treated as hazardous wastes for handling purposes. NRDC also seeks to establish strict liability for natural gas waste releases and a formal spill registry for the natural gas industry.

Speaker **Lisa M. Burianek** has been an Assistant Attorney General for the State of New York since 1993, and is currently Deputy Bureau Chief of the Environmental Protection Bureau managing staff in the Albany and Buffalo EPB offices. Ms. Burianek has also served as a Special Assistant United States Attorney in the Office of the United States Attorney for the Eastern District of New York, and as an Assistant Regional Counsel in the Office of Regional Counsel, United States Environmental Protection Agency, Region 2. In her prepared remarks, she

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expounded on the EPB's difficult work in preserving the State's environmental rights in numerous bankruptcies and her Bureau's enforcement initiatives to combat unlawfully operated junk yards and waste tire dumps and recover state costs. She also spoke about the need for additional resources to assist local law enforcement, prevent quality of life violations, and address a new emerging threat to environmental quality: under-regulated and/or abandoned trailer parks.

The Forum's final speaker, **Darren Suarez,** is director of government affairs for the N.Y.S. Business Council, where he fosters the Business Council's advocacy efforts by leading the Council's energy and environment and occupational safety and health committees. Prior to his work at the Business Council, he lobbied on behalf of a number of Fortune 500 companies on energy and environment issues and was the program director for environmental and economic development for the New York State Senate. While working for the Senate, he represented the Majority Leader in meetings and public events. Among his accomplishments, he was the recipient of the 2006 Economic Development Service Award in recognition of his work in attracting AMD to construct a $3.2 billion chip fab factory in New York State and was the coauthor of the 2005 amendments to the Empire Zone tax incentive program.

One legislative issue of concern to the Business Counsel is regulatory compliance rather than mere enforcement as the main focus of the State's efforts to ensure environmental quality. He opined that the intent of the violator should be the most important element in establishing an enforcement case.

In other legislative and policy areas, the Business Council takes exception to the reductions of NYSDEC staffing of approximately 15-25% as compared to 2% for most other agencies and hopes to see an end to reductions and budget cuts in that agency.

The 2012 Legislative Forum was organized by the Section's Legislation Committee co-chairs Jeffrey Brown, Michael Lesser, John Parker, and Andrew Wilson with the assistance of NYSBA staffers Lisa Bataille and Kathy Plog. This report was compiled with the assistance and contributions of Section and Committee members Terresa Bakner and Andrew Wilson. Finally, we thank 2011-2012 Section Chair Phil Dixon and the Section's Executive Committee for their support and guidance.

The Billion Dollar Question—Are Municipalities Preempted Under New York State Law from Using Their Zoning Powers to Control Hydraulic Fracturing for Natural Gas?

By David Everett and Robert Rosborough

A huge legal battle is brewing in the Southern Tier of New York State over whether municipalities can use their zoning powers to control where natural gas drilling occurs using hydraulic fracturing methods. The battle pits small, cash-strapped municipalities against wealthy, international corporations interested in extracting natural gas from rich deposits contained in the Marcellus and Utica Shale located deep under the Southern Tier. The outcome of this battle could have significant effects on municipal home rule powers in the State.

Although many municipalities and their citizens are embracing natural gas drilling and the promises of millions of dollars in royalties, taxes, jobs, clean energy, energy independence, and the other significant economic benefits that it brings, other municipalities have not been so welcoming. Dozens of municipalities across the State have adopted zoning bans or moratoria on natural gas drilling within their borders. Many of these municipalities consider hydraulic fracturing for natural gas to be a heavy industrial use that conflicts with their comprehensive plans or be an inappropriate land use within their communities. They are also concerned that their water supplies could be affected adversely by the chemicals used during the hydraulic fracturing process and that their community character could be altered detrimentally as thousands of new gas wells are drilled each year across the Southern Tier and State. They are further concerned with the potential impacts on their local roads from millions of new heavy truck-trips that will be needed during the hydraulic fracturing process.

In reacting to the municipalities' position, the drilling industry has fought back, challenging these zoning bans in two lawsuits filed in the State Supreme Courts in Tompkins and Otsego Counties.[1] In these suits, the plaintiffs seek to protect their investment of millions of dollars in lucrative gas leases for the right to extract billions of dollars in rich natural gas deposits. Clearly, the stakes are high. It is now up to the courts to resolve the standoff.

For the first time, these courts will be asked to determine whether a municipality has the legal authority to use its zoning laws to prohibit natural gas drilling within its borders or whether its constitutionally guaranteed and legislatively delegated zoning authority is preempted by the Environmental Conservation Law ("ECL"). Specifically, ECL 23-0303(2) provides that: "The provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law."[2] The plaintiffs argue that this section of the ECL was intended to preempt *all* municipal laws related to natural gas drilling, including zoning laws. In contrast, the Towns argue that ECL 23-0303(2) was not intended to preempt generally applicable zoning laws which regulate land uses. Given its statewide import, it is anticipated that the New York Court of Appeals will ultimately decide the issue.

This Article addresses the relative merits of the arguments on both sides of the issue and posits that a plain reading of ECL 23-0303(2) together with a review of analogous case law under the Mined Land Reclamation Law support the conclusion that a municipality's land use powers are not preempted.

I. Summary of the Parties' Arguments

To support their position under ECL 23-0303(2), the plaintiffs argue that the plain language of the statute limits the local regulation of natural gas drilling to only two areas: local roads and property taxes. They argue that a total ban on natural gas drilling falls outside of these limited exceptions and, thus, constitutes impermissible regulation of the industry within the meaning of the statute. Noting that only one New York court has interpreted this supersession provision, the plaintiffs rely extensively on *Matter of Envirogas, Inc. v. Town of Kiantone*,[3] where the Erie County Supreme Court invalidated a town's zoning ordinance which imposed, among other things, a $25 permit fee and a requirement to post a $2,500 compliance bond prior to construction of any gas well within the Town, on the ground that it was superseded under section 23-0303(2). The plaintiffs assert that the *Envirogas* case confirms that the supersession provision was intended to preempt all local regulation of the natural gas industry, including local zoning laws.

The plaintiffs also argue that the doctrine of implied or conflict preemption bars municipalities from using their zoning powers to prohibit natural gas extraction. They contend that the New York State Department of Environmental Conservation ("DEC") has created a comprehensive scheme of regulations governing the natural gas industry and, therefore, municipalities are foreclosed

from using their zoning authority to otherwise interfere with the State's regulatory program. They argue that if all municipalities throughout the State could ban natural gas drilling, it would conflict directly with the intention of the Legislature to promote the efficient use of the State's natural resources.

In contrast, the Towns argue that their constitutionally guaranteed and legislatively delegated zoning powers cannot be usurped or superseded without an express statement to do so. They contend that ECL 23-0303(2) contains no such expression, and the plain meaning of the term "regulation" in that section limits the scope of preemption to local laws that relate to the operations of the natural gas industry. Zoning laws, they contend, do not "regulate" or relate to gas drilling operations. Instead, they relate to land uses in general, an entirely different matter. Furthermore, the Towns assert that the Court of Appeals' interpretation of a nearly identical supersession provision contained in the Mined Land Reclamation Law[4] is controlling,[5] and requires the conclusion that the zoning laws at issue are not preempted.

The parties' positions are discussed in more detail below.

II. Preemption Under ECL 23-0303(2)

An analysis of the plaintiffs' preemption claims must begin with a local government's legislatively delegated authority to adopt zoning laws governing permissible and impermissible land uses within its borders. Indeed, the Towns argue that because the Legislature has set forth a comprehensive statutory scheme under which local governments are vested with the authority to regulate land uses, their zoning authority cannot be preempted absent a clear expression to do so and ECL 23-0303(2) contains no such expression.[6]

A. Constitutional and Statutory Authority of Municipalities to Enact Zoning Laws

The New York State Constitution provides that "every local government shall have the power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law…except to the extent that the legislature shall restrict the adoption of such a local law."[7] Implementing this express grant of authority, the Legislature enacted the Municipal Home Rule Law, which provides that a municipality may enact local laws for the "protection and enhancement of its physical and visual environment" and for the "protection, order, conduct, safety, health and well-being of persons or property therein."[8] Most importantly, the Legislature delegated to every local government the authority to adopt, amend, and repeal generally applicable zoning laws and to "perform comprehensive or other planning work relating to its jurisdiction."[9] Moreover, the General City, Town and Village Laws grant municipalities the express authority to regulate land use within their jurisdiction by defining zoning districts and determining which uses will be permitted therein and which uses will not.[10]

As the Court of Appeals has repeatedly emphasized, "[o]ne of the most significant functions of a local government is to foster productive land use within its borders by enacting zoning ordinances."[11] In that same vein, local governments spend significant amounts of time, effort, and resources on developing comprehensive plans outlining the zoning and planning goals for the future of their communities.[12] Taken together, these powers leave local land use matters in the hands of municipalities—those individuals who know their communities best and can best determine what land uses will serve the public health, safety, and general welfare of their citizens.[13] Because the "inclusion of [a] permitted use in [a zoning] ordinance is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood,"[14] New York courts have consistently held that a municipality's home rule authority includes the power to zone out certain uses of land in order to serve the public health, safety, or general welfare of the community.[15]

In these cases, the Towns of Dryden and Middlefield determined that the extraction of natural gas poses a significant threat to their residents' health, safety, and welfare and, thus, should not be a permitted use within their Towns, absent further studies and data concluding that these uses will not detrimentally affect their ground water supply, community character, roads, agriculture, or local tourism, among other things.[16]

B. Express Preemption

Although municipal home rule powers are construed very broadly, any local law must be consistent with the Constitution and the general laws of the State.[17] Where the Legislature has expressly preempted an area of regulation, a local law governing the same subject matter must yield."[18] Indeed, as the Court of Appeals has held,

> The preemption doctrine represents a fundamental limitation on home rule powers. While localities have been invested with substantial powers both by affirmative grant and by restriction on State powers in matters of local concern, the overriding limitation of the preemption doctrine embodies the untrammeled primacy of the Legislature to act…with respect to matters of State concern. Preemption applies both in cases of express conflict between local and State law and in cases where the State has evidenced its intent to occupy the field.[19]

Notably, however, the fact that State and local laws touch on the same subject matter does not automatically lead to the conclusion that the State intended to preempt the entire field of regulation.[20]

As noted above, the plaintiffs assert that the Legislature has expressly stated its intent in ECL 23-0303(2) to preempt a municipality's zoning authority over natural gas drilling. Specifically, section 23-0303(2) provides that "[t]he provisions of this article shall supersede all local laws or ordinances *relating to the regulation of the oil, gas and solution mining industries*; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law."[21] Relying on the maxim of statutory construction that the expression of one thing necessarily implies the exclusion of all others,[22] the plaintiffs argue that the Legislature's choice to exclude local roads and real property taxation from the preemption leads to the conclusion that, by failing to include an exception for zoning authority, the Legislature intended section 23-0303(2) to preempt it. Notwithstanding this position,[23] the Dryden and Middlefield cases will likely turn, instead, on the courts' interpretation of the scope of the phrase "regulation of the oil, gas and solution mining industries."[24]

1. The Plain Language of ECL 23-0303(2)

When determining the preemptive scope of ECL 23-0303(2), the courts must start with the plain language employed by the Legislature[25] and must construe the phrase "relating to the *regulation* of the oil, gas and solution mining industries."[26]

The Towns argue that the term "regulation" is defined as "an authoritative rule dealing with details or procedure."[27] Thus, under the plain language of section 23-0303(2), a local law is not expressly preempted unless it relates to the details or procedures of natural gas drilling. This is consistent with New York law generally which draws a distinction between local laws that regulate the operation of a business or enterprise and those that govern land uses in general.[28] Generally applicable zoning laws, such as those challenged in these cases, do not relate to the details or procedures of the natural gas drilling industry in any way. Instead, they identify land uses that are permissible and impermissible within the municipality.

As noted above, only one court has interpreted the supersession clause contained in ECL 23-0303(2). In *Matter of Envirogas, Inc. v. Town of Kiantone*,[29] the petitioner challenged a zoning ordinance which imposed a $25 permit fee and a requirement to post a $2,500 compliance bond prior to construction of any gas well within the Town.[30] The Court struck down the ordinance, specifically noting that ECL 23-0303(2) made it clear that the supersession provision "pre-empts not only inconsistent local legislation, but also any municipal law which purports *to regulate gas and oil well drilling operations*, unless the law relates to local roads or real property taxes which are specifically excluded by the amendment."[31] Clearly, the Court recognized *in that case* that Kiantone did not adopt a generally applicable land use restriction, but instead impermissibly enacted a regulation which interfered with the *operations* of the natural gas industry in violation of ECL 23-0303(2).[32]

Dryden and Middlefield have asserted that, unlike the zoning ordinance in *Envirogas*, their zoning laws do not regulate the operations of natural gas drilling. They do not impose duplicative fees, area and bulk restrictions, or other conditions applicable only to the natural gas industry. Instead, the challenged laws adopted by Dryden and Middlefield are generally applicable zoning regulations merely identifying the land uses that are permissible and impermissible in their Towns. As such, they argue that the Court's holding in *Envirogas* is distinguishable and should not control.

The legislative history underlying ECL 23-0303(2) does not provide a clear indication of the scope of the preemption intended by the Legislature. Indeed, other than a passing reference to the supersession language in a memorandum from the Division of Budget, the bill jacket is silent on the preemption issue.[33] To supplement this dearth of legislative history, the plaintiffs attempt to rely on an interpretation of section 23-0303(2) by a former employee of DEC who asserts that the section was intended to preempt local zoning laws. In response, the Towns argue that the interpretation of the ECL does not require reliance upon DEC's "knowledge and understanding of underlying operational practices or…an evaluation of factual data and inferences to be drawn therefrom," but instead is a question of "pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent." As a result, DEC's interpretation of section 23-0303(2) is not entitled to deference.[34] Thus, regardless of DEC's alleged interpretation, the courts are tasked with determining, as a matter of law, whether the Legislature, by its chosen language, clearly expressed an intent to preempt a municipality's zoning authority to control natural gas drilling.

In addition, the Towns argue that when the Legislature has intended to supersede the local zoning laws, it has done so expressly. For example, in ECL 27-1107, the Legislature expressly declared that municipalities were prohibited from requiring "any approval, consent, permit, certificate or other condition *including conformity with local zoning or land use laws and ordinances*, regarding the operation of a [hazardous waste treatment, storage, and disposal] facility."[35] The Legislature has also expressly preempted local zoning laws related to the siting of major electric generating facilities.[36] Had the Legislature intended to preempt zoning laws under ECL 23-0303(2), it could have done so easily.[37] Its failure to expressly preempt local zoning laws appears to lead to the conclusion that the Legislature did not intend ECL 23-0303(2) to preempt such laws.

2. New York Courts' Interpretation of the Analogous Supersession Clause of the Mined Land Reclamation Law

Although the interpretation of ECL 23-0303(2) is a matter of first impression, the phrase "relating to the regulation" has been repeatedly construed by New York courts in the context of the supersession provision in the Mined Land Reclamation Law ("MLRL").[38] In the Court of Appeals' landmark decision in *Matter of Frew Run Gravel Prods. v. Town of Carroll*,[39] the Court was asked to consider whether the MLRL supersession provision—ECL 23-2703(2)—was "intended to preempt the provisions of a town zoning law establishing a zoning district where a sand and gravel operation is not a permitted use."[40] At that time, the MLRL supersession provision provided that it "shall supersede all other state and local laws *relating to the extractive mining industry*."[41] Notably, this language is nearly identical to that contained in ECL 23-0303(2).

Construing this supersession clause according to the plain meaning of the phrase "relating to the extractive mining industry," the Court of Appeals concluded that the Town of Carroll Zoning Ordinance—a law of general applicability—was not expressly preempted because the "zoning ordinance relate[d] not to the extractive mining industry but to an entirely different subject matter and purpose: i.e., regulating the location, construction and use of buildings, structures, and the use of land in the Town."[42] Specifically, the Court held:

> The purpose of a municipal zoning ordinance in dividing a governmental area into districts and establishing uses to be permitted within the districts is to regulate land use generally. In this general regulation of land use, the zoning ordinance inevitably exerts an incidental control over any of the particular uses or businesses which, like sand and gravel operations, may be allowed in some districts but not in others. But, this incidental control resulting from the municipality's exercise of its right to regulate land use through zoning is not the type of regulatory enactment relating to the "extractive mining industry" which the Legislature could have envisioned as being within the prohibition of the statute ECL 23-2703(2).[43]

Thus, the Court concluded that, in limiting the MLRL's supersession to those local laws "relating to the extractive mining industry," the Legislature intended to preempt only "[l]ocal regulations dealing with the *actual operation and process of mining*."[44] By interpreting the scope of ECL 23-2703(2) in such a way, the Court avoided the concomitant impairment of local authority over land use matters that would have inevitably resulted had it accepted the petitioner's argument that section 23-2703(2) was intended to preempt a town zoning law.[45] Indeed, the Court noted:

> To read into ECL 23-2703(2) an intent to preempt a town zoning ordinance prohibiting a mining operation in a given zone, as petitioner would have us, would drastically curtail the town's power to adopt zoning regulations granted in subdivision (6) of section 10 of the Statute of Local Governments and in Town Law § 261. Such an interpretation would preclude the town board from deciding whether a mining operation—like other uses covered by a zoning ordinance—should be permitted or prohibited in a particular zoning district. In the absence of any indication that the statute had such purpose, a construction of ECL 23-2703(2) which would give it that effect should be avoided.[46]

Following the Court of Appeals' decision in *Frew Run*, the Legislature amended ECL 23-2703(2) to expressly codify the Court's holding.[47] Had the Legislature disagreed with the Court's interpretation of the phrase "relating to the extractive mining industry" in *Frew Run*, this amendment gave it ample opportunity to overrule the Court and add a provision expressly preempting all zoning laws. That the Legislature declined to do so appears significant.[48]

In light of the amendment to section 23-2703(2), the Town of Sardinia, a rural community located in western New York, amended its zoning law to eliminate mining as a permitted use throughout the Town.[49] Petitioner, the owner and operator of three mines within the Town, challenged the amendments on various grounds, including that the Town's authority to eliminate mining as a permitted use was superseded by ECL 23-2703(2). Specifically, the petitioner argued that the Court of Appeals' holding in *Frew Run* only left "municipalities with the limited authority to determine in *which* zoning districts mining may be conducted but not the authority to prohibit mining in *all* zoning districts."[50]

The Court, however, rejected the petitioner's attempt to limit the municipality's home rule authority.[51] Instead, the Court reaffirmed its holding in *Frew Run* that the MLRL supersession clause was intended to preempt only those local laws that regulated the operations of mining.[52] Although the Court recognized that local land use laws had an incidental effect on the mining industry, it held that "zoning ordinances are not the *type* of regulatory provision the Legislature foresaw as preempted by Mined Land Reclamation Law; the distinction is between ordinances that regulate property uses and ordinances that regulate mining activities."[53]

Recognizing the primacy of local control over land use matters, the Court further noted that "[a] municipality is not obliged to permit the exploitation of any and all natural resources within the town as a permitted use if limiting that use is a reasonable exercise of its police powers to prevent damage to the rights of others and to promote the interests of the community as a whole."[54]

Undoubtedly, the holdings in *Frew Run* and *Gernatt* have continuing vitality today and are applicable to the question of statutory interpretation presented in the Dryden and Middlefield cases. Based on these cases, the Towns argue that they are only preempted from regulating the actual operations, processes, and details of natural gas drilling, not from adopting generally applicable zoning laws that determine what land uses are permissible or impermissible within their borders.

C. Implied Preemption

Alternatively, the plaintiffs in the Dryden and Middlefield cases argue that, even if the courts were to conclude that the Legislature has not expressly preempted a municipality's home rule authority to adopt zoning bans on gas drilling, the Legislature has impliedly evidenced its intent in State policy to preempt these laws in favor of promoting the development of natural gas to maximize its recovery and protect the correlative rights of the mineral owners across the State.[55]

ECL 23-0301 provides the Legislature's statement of policy underlying the statewide regulation of the natural gas industry. Specifically, section 23-0301 declares that it is

> in the public interest to regulate the development, production and utilization of natural resources of oil and gas in this state in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be had, and that the correlative rights of all owners and the rights of all persons including landowners and the general public may be fully protected, and to provide in similar fashion for the underground storage of gas, the solution mining of salt and geothermal, stratigraphic and brine disposal wells.[56]

The plaintiffs argue that this statement of policy indicates that the Legislature intended to promote the viability of natural gas drilling in New York and discourage waste by preempting local attempts to ban the practices. In response, the Towns argue that the Legislature's declaration of policy specifically recognizes the interplay that must occur between the rights of owners of natural gas properties and the rights of all other landowners and the general public. In order to fully protect the rights of both, as ECL 23-0301 states, the Legislature likely did not intend to wholly supersede local zoning laws.

The plaintiffs also posit that the Legislature has enacted detailed statutory provisions governing the operations of the natural gas industry, which include regulations specifying the permissible location and size of drilling units and the location of well pads.[57] These regulations establish a limit on the number of wells that may be constructed statewide and provide minimum area and setback requirements to ensure adequate protection of the State's natural gas resources, as well as to encourage an efficient yield of these resources.[58] Because the Legislature has recognized the importance of State regulation in these areas, the plaintiffs conclude that the Legislature intended to supersede any conflicting local laws, including zoning laws.

In response, the Towns argue that their zoning laws simply determine where heavy industrial uses may be permitted and are not inconsistent with the State regulations because they only incidentally impact the day-to-day operations of the gas industry.[59] The ECL provisions including those regulating delineation of pools and well spacing units do not appear to contain any provisions indicating that the Legislature intended to wholly preempt a municipality's exercise of its zoning authority. Moreover, as the Third Department has recognized, "[a] necessary consequence of limiting the number of wells is that some people will be prevented from drilling to recover the oil or gas beneath their property."[60]

III. Public Policy Concerns

Significant policy concerns exist on both sides of this issue. As the plaintiffs argue, if the courts determine that Dryden's and Middlefield's zoning laws are not preempted, municipalities throughout the State could similarly enact zoning bans on natural gas drilling which could lead to the waste of the natural resources, contrary to the Legislature's intent,[61] and an impermissible restriction on the rights of individual landowners who desire to profit from those activities. If local governments are permitted to ban drilling, the plaintiffs contend, the natural gas industry, which has invested millions of dollars in gas leases in New York, will lose the value of its investment. In light of this situation, the industry would likely look to invest future dollars in natural gas drilling elsewhere in the country, where it does not face a similar threat. Thus, the plaintiffs argue, local governments should not be permitted to deprive their residents (or others in the State) of this economic boon simply by zoning out hydraulic fracturing and other drilling activities that are amply regulated at the State level.

The Towns, on the other hand, assert that a deprivation of their constitutionally guaranteed and legislatively delegated authority to control land uses within their borders would obviate New York's longstanding history of

promoting local governments' municipal home rule powers.[62] This history extends planning and zoning responsibilities to local governments because local elected officials are the ones most intimately involved with the land use issues that specifically face their municipalities.[63] The Legislature expressly delegated these powers to local governments because it determined those matters should not be handled on a statewide level. Moreover, municipalities expend significant amounts of time, effort, and resources on developing comprehensive plans, outlining the zoning and planning goals for the future of their communities, and extensively rely on those plans in determining what land uses should be permitted within their borders. The Towns contend that this constitutionally guaranteed authority cannot be undermined solely because a natural gas driller owns or leases property within the municipality. Local land use matters, including whether and where to permit heavy industrial uses, should not be determined by DEC or by a private gas drilling company. Thus, the Towns argue that, as a matter of sound public policy, local land use matters cannot be taken out of the hands of those who best know the unique issues facing the municipality.

Clearly, in the *Dryden* and *Middlefield* cases, the courts must weigh not only the proper interpretation of ECL 23-0303(2), but also the significant public policy implications that will result from their decisions. Because both sides have strong policy arguments on their side, it will be interesting to see how extensively the courts rely on those considerations in determining whether ECL 23-0303(2) preempts local zoning laws.

IV. The Supreme Court Rulings

In late February 2012, the first skirmish in this battle went to the Towns. In each case, the Supreme Court upheld the Towns' right to exercise their local land use powers to ban natural gas drilling activities within their borders against the plaintiffs' contention that that authority was preempted by ECL 23-0303(2). Each Court approached the issue slightly differently.

In the *Dryden* case, the Supreme Court focused on the Court of Appeals' decisions in *Frew Run* and *Gernatt* holding that no meaningful difference existed between the supersession provisions in the MLRL and in the language of ECL 23-0303(2) and its legislative history. As a result, the Court concluded that Dryden's zoning ordinance was not preempted by section 23-0303(2).[64] Specifically, the Court rejected the plaintiff's attempts to distinguish the language of section 23-0303(2) from the language of the MLRL supersession provision at issue in *Frew Run.* The Court also held that the Legislature's inclusion of two exceptions for local roads and real property taxes in section 23-0303(2) did not support the conclusion that it "intended to preempt local zoning power not directly concerned with regulation of operations,"[65] especially where section 23-0303(2) did not contain a "clear expression of legislative intent to preempt local zoning authority."[66]

Acknowledging that this is an issue of first impression in this State, the *Dryden* Court also looked to the decisions of the highest courts in Pennsylvania and Colorado that had decided this issue under similar circumstances, noting that although "they are not binding precedents in this case, it is instructive that both courts reached the same conclusion as this court did by applying New York precedent—that their respective State's statute governing oil and gas production does not preempt the power of a local government to exercise its zoning power to regulate the districts where gas wells are a permitted use."[67]

Although the Supreme Court in the *Middlefield* case looked at the issue slightly differently, focusing extensively on the legislative history underlying ECL 23-0303(2), it reached the same conclusion—"that the supersession clause contained [in] ECL § 23-0303(2) does not serve to preempt a local municipality…from enacting land use regulation within the confines of its geographical jurisdiction and, as such, local municipalities are permitted to permit or prohibit oil, gas and solution mining or drilling in conformity with…constitutional and statutory authority."[68] After reviewing the ECL's oil and gas provisions from their enactment in 1963 through the addition of the supersession clause in 1981, the Supreme Court concluded that "no support [exists] within the legislative history leading up to and including the 1981 amendment of the ECL as it relates to the supersession clause which would support plaintiff's position in this action."[69] The Court also held that the plain meaning of the term "regulation" in section 23-0303(2) demonstrated "convincingly" that the Legislature's intention was to enact statewide standards for "the manner and method to be employed with respect to oil, gas and solution drilling or mining," which the Court found could be "harmonized with the home rule of local municipalities in their determination of where oil, gas and solution drilling or mining may occur."[70]

Although no appeals to the Appellate Division have yet been filed from these decisions at the time of this writing, it is anticipated that the plaintiffs will indeed appeal each decision.

V. Conclusion

In sum, the New York appellate courts may soon be faced with the novel question of whether a municipal zoning law prohibiting natural gas drilling is preempted by ECL 23-0303(2). For now, the Towns have won a decisive victory in the lower courts, which upheld their authority to enact generally applicable zoning ordinances banning natural gas drilling and extraction within their borders. Given the statewide importance of this question to local governments, property owners, and gas drilling companies alike, however, the final decision in these actions may indeed lay with the Court of Appeals.

Endnotes

1. *See Anschutz Exploration Corp. v. Town of Dryden,* Sup. Ct., Tompkins Co., Rumsey, J., Index No. 2011-0902. The authors submitted an *amicus curiae* brief in this lawsuit on behalf of the Town of Ulysses in support of the Defendant, Town of Dryden. *See also Cooperstown Holstein Corp. v. Town of Middlefield*, Sup. Ct., Otsego Co., Cerio, Jr., A.J., Index No. 2011-0930. The authors submitted an *amicus curiae* brief in this lawsuit on behalf of the Town of Ulysses in support of the Defendant, Town of Middlefield.
2. ECL 23-0303(2).
3. 112 Misc. 2d 432 (Sup Ct, Erie County 1982), *aff'd,* 89 A.D.2d 1056 (4th Dep't 1982), *lv. denied,* 58 N.Y.2d 602 (1982).
4. Environmental Conservation Law 23-2703(2) (ECL).
5. *See Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668 (1996); *Frew Run Gravel Prods. v. Town of Carroll*, 71 N.Y.2d 126 (1987).
6. *See e.g. Gernatt Asphalt Prods.*, 87 N.Y.2d at 682 (emphasizing that "in the absence of a *clear expression* of legislative intent to preempt local control over land use, [ECL 23-2703(2)] could not be read as preempting local zoning authority" [emphasis added]).
7. N.Y. Const, art IX, § 2(c)(ii).
8. Municipal Home Rule Law § 10(1)(ii)(a)(11), (12).
9. *See* Statute of Local Governments § 10(6), (7).
10. *See e.g.* Town Law § 261 ("For the purpose of promoting the health, safety, morals, or the general welfare of the community, the town board is hereby empowered by local law or ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes."); *see also* General City Law § 20(24), (25); Village Law § 7-700.
11. *DJL Rest. Corp. v. City of New York*, 96 N.Y.2d 91, 96 (2001); *see also Udell v. Haas*, 21 N.Y.2d 463, 469 (1968).
12. *See e.g.* Town Law § 272-a(1)(b) ("Among the most important powers and duties granted by the legislature to a town government is the authority and responsibility to undertake town comprehensive planning and to regulate land use for the purpose of protecting the public health, safety and general welfare of its citizens."); Village Law § 7-722(1)(b); *Udell*, 21 N.Y.2d at 469 ("[T]he comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use. It is the insurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll.").
13. *See Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 431 (1989) ("a town's planning needs with respect to its neighborhood parks and playgrounds are 'distinctively' matters of local concern"); *Adler v. Deegan*, 251 N.Y. 467, 485 (1929) (Cardozo, J., concurring) ("A zoning resolution in many of its features is distinctively a city affair, a concern of the locality, affecting, as it does, the density of population, the growth of city life, and the course of city values."); *see also Zahara v. Town of Southold*, 48 F.3d 674, 680 (2d Cir. 1995) ("decisions on matters of local concern should ordinarily be made by those whom local residents select to represent them in municipal government").
14. *Matter of North Shore Steak House v. Board of Appeals of Inc. Vil. of Thomaston*, 30 N.Y.2d 238, 243 (1972).
15. *See e.g. Gernatt Asphalt Prods.*, 87 N.Y.2d at 683-684 (upholding the Town's determination that mining was not a permitted use of land within its borders); *Matter of Iza Land Mgt. v. Town of Clifton Park Zoning Bd. of Appeals*, 262 A.D.2d 760, 761-762 (3d Dep't 1999) (upholding the exclusion of heavy industrial uses from the Town because of "the potential adverse and/or harmful impact" of such uses to the Town's residents); *Thomson Indus. v. Incorporated Vil. of Port Wash. N.*, 55 Misc. 2d 625, 632 (Sup. Ct., Nassau Co. 1967) ("The defendant village may certainly exclude from its industrial district any uses which constitute a danger or nuisance to other properties within the district or within the village."), *mod. on other grounds,* 32 A.D.2d 1072 (2d Dep't 1969), *aff'd,* 27 N.Y.2d 537 (1970); *see also e.g. Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388-389 (1926) (upholding an exercise of local zoning authority to preclude all industrial uses).
16. *See generally* United States Environmental Protection Agency, Draft Report, Investigation of Ground Water Contamination Near Pavillion, Wyoming (Dec. 2011) (concluding that hydraulic fracturing operations in Wyoming likely lead to significant contamination of the ground water supply), *available at* http://www.epa.gov/region8/superfund/wy/pavillion/EPA_ReportOnPavillion_Dec-8-2011.pdf; New York State Department of Environmental Conservation, Revised Draft Supplemental Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program (2011) (hereinafter, "DEC Revised SGEIS"), *available at* http://www.dec.ny.gov/data/dmn/rdsgeisfull0911.pdf; Michelle L. Kennedy, *The Exercise of Local Control Over Gas Extraction*, 22 Fordham Envtl. L. Rev. 375 (2011).
17. *See* N.Y. Const, Art IX, § 2(c); *see also Jancyn Mfg. Corp. v. County of Suffolk*, 71 N.Y.2d 91, 96 (1987) ("although the constitutional home rule provision confers broad police powers upon local governments relating to the welfare of its citizens, local governments may not exercise their police power by adopting a law inconsistent with the Constitution or any general law of the State"); *New York State Club Assn. v. City of New York*, 69 N.Y.2d 211, 217 (1987), *aff'd,* 487 U.S. 1 (1988).
18. *Jancyn Mfg. Corp.*, 71 N.Y.2d at 97 (citations omitted); *see also Incorporated Vil. of Nyack v. Daytop Vil.*, 78 N.Y.2d 500, 505 (1991).
19. *Albany Area Bldrs. Assn. v. Town of Guilderland*, 74 N.Y.2d 372, 377 (1989).
20. *See Jancyn Mfg. Corp.*, 71 N.Y.2d at 99.
21. ECL 23-0303(2) (emphasis added).
22. Statutes § 240 ("The maxim *expressio unius est exclusio alterius* is applied in the construction of the statutes, so that where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded.").
23. This argument would be more compelling, however, had the Court of Appeals not impliedly rejected it in *Matter of Frew Run Gravel Prods. v. Town of Carroll* (71 N.Y.2d 126 [1987]) and its progeny.
24. ECL 23-0303(2).
25. *See Balbuena v. IDR Realty LLC*, 6 N.Y.3d 338, 356 (2006); *Theroux v. Reilly*, 1 N.Y.3d 232, 239 (2003) ("When interpreting a statute, we turn first to the text as the best evidence of the Legislature's intent."); *Riley v. County of Broome*, 95 N.Y.2d 455, 463 (2000) ("Of course, the words of the statute are the best evidence of the Legislature's intent."); *see also e.g. Frew Run Gravel Prods. v. Town of Carroll*, 71 N.Y.2d 126, 131 (1987) (noting that where the court faced an express supersession clause, the matter turned on the proper statutory construction of the provision).
26. ECL 23-0303(2).
27. Merriam-Webster's Collegiate Dictionary, at 1049 (11th ed. 2004); *see also id.* (defining "regulate" as "to govern or direct according to rule"); Black's Law Dictionary (9th ed. 2009) (defining "regulation" as "[t]he act or process of controlling by rule or restriction").
28. *See Matter of St. Onge v. Donovan*, 71 N.Y.2d 507, 516 (1988) ("Nor may a zoning board impose a condition that seeks to regulate the details of the operation of an enterprise, rather than the use of the land on which the enterprise is located."); *Louhal Props. v. Strada*, 191 Misc. 2d 746, 751 (Sup. Ct., Nassau Co. 2002) ("Applicable case law draws a dichotomy between those regulations that directly relate to the physical use of land and those that regulate the manner of operation of a business or other enterprise."), *aff'd,* 307 A.D.2d 1029 (2d Dep't 2003).

29. 112 Misc. 2d 432 (Sup. Ct., Erie Co. 1982), *aff'd*, 89 A.D.2d 1056 (4th Dep't 1982), *lv. denied*, 58 N.Y.2d 602 (1982).
30. *See id.* at 432.
31. *Id.* at 434 (emphasis added).
32. *See id.*
33. *See* Bill Jacket, L 1981, ch. 846 ("The existing and amended oil and gas law would supersede all local laws or ordinances regulating the oil, gas, and solution mining industries. Local property tax laws, however, would remain unaffected.").
34. *Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459 (1980); *see also Matter of Madison-Oneida Bd. of Coop. Educ. Servs. v. Mills*, 4 N.Y.3d 51, 59 (2004) ("this Court is faced with the interpretation of statutes and pure questions of law and no deference is accorded the agency's determination").
35. ECL 27-1107 (emphasis added).
36. *See* Public Service Law § 172(1) ("no state agency, municipality or any agency thereof may…require any approval, consent, permit, certificate or other condition for the construction or operation of a major electric generating facility").
37. *See e.g. Rhodes v. Herz*, 84 A.D.3d 1, 14 (1st Dep't 2011); *Matter of Estate of Terjesen v. Kiewit & Sons Co.*, 197 A.D.2d 163, 165 (3d Dep't 1994).
38. *See* ECL 23-2703(2).
39. 71 N.Y.2d 126 (1987).
40. *Id.* at 129.
41. ECL 23-2703(2) (as added by L 1974, ch 1043, § 1) (emphasis added).
42. *Frew Run Gravel Prods.*, 71 N.Y.2d at 131 (internal quotation marks omitted).
43. *Id.* at 131-132.
44. *Id.* at 133 (emphasis added).
45. *Id.*
46. *Id.* at 133-134.
47. *See* L 1991, ch. 166, § 228. As amended, the MLRL supersession provision now reads, in pertinent part: "For the purposes stated herein, this title shall supersede all other state and local laws relating to the extractive mining industry; provided, however, that nothing in this title shall be construed to prevent any local government from: a. enacting or enforcing local laws or ordinances of general applicability, except that such local laws or ordinances shall not regulate mining and/or reclamation activities regulated by state statute, regulation, or permit; or b. enacting or enforcing local zoning ordinances or laws which determine permissible uses in zoning districts." ECL 23-2703(2).
48. *See e.g. Falk v. Inzinna*, 299 A.D.2d 120, 122-125 (2d Dep't 2002 (noting that "if the Legislature intended to limit or qualify disclosure under CPLR 3101[i] as did the Court of Appeals in *DiMichel v. South Buffalo Ry. Co.* (80 NY2d 184 [1992 it would have added language to that effect").
49. *See Matter of Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668, 674-676 (1996).
50. *Id.* at 681.
51. *See id.*
52. *See id.* at 682.
53. *Id.* at 681-682.
54. *Id.* at 684.
55. The courts, however, may not be able to reach this argument because the Legislature has, in ECL 23-0303(2), expressly stated its intent to preempt "regulation of the oil, gas and solution mining industries." *See Matter of People v. Applied Card Sys., Inc.*, 11 N.Y.3d 105, 113 (2008), *cert. denied*, 129 S. Ct. 999 (2009).
56. ECL 23-0301.
57. *See* ECL 23-0501.
58. *See* ECL 23-0501, 23-0503; *see also* DEC Revised SGEIS, at 3-10, 5-22 to 5-23.
59. *See e.g. Jancyn Mfg. Corp.*, 71 N.Y.2d at 97 (*JIJ Realty Corp. v. Costello*, 239 A.D.2d 580, 582 (2d Dep't 1997), *lv. denied*, 90 N.Y.2d 811 (1997).
60. *Matter of Western Land Servs., Inc. v. Department of Envtl. Conservation of State of N.Y.*, 26 A.D.3d 15, 17 (3d Dep't 2005), *lv. denied*, 6 N.Y.3d 713 (2006).
61. *See* ECL 23-0301.
62. *See* N.Y. Const, Art IX, § 1 ("Effective local self-government and intergovernmental cooperation are purposes of the people of the state."); *Lanza v. Wagner*, 11 N.Y.2d 317, 325 (1962) (noting that the "purpose of [the constitutional municipal home rule] provisions is to preserve the principle of home rule for cities, towns and villages"); *Matter of Town of E. Hampton v. State of New York*, 263 A.D.2d 94, 96 (3d Dep't 1999) ("The unquestioned purpose behind the home rule amendment was to expand and secure the powers enjoyed by local governments." [internal quotation marks omitted]).
63. *See e.g.* Town Law §§ 261, 272-a; *see also* General City Law § 20(24), (25); Village Law §§ 7-700, 7-722.
64. *See* __ Misc. 3d __, 2012 N.Y. Slip Op. 22037, *14 (Sup. Ct., Tompkins Co. Feb. 21, 2012). Notably, however, Supreme Court did invalidate a portion of Dryden's zoning ordinance that purported to invalidate a local, State, or federal permit for natural gas drilling as preempted by ECL 23-0303(2) because that section directly related to the regulation of oil and gas industry. *See id.* at *14.
65. *Id.* at *9-10.
66. *Id.* at *11.
67. *Id.* at *13.
68. *Cooperstown Holstein Corp. v. Town of Middlefield*, Index No. 2011-0930, slip op. at 10 (Sup. Ct., Otsego Co. Feb. 24, 2012).
69. *Id.* at 8.
70. *Id.*

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Vapor Intrusion in New York: Five Years After Release of New York's Strategy and Vapor Intrusion Guidance

By Katherine Rahill

I. Introduction

In 2006, the state of New York changed the landscape for contaminated sites in New York with the issuance of two documents: the Department of Environmental Conservation's ("DEC") *Strategy for Evaluating Soil Vapor Intrusion at Remedial Sites in New York* (hereinafter, the "DEC Strategy") and the Department of Health's (DOH) *Guidance for Evaluating Soil Vapor Intrusion in the State of New York* (hereinafter, the "DOH Guidance").[1] As described in the DEC Strategy, these documents are "complementary documents" that describe the state of New York's approach to evaluating vapor intrusion.[2] Following the release of these documents, New York moved forward with what is arguably the most aggressive vapor intrusion program in the country.

This article describes vapor intrusion generally, New York's program and its impacts on the state level, the current state of vapor intrusion investigation on the national stage, and practical tips for property owners in light of these impacts.

II. Vapor Intrusion in General

Vapor intrusion is the migration of gaseous or volatile chemicals from the subsurface underlying a building, either groundwater or soil, into the building itself.[3] The volatile chemicals present in the subsurface can be naturally occurring or occur as a result of chemical spills or leaks. A well-known example of a naturally occurring chemical that can migrate into buildings from the subsurface is radon. The most common chemicals cited for man-made vapor intrusion are volatile organic compounds (VOCs), typically chlorinated VOCs associated with manufacturing or dry-cleaning operations such as trichloroethylene (TCE) or perchloroethylene (otherwise known as CVOCs) and non-chlorinated VOCs associated with gasoline service stations like benzene. Volatile chemicals enter a building as a result of a pressure differential between the subsurface and the interior of the building. Contamination from a site may spread off-site via the groundwater, causing potential vapor intrusion risks at nearby properties.

Vapor intrusion presents a potential health risk due to chronic or long-term exposure to these chemicals as people living or working in a structure overlying soil or groundwater contamination inhale the chemicals. As with any potential risk due to chemical exposure, the true health risk is dependent on the dose or amount of chemical to which a person is exposed, the length of time of the exposure, and the potential to cause a health impact associated with a particular chemical.[4] Two of these factors are fairly constant across sites in that regulatory authorities have developed default parameters to be used for length of exposure depending on whether a building is residential or commercial and toxicologists and epidemiologists have worked to develop a body of knowledge regarding known and potential health effects of chemicals. However, the dose a person receives is site-dependent. As a result, a critical component to understanding the potential for health risks associated with vapor intrusion is the concentration of the chemical suspected of posing such a risk, and much of the evaluation of vapor intrusion risks associated with a site is aimed at determining whether there exists a potential for humans to be exposed to a contaminant related to a site at sufficient levels to cause adverse health impacts.

III. New York's Vapor Intrusion Program

A. DEC's Aggressive Approach to Vapor Intrusion Evaluation

Beginning in the early 2000s, the state of New York began focusing on the potential health impacts of vapor intrusion and reassessing previous assumptions of human health risks associated with contamination. In 2005, the State issued a draft guidance outlining a comprehensive approach to the assessment of vapor intrusion risks. This guidance was then finalized in 2006 with the issuance of the DEC Strategy and DOH Guidance. As described in the DEC Strategy, the 2006 DEC and DOH documents were intended to be "complementary," setting forth the approach by which "all past, current, and future contaminated sites" would be evaluated for the potential for risk associated with vapor intrusion.[5] The DEC Strategy describes DEC's plan for addressing vapor intrusion risks at contaminated sites whereas the DOH Guidance provides the methodology for conducting the actual soil vapor intrusion investigations.

The DEC Strategy calls for all sites currently undergoing investigation and remediation for suspected contamination as well as future sites to be evaluated for potential soil vapor intrusion impacts. Since the issuance of the DEC Strategy, vapor intrusion investigations have been integrated into the DEC's remedial investigation process,[6] thereby making it a requirement to assess the potential for soil vapor intrusion and address any risks associated with such an assessment in the selected remedy for a site.

Additionally, and perhaps more significantly, DEC pledged in the DEC Strategy to evaluate all past sites in the State of New York.[7] "Past" sites are defined as all sites for which remedial determinations had been made prior to 2003.[8] Pursuant to DEC's program, past sites were initially screened to determine whether VOCs were found at these sites and, if so, whether the VOCs found at the site were chlorinated VOCs (CVOCs).[9] Past sites with no indication of VOC contamination were determined by DEC to

require no further assessment.[10] Past sites with evidence of VOC contamination were categorized into two priority groups—high priority was placed on sites with Priority 1 for sites with CVOC contamination and Priority 2 for sites with non-chlorinated VOC contamination.[11] According to the DEC Strategy, DEC reviewed its records of past sites and determined there were 421 Priority 1 past sites in the state of New York.[12] In collaboration with the U.S. Environmental Protection Agency (EPA), these 421 sites were to be divided up into two groups, those sites at which EPA would take the lead (sites on the National Priorities List in New York) and the remaining sites at which DEC would take the lead.[13] The status of this review is discussed in more detail below.

B. DOH's Guidance for Evaluating Sites

As stated above, the DOH Guidance sets forth the methodology recommended to be used by parties to assess soil vapor intrusion[14] risks at sites in the State of New York. Notably, the DOH Guidance applies to all sites, both residential and non-residential, at which vapor intrusion is being investigated, including investigations performed voluntarily or pursuant to DEC's environmental remediation programs.[15] The DOH Guidance describes the data to be collected, the means by which to evaluate that data, possible monitoring and/or mitigation techniques, and recommendations for communicating with the potentially impacted community.

The first step in assessing soil vapor intrusion risks is to determine whether the site poses a risk at all. According to the DOH Guidance, soil vapor intrusion should be investigated at any site where there is (1) known or suspected subsurface source of volatile chemicals; and (2) an existing building or a possibility of buildings in the future.[16] Once a site is established as posing a potential vapor intrusion risk, the next step is to collect data.[17]

In order to determine whether contamination at a site is causing, or poses a threat of causing, health impacts through vapor intrusion, the DOH Guidance calls for potential vapor intrusion issues to generally be evaluated through the collection of four types of environmental samples.[18] These types of samples are soil vapor, sub-slab, indoor air, and ambient or outdoor air. Soil vapor samples look at the levels of volatile contaminants in the air space within the soil and are generally taken in the vicinity of the building being investigated.[19] Sub-slab samples are taken below the floor slab underlying the building to evaluate the soil vapor content directly beneath the building, basically to determine what type of soil vapor could migrate into a building.[20] Indoor air samples reflect the actual conditions within a building to which a person within that environment is, in fact, exposed.[21] Indoor air samples are generally taken during the heating season on the lowest level of a building including crawl spaces and basements, as these samples are most likely to represent the worst case for potential exposure from sub-surface contaminants. Last, ambient air samples taken just outside a building provide a snapshot of the background levels for a particular chemical in the area.[22] Whether all of these types of data need to be collected is somewhat site-specific and parties will need to work with the appropriate regulatory authority to determine what sampling is required and whether an iterative approach to investigating soil vapor intrusion is acceptable at a site.[23]

During and following the data collection phase, the next step is to evaluate the data. The DOH Guidance calls for an evaluation of the collected data in light of several factors including, but not limited to, all known contamination at a site, potentially relevant regulatory standards, present and future use of the building, background contaminant levels and completed or proposed remedial actions.[24] While the DOH Guidance describes generally how parties should evaluate each of the types of data, it also provides decision matrices that set forth more specifically the steps to be taken in response to sub-slab and indoor air data.[25] At present, DOH has developed two matrices to be used for decision-making and assigned four chemicals to those matrices—carbon tetrachloride, tetrachloroethene, 1,1,1-trichloroethane, and TCE.[26]

Based on the data collected, three responses are likely. First, the samples may demonstrate a lack of a risk of vapor intrusion such that no further investigation is necessary. This response is expected only where sub-slab samples are sufficiently low to show no risk due to vapor intrusion.[27] By way of example, the DOH Guidance Matrix 1 effectively sets the threshold level for further investigation or remedial at 5 $\mu g/m^3$ for TCE and carbon tetrachloride.[28] Second, sampling results may not evidence present vapor intrusion impacts, but a potential for such impacts may exist such that monitoring may be required.[29] Third, the results may demonstrate impacts within a structure as a result of the migration of contaminants from the subsurface such that mitigation of those impacts is necessary.[30] Mitigation may take the form of remediating the source of the impacts, sealing the interior of the building to prevent the migration, the installation of systems to reverse the pressure differential such that vapor cannot go into a building, or a combination of any or all of the above.

IV. Impacts of New York's Vapor Intrusion Evaluation Program

New York's emphasis on evaluating vapor intrusion risks at contaminated sites has had numerous impacts on the state level. These impacts include not only the reopening of previously closed sites but also new litigation in the form of actions to recover costs expended in investigating and remediating vapor intrusion and a potential rejuvenation of previously expired toxic tort claims as well as new obligations on landlords.

A. Reopening of Past Sites

As discussed above, DEC has launched an effort to re-evaluate conditions at hundreds of sites previously thought to be closed. At the time of issuance of the 2006 policy, DEC determined there were 421 high priority past sites to be evaluated for potential vapor intrusion risk.[31] Since that time,

DEC has reopened all 421 identified sites and initiated an evaluation of vapor intrusion at each of these sites.[32] As of August 2011, DEC reported that vapor intrusion evaluation was "Complete" at 247 sites and "Underway" at 174 sites.[33] Of those sites for which DEC reported vapor intrusion evaluation to be complete, DEC determined 50 sites required some type of mitigation to remediate vapor intrusion risks, 57 sites required further monitoring, and 140 sites needed no further action.[34] Additionally, 12 of the sites at which the vapor intrusion risks are still being evaluated were required to install mitigation systems.[35] DEC has not indicated when it plans to complete the evaluation of the remaining 174 sites. However, based on DEC's progress to date, it seems likely to occur in the next few years.

While DEC is making what is arguably swift progress in evaluating the 421 high priority sites, responsible parties at other past sites are left somewhat in the dark as to the status of their closed sites. As discussed above, the 421 sites for which an evaluation is either complete or under way were identified as top priority by DEC as a result of the presence of CVOC contamination at these sites. The remaining closed sites with non-chlorinated VOC contamination such as benzene or naphthalene (contaminants often associated with former gasoline stations) were determined to pose a lower risk because many of these compounds biodegrade in the presence of oxygen and are more easily identified as a result of recognizable odors.[36] As a result, DEC stated that these sites would be addressed as identified. However, DEC did not foreclose the idea that the priority of these remaining sites would be re-evaluated at a later date, thereby leaving these sites vulnerable to re-opening in the future.

B. Litigation Impacts

While the need to evaluate vapor intrusion impacts at current and future sites is now well known, the potential litigation implications of the state of New York's focus on vapor intrusion is continuing to take shape. The primary types of litigation impacted by New York's vapor intrusion efforts are cost recovery actions and toxic tort.

As parties are required to engage in investigation and remediation of vapor intrusion impacts at sites, whether those sites are current sites or sites re-opened as a result of DEC's evaluation of vapor intrusion at past sites, those same parties will likely pursue recovery of these costs from other potentially responsible parties at these sites. While potentially responsible parties at sites currently being investigated should not be surprised by a cost recovery action that includes costs associated with vapor intrusion investigation, parties may be surprised by actions concerning sites that were previously thought to be closed. A recent example is the filing of a federal lawsuit in the Northern District of New York, seeking recovery of $2.5 million in response costs related to soil vapor contamination pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and various state law claims.[37] On June 24, 2011, CAEUSA, Inc. (CAE) filed suit against numerous owners and operators of properties neighboring CAE's former facility, alleging that groundwater contamination from these neighboring properties had contributed to contamination at CAE's former property and the surrounding area.[38] This case is unique in that it is one of the first (if not the very first) actions for cost recovery in New York as a result of costs incurred to investigate and address vapor intrusion years after a remedy was implemented at the site. According to the complaint, following extensive investigation and remediation beginning in 1984, in 1998, pursuant to consent orders entered into with DEC, CAE spent $4 million on soil remediation on its property and DEC determined at that time that no remedial action was required to address groundwater due to low contamination levels.[39] Despite the prior remedy and decision on groundwater contamination, in 2003 and 2004, DEC undertook an investigation of soil vapor issues in the area surrounding CAE's former facility including investigating sub-slab and indoor air concentrations at a number of properties.[40] As a result of this investigation, DEC installed over 120 soil vapor mitigation systems at surrounding properties and then pursued reimbursement from CAE for $2.5 million in costs DEC incurred in conducting the soil vapor investigation and mitigation.[41] While CAE has reimbursed DEC for some of these costs, it denied responsibility for $2.1 million in costs and DEC has filed claims against the company for the outstanding costs as well as to require CAE to conduct additional investigation and remediation at the surrounding properties.[42] CAE is now seeking to recover the $400,000 paid to DEC as well as the remaining $2.1 million demanded by DEC from the neighboring property owners and operators, which it alleges contributed to the soil vapor contamination problems in the area.[43] This complaint is just one example of what parties can expect to occur at contaminated sites in New York, including, as with the CAE case, sites previously thought to have a final remedy. Both CAE and the defendants in the present action were met with tail liability that they likely had believed to have been extinguished following the completion of the 1998 remedial action.

The impact of the state of New York's approach to vapor intrusion will likely be felt on the toxic tort front as well. Toxic tort actions alleging either personal injury or property damage as a result of vapor intrusion caused by groundwater contamination emanating from a contaminated site are not uncommon. However, tort actions are generally not intended to be open-ended. Rather, plaintiffs must bring such actions within the applicable statute of limitations. For responsible parties at closed sites, the statute of limitations arguably provides a defense to later brought actions for personal injury or property damage as a result of contamination. However, a 2008 New York appellate decision called such a defense into question in a matter involving soil vapor intrusion. In *Aiken v. General Electric Co.*,[44] a New York appellate court held that plaintiffs' claims of property damage due to soil vapor contamination were not necessarily precluded by the statute of limitations despite the fact that the plaintiffs had knowledge of groundwater contamination underneath their properties as early as 1983. In that case,

several property owners had brought an action for property damages in 1983 against a former facility owner, alleging that CVOCs had migrated from the facility into a neighboring residential area and were contaminating their drinking water wells.[45] That case was subsequently settled.[46] Much later, in 2004 and 2005, the facility owner conducted an assessment of vapor intrusion risks in the residential neighborhood at the request of DEC, leading the facility owner to announce in 2004 that "soil vapor from the contamination emanating from the groundwater…was a potential problem for residents."[47] Two years later, in 2006, a second group of property owners that did not have drinking water wells impacted by the contamination brought the *Aiken* suit, seeking damages for the alleged soil vapor intrusion of their property. The defendant moved for summary judgment, arguing the claims were barred by the three-year statute of limitations given that the groundwater contamination in the area had been widely known for over twenty years.[48] The plaintiffs, however, countered that, despite being on notice of the groundwater contamination, they were not on notice as to the threat soil vapor intrusion posed to their property until 2004 at the earliest and thus filed their action within three years of discovery of the injury to their property. The defendant was unsuccessful at the trial court level and appealed to the appellate division where the defendant was again unsuccessful. In affirming the lower court's denial of summary judgment, the court acknowledged that the groundwater contamination was widely known but held that there was a question of fact as to "when plaintiffs should have suspected, let alone discovered, that their properties had been damaged by *soil vapor intrusion*."[49] This decision effectively requires that a plaintiff know or have reason to know of the injury resulting from the particular pathway of vapor intrusion in order for the clock to begin to run on statute of limitations. As a result, even responsible parties that long ago settled cases concerning groundwater contamination in an area, such as the defendant in the *Aiken* case, cannot enjoy the finality a statute of limitations is intended to provide.

C. Impacts on Lessors

Additionally, the impacts of New York's focus on vapor intrusion have extended to landlords. On December 3, 2008, New York became the first state to require property owners to inform tenants of results demonstrating a potential risk of vapor intrusion. As of that date, the state of New York requires property owners to notify their tenants and occupants, whether residential or commercial, about contamination reports evidencing a potential risk of vapor intrusion, regardless of where the contamination originated.[50] The disclosure is required whenever an owner receives[51] results from indoor air, sub-slab air, ambient air, sub-slab groundwater, and/or sub-slab soil sampling that exceed either a DOH or Occupational Safety and Health Administration (OSHA) guideline for indoor air quality.[52] The rule requires the property owner, within 15 days of receiving the air contamination report, to give all tenants or occupants fact sheets prepared by DOH, notices of resources providing supplemental information, and "timely notice of any public meetings required to be held to discuss" the report.[53] While the rule does not impose any affirmative obligation on landlords to investigate and remediate soil vapor intrusion outside of what they might otherwise be required to do under other environmental laws, this information could impact the landlord's ability to retain tenants as well as attract new tenants.

V. Vapor Intrusion on the National Stage

As with many recent environmental issues, the efforts by states such as New York to dig deeper into the potential impacts of vapor intrusion have had impacts on the national level. While vapor intrusion has been a known pathway of potential exposure for many years, there has been an increased focus on vapor intrusion at the federal level in the past year. In the past year, EPA has taken a number of steps to address vapor intrusion, including considering the addition of a vapor intrusion component to the Hazard Ranking System ("HRS"), announcing its plan to finalize its vapor intrusion evaluation guidance, and issuing a final health assessment for TCE in which vapor intrusion is an obvious focus. These actions are described in more detail below.

On January 31, 2011, EPA made its announcement that it is considering adding a vapor intrusion component to the HRS.[54] The HRS is the principal means by which EPA evaluates sites for inclusion on the National Priorities List (NPL). The NPL is a list of priority sites used to focus EPA's investigation of known or suspected releases and represents what EPA has determined are sites that pose a risk to human health or the environment.[55] The HRS currently evaluates four different pathways—the groundwater pathway, the surface water pathway, the soil exposure pathway, and the air migration pathway—to assess such risks.[56] Notably, the evaluation of these pathways does not include an evaluation of the risk of vapor intrusion. As a result, the HRS does not currently consider the risk of vapor intrusion in determining whether a site poses a sufficient risk to human health or the environment to warrant listing on the NPL. The inclusion of this pathway would allow EPA to consider vapor intrusion risks in listing decisions and could potentially result in sites that do not currently qualify for placement on the NPL to be eligible for placement on that list.

On March 17, 2011, EPA announced its plan to finalize its *Evaluating Vapor Intrusion to Indoor Air Pathway from Contaminated Groundwater and Soil (Subsurface Vapor Intrusion Guidance)*, which was originally released in draft in 2002.[57] This effort to finalize the federal vapor intrusion guidance largely was the result of an EPA Office of the Inspector General report entitled *Final Guidance on Vapor Intrusion Impedes Efforts to Address Indoor Air Risks* in which the Inspector General recommended that EPA review the 2002 guidance based on the body of knowledge developed during the time since the Subsurface Vapor Intrusion Guidance's initial issuance.[58] As a result, EPA engaged in such a review to identify provisions in the guidance that need to be revised in light of that knowledge. Additionally, EPA provided a new opportunity

for the public to comment on the 2002 guidance and held listening sessions on the nine-year-old guidance.[59] According to the Federal Register notice announcing the public comment period, EPA plans to issue a new draft guidance document for comment in Spring 2012 with a goal of issuing a final vapor intrusion guidance document in November 2012.[60] The final federal guidance document will clearly impact the evaluation of vapor intrusion impacts at sites undergoing investigation and remediation under federal oversight and may have impacts on the state level as well.

Finally, on September 28, 2011, EPA released its final health assessment for TCE.[61] Although not directly related to EPA's federal policy on vapor intrusion, the Integrated Risk Information System assessment demonstrates a clear focus on the potential health risks associated with inhalation exposure to TCE from vapor intrusion. Traditionally, EPA's focus has largely been on oral exposure to TCE through the drinking of contaminated drinking water. However, for the first time in the new assessment, EPA has set a reference concentration for chronic inhalation exposure to TCE for non-cancer health impacts,[62] which it determined to be 2 $\mu g/m^3$.[63] Additionally, EPA has quantified risk estimates for cancer effects from inhalation exposure. Using the risk estimates, the final health assessment equates to a 1 in 10,000 risk level with lifetime exposure to 20 $\mu g/m^3$ and a 1 in 1,000,000 risk level with lifetime exposure to 0.2 $\mu g/m^3$.[64] Overall, the impact of the final health assessment is likely to be significant. In addition to having impacts at the federal level, the assessment will likely have an effect on state standards for drinking water and vapor intrusion, especially in those states such as New York that use EPA risk estimates to set their own standards. In the event New York lowers its threshold values as a result of the TCE assessment, it may lead to the reopening of more sites.

VI. What Does New York's Vapor Intrusion Program Mean for Property Owners?

While the state and federal emphasis on vapor intrusion risks is not new, it is clear that such emphasis is growing as evidenced by the aggressive approach taken by the state of New York over the last five years and the actions taken by EPA over the past year. As discussed above, these changes have, and will continue to have, direct impacts on investigation and remediation requirements at contaminated sites as well as more indirect impacts such as litigation risks and impacts on the marketability of property. As a result, past and present property owners or operators as well as parties considering buying property, especially in the state of New York, need to be aware of the potential impact vapor intrusion could have on them and take steps to reduce their risks:

- Responsible parties for closed sites should be aware of the potential reopening of such sites as a result of vapor intrusion risks. While it is likely that many responsible parties at past sites contaminated with CVOCs are aware of the status of those sites under DEC's vapor intrusion initiative, there may be potentially responsible parties that are not directly involved with these actions. Additionally, parties at non-chlorinated VOC contaminated past sites likely have not been contacted. However, these parties should not ignore present actions or the possibility of future actions at past sites but should work to educate themselves on the process of vapor intrusion evaluation generally and at any site at which they may be implicated.

- Responsible parties and current property owners at sites at which vapor intrusion evaluation is necessary should employ environmental consultants that are well-versed in vapor intrusion investigations, including the DOH Guidance, to conduct such investigations. A knowledgeable environmental consultant will be able to provide advice as to the appropriate approach for conducting the evaluation and, where necessary, the appropriate mitigation measures for a particular site. For example, questions that may arise include whether staged data collection depending on the circumstances of the evaluation, or whether it is appropriate to install mitigation systems at some point during the evaluation rather than continue with lengthy data collection.

- Prospective property owners or long-term lessees should ensure that vapor intrusion risks are evaluated as part of their due diligence. Vapor intrusion risks could have a number of negative impacts, including requiring investigation and mitigation, potential toxic tort liability, and impacts to a landlord's ability to rent a property, to name a few. As a result, prospective property owners and long-term lessees should engage environmental consultants with significant experience in assessing vapor intrusion risks when considering property at which there is a risk of vapor intrusion. In particular, such parties may want to consider including compliance with the screening provisions of ASTM Standard E 2600-08: *Standard Practice for the Assessment of Vapor Intrusion into Structures on Property Involved in Real Estate Transactions* in the scope of work for environmental consultants assisting with due diligence.

- Finally, parties should consider obtaining environmental insurance to the extent it is available to provide coverage for vapor intrusion risks. There are numerous environmental insurance products on the market such as, for example, a pollution legal liability policy that can be used to protect policyholders against third party claims related to off-site conditions or unknown conditions on-site.

Endnotes

1. New York State Department of Environmental Conservation, *DER-13/Strategy for Evaluating Soil Vapor Intrusion at Remedial Sites in New York* (Oct. 2006), http://www.dec.ny.gov/docs/ remediation_ hudson_pdf/der13.pdf [hereinafter *DEC Strategy*]; New York State Department of Health, *Guidance for Evaluating Soil Vapor Intrusion*

in the State of New York (Oct. 2006), http://www.health.ny.gov/environmental/ investigations/soil_gas/svi_guidance/docs/svi_main.pdf [hereinafter *DOH Guidance*].

2. *DEC Strategy*, *supra* note 1, at 1.
3. *DOH Guidance*, *supra* note 1, at 1.
4. *Id.* at 2.
5. *DEC Strategy*, *supra* note 1, at 1.
6. Vapor intrusion impacts were reviewed at sites prior to the issuance of the DEC Strategy and DOH Guidance. However, the review of these impacts has now been incorporated into the DEC's environmental remediation programs regulations. *See* N.Y. Comp. R. & Regs. Tit. 6, § 375-6.7 (added in Dec. 2006 and requiring soil vapor intrusion potential to be evaluated and included in the remedy for a site).
7. *DEC Strategy*, *supra* note 1, at 4.
8. *Id.* at 3.
9. *Id.* at 4-6.
10. *Id.* at 6.
11. *Id.* at Attachment 2-4.
12. *Id.* at 4.
13. *Id.* at 4.
14. The DOH Guidance does not specifically address the methods to be used for assessing vapor intrusion directly from groundwater into indoor air with no soil interface. The DOH Guidance states that such circumstances should be addressed on a site-specific basis. *DOH Guidance*, *supra* note 1, at i-ii.
15. *Id.* at i.
16. *Id.* at 8.
17. *Id.* at § 2.
18. *Id.*
19. *Id.* at 9.
20. *Id.* at 10.
21. *Id.* at 10-11.
22. *Id.* at 11.
23. *Id.*
24. *Id.* at 39-40.
25. *Id.* at 48-50.
26. *Id.* at 49.
27. *Id.* at 51.
28. *Id.* at App. A, Matrix 1.
29. *Id.* at 51.
30. *Id.*
31. *DEC Strategy*, *supra* note 1, at 4.
32. New York State Department of Environmental Conservation, *New York's Chemical Vapor Intrusion Called the Most "Proactive" in the Nation*, ENVIRONMENT DEC (Apr. 2009), http://www.dec.ny.gov/environmentdec/52789.html.
33. New York State Department of Environmental Conservation, *Status of Vapor Intrusion Evaluations at Legacy Sites as of August 2011*, http://www.dec.ny.gov/regulations/51715. html.
34. *Id.*
35. *Id.*
36. *DEC Strategy*, *supra* note 1, at 4.
37. Complaint, *CAEUSA, Inc. v. Triple Cities Metal Finishing Corp, et al.*, Civil Action No.: 3:11-C.V.-0711 (N.D.N.Y. filed June 24, 2011).
38. *Id.*
39. *Id.* at ¶¶30, 31.
40. *Id.* at ¶¶32, 33.
41. *Id.* at ¶¶36-38.
42. *Id.* at ¶¶39, 40.
43. *Id. at* Prayer for Relief.
44. *Aiken v. General Electric Co.*, 57 A.D.3d 1070 (3d Dep't 2008).
45. *Id.* at 1071.
46. *Id.*
47. *Id.* at 1073.
48. *Id.* at 1071-72.
49. *Id.* at 1073 (emphasis added).
50. N.Y. Environmental Conservation Law § 27-2405 (ECL).
51. Notably, the results must be received from an "issuer," which is defined as: (1) a party subject to a consent order under the state Superfund program or an order or agreement under the Navigation Law; (2) a "participant" under the Brownfields Cleanup Project (BCP)"; (3) a municipality operating under an ECL Title 56 Environmental Restoration Program contract; or (4) the DEC. ECL § 27-2405.
52. ECL § 27-2405(1)(a); New York State Department of Environmental Conservation, *Tenant Notification of Indoor Air Contamination Associated with Soil Vapor Intrusion*, http://www.dec.ny.gov/regulations/55739. html.
53. ECL § 27-2405(2).
54. Potential Addition of Vapor Intrusion Component to the Hazard Ranking System, 76 Fed. Reg. 5370 (Jan. 31, 2011).
55. *See* 42 U.S.C. § 9605(a)(8)(B) (requiring EPA to establish the NPL).
56. Potential Addition of Vapor Intrusion Component to the Hazard Ranking System, 76 Fed. Reg. at 5372.
57. Public Comment on the Development of Final Guidance for Evaluating the Vapor Intrusion to Indoor Air Pathway from Contaminated Groundwater and Soils (Subsurface Vapor Intrusion Guidance), 76 Fed. Reg. 14660, 14660 (Mar. 17, 2011) (hereinafter *Public Comment*).
58. *Public Comment*, 76 Fed. Reg. at 14661; United States Environmental Protection Agency, *Review of the Draft 2002 Subsurface Vapor Intrusion Guidance*.
59. *Public Comment*, 76 Fed. Reg. 14660.
60. *Public Comment*, 76 Fed. Reg. at 14661.
61. United States Environmental Protection Agency, *Integrated Risk Information System: Trichloroethylene Quickview*, http://cfpub.epa.gov/ncea/iris/index.cfm?fuseaction=iris. showQuickView&substance_nmbr=0199.
62. The reference concentration represents the continuous inhalation exposure to humans over their lifetime that EPA estimates is likely to be without an "appreciable risk" of non-cancer health impacts.
63. United States Environmental Protection Agency, *Integrated Risk Information System: Trichloroethylene Quickview*, § I.B.1, http://cfpub.epa.gov/ncea/iris/index.cfm? fuseaction=iris. showQuickView&substance_nmbr=0199.
64. *Id.* at § II.C.1.2.

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Greening the Legal Profession—Law Office Climate Challenge Profiles

In early 2007, the American Bar Association ("ABA") and the U.S. Environmental Protection Agency ("EPA") partnered to encourage law offices to commit to waste reduction and energy and resource conservation. The partnership resulted in the Law Office Climate Challenge Program. As part of the New York State Bar Association's ("NYSBA") effort to promote and grow the program, we are continuing our recognition of firms within the state of New York that have committed to this challenge. In this issue of *The New York Environmental Lawyer*, we recognize the innovation and commitment of attorneys in the New York offices of Chadbourne & Parke and Kilpatrick Townsend & Stockton LLP. Information on the ABA-EPA Law Office Climate Challenge Program can be found at: http://www.abanet.org/environ/climatechallenge/home.shtml. Questions regarding the NYSBA's support of the Law Office Climate Challenge may be directed to Megan Brillault (mbrillault@bdlaw.com) or Kristen Wilson (kwilson@harrisbeach.com) .

Chadbourne & Parke

Chadbourne & Parke launched its Green Initiative in April 2008. With a goal of becoming a model environmental citizen, Chadbourne's Green Initiative began with a focus on recycling and reducing its energy and resource consumption. The firm incorporated both large and small changes, from recycling bins at desks and less use of plastic water bottles to double-sided printing, use of recycled paper and Energy Star-rated equipment.

As part of its Green Initiative, Chadbourne enrolled in the ABA-EPA Law Office Climate Challenge. In April 2008, Chadbourne was certified as a leader in the Green Power Partnership category and is now a leader in the other three categories: Best Paper Practices, Waste Wise, and Energy Star. The firm documented a 50% reduction in paper usage and Chadbourne's New York office alone documented an 11.8% decrease in power usage. In 2008 and 2009, Chadbourne purchased renewable energy certificates to offset 60% of its domestic energy use. As of 2010, the firm increased that percentage to 100%.

The firm switched to using more energy-efficient light bulbs and encourages its employees to shut off lights, computers, and all other equipment when they are not in their offices. Copiers and printers have been programmed for two-sided usage and employees have been encouraged to do more work electronically without printing. The firm also set up a "green" suggestion box for employees so that its program continues to grow and expand.

Other steps the firm has taken to attain its Green Initiative goal include:

- Placing paper recycling containers at everyone's desk
- Ordering office supplies that contain recycled materials, such as paper containing at least 30% recycled content
- Using and purchasing as necessary Energy Star-designated copiers and other office equipment
- When possible and as needed, reconditioning/refinishing wood furniture using eco-friendly products, rather than replacing the furniture
- Cleaning office carpets using environmentally friendly products, such as Chemspec DFC105
- Using low-volatile organic compound paint
- Upgrading bathrooms to reduce the amount of water used in urinals, water closets (flushometers), and water faucets
- Purchasing Green Wave biodegradable plates and containers, EarthSmart utensils (made from corn and potatoes), and FabriKal Greenwar

Chadbourne developed the Green Initiative to reflect its engagement with environmental issues from both professional and civic vantage points. Since the program launched, Chadbourne has helped clients establish their own green practices and hosted a Green Business Summit in New York in June 2008. Chadbourne's Green Initiative is the firm's way of taking immediate, quantifiable steps to limit its impact on the environment. The program covers Chadbourne's New York, Washington, and Los Angeles offices.

For more information regarding Chadbourne's initiative, please see: http://www.chadbourne.com or contact Andrew Blum, Media Relations Manager, ablum@chadbourne.com, (212) 728-4519.

Kilpatrick Townsend & Stockton LLP

Another firm which has been at the forefront of creating and promoting a more sustainable business practice and which has signed on to the ABA/EPA Law Office Climate Challenge is Kilpatrick Townsend & Stockton LLP ("Kilpatrick"). In 2008, Kilpatrick launched an initiative that touches upon all aspects of sustainability including

the environment, social responsibility, and pro-bono and diversity initiatives. As part of this global sustainability practice, the firm created the "Keeping Sustainable @ Kilpatrick Townsend" program. Kilpatrick is one of the few firms that have signed onto the Energy Star Program, the Green Power Partnership Program, and the WasteWise Program.

In January 2011, with the merger of Kilpatrick Stockton and Townsend and Townsend and Crew, one of the primary goals as part of bringing the two firms together was to roll out the Keeping Sustainable @ Kilpatrick Townsend program firm-wide. As part of Kilpatrick's dedication to furthering sustainability practices, the firm bought renewable energy certificates for all of its legacy offices in 2010 (the year prior to the merger). In addition, for any office space that Kilpatrick builds out, it uses environmentally friendly carpets and flooring.

Some current sustainable practices that are incorporated into Kilpatrick's offices include:

- motion sensor lights;
- use of recycled paper products in lieu of Styrofoam;
- use of biodegradable utensils;
- double-sided printing;
- use of 100% post-consumer product for letterhead;
- use of copy and printer paper with 35% recycled content.

In addition, Kilpatrick provides each of its employees with re-usable mugs for both hot and cold beverages.

Kilpatrick's sustainability agenda for 2012 is also packed with some innovative ways to continue sustainability. On the agenda for 2012, Kilpatrick is considering a way to provide carbon offsets for traveling to meetings or other professional-related events and to develop a methodology to quantify the firm's energy consumption and paper use. As a result of Kilpatrick's sustainability practices, some of the firm's clients have also expressed interest in how to run more sustainable business places.

Kilpatrick is not only at the forefront in New York but also in Georgia where it has the distinction of being the first law firm to join the Partnership for a Sustainable Georgia Program, a voluntary environmental leadership initiative sponsored by the Georgia Environmental Protection Division.

For additional information on Kilpatrick's sustainability initiative, please see: http://kilpatricktownsend.com/en/About_Us/Sustainability.aspx, or contact Whitney Deal, Associate Director, Social Responsibility, wdeal@kilpatricktownsend.com, (404) 815-6651.

The Roles of Positivism and Ethics in Professional Responsibility

By Randall C. Young

The legal profession is uniquely concerned with the meaning of words and the application of language, yet lawyers are notably careless with the terms applied to governance of their conduct. In particular, we use the word "ethics" to describe any matter that pertains to professional responsibility.

Law students refer to their Professional Responsibility class as their ethics course. Mandatory Continuing Legal Education requirements include a minimum of four hours of credits in "Ethics and Professionalism."[1] However, lawyers and MCLE providers refer to these only as "ethics" credits. More to the point, many—if not most—of these courses focus on the intricacies of the Rules of Professional Conduct with scant discussion of ethics as such. Bar associations have Committees on Professional Ethics which, again, focus primarily on application of the Rules of Professional Conduct.

"[T]he application of rules by an outside authority to govern conduct is legal positivism—a system in which compliance with the rules is an end in itself regardless of value judgments."

Ethics and Professionalism involve more than consideration of ethics alone.[2] Ethics is normative and involves an effort to determine what constitutes moral behavior or what distinguishes right from wrong. Immanuel Kant described ethics as internal values that form a basis for self-control.[3] By contrast, the application of rules by an outside authority to govern conduct is legal positivism—a system in which compliance with the rules is an end in itself regardless of value judgments.[4]

The distinction between law and ethics can also be practically illustrated. Following any given course on professional responsibility, the discussion among the attendees is likely to include some expression of dissatisfaction with the idea that one can teach ethical behavior in a class or determine whether behavior is ethical by application of specific rules such as the Rules of Professional Conduct.

Lawyers who believe that ethical behavior cannot be determined by reference to printed rules are not wrong.[5] Laws may be based on the moral judgments of the lawmaker, but compliance with the law does not necessarily require consideration of ethical values. One can violate a law for a good purpose, and one can comply with a law to achieve selfish or even malicious ends.

Professional Responsibility includes both legal positivism—compliance with the Rules of Professional Conduct—and a system of ethics. However, using the phrase "legal ethics" synonymously with application of the Rules of Professional Conduct obscures the regulatory nature of the Rules of Professional Conduct, and can lead lawyers to perceive the rules as ethical norms rather than regulations.

Not long ago, I attended a course on the Rules of Professional Conduct during which one of the panelists admitted that he primarily guided his conduct by whether he thought he would be able to look himself in the mirror after taking a particular action. In a different forum, a renowned trial attorney lecturing about the art of litigation told the audience that he primarily relied "on his gut" when deciding how to handle ethical problems that arose during litigation.

These lawyers appear to have an innate perception that matters of professional responsibility are issues of ethics, rather than questions of law. How else could one explain any lawyer relying on his or her intuition to determine whether behavior comports with regulations? Would an attorney ever advise clients facing a question of compliance with a regulation governing their business to simply rely on their gut or look themselves in the mirror to determine what to do? No. But, the accepted view that questions of professional responsibility are matters of ethics rather than issues of regulatory compliance—as reflected in our use of word ethics—apparently leads some lawyers to do exactly that.

Lawyers who argue against the ability to teach ethical behavior in classrooms may be correct about the distinction between ethics and positive law, but they are mistaken if they conclude that this distinction makes the study of ethics irrelevant. The issue of professional conduct is not solely a matter of whether behavior complies with the Rules.[6] It is a question of understanding the system of values that the Rules protect so the lawyer can properly apply the Rules and make discretionary decisions that enhance the profession.

Unlike most sovereign commands, the Rules often defer to the judgment of the governed. For example, a lawyer may limit the scope of representation.[7] A lawyer may exercise judgment to waive a right or position of the client or accede to reasonable requests.[8] A lawyer may disclose confidential information under certain circumstances.[9] A lawyer may represent a client despite a potential conflict of interest if certain conditions are met.[10] A lawyer may

advance costs and fees for an indigent or pro bono client.[11] Whether the lawyer should engage in such permissible activities as part of representation is within the lawyer's control and subject to personal ethical judgment.

Similarly, if the Rules and the cases applying them are ambiguous or fail to address a particular situation, the lawyer can turn to other attorneys or the Committee on Professional Ethics for guidance about what is proper behavior within the profession. This guidance must be drawn from judgments about the priorities and values of the legal profession as a whole—a philosophy of ethics.

The Rules themselves are an expression of the ethical values of the profession, and studying their nuances and history can provide insight into those values. Consider that under the Code of Professional Conduct, the Committee on Professional Ethics was sometimes called upon to weigh the Canons calling for zealous representation against other professional obligations, such as candor, preservation of confidences, and public confidence in the judicial system.[12] The Rules of Professional Conduct do not reference zealous representation. This represents an expression of what the values of the profession are and should be. Such changes can have significant meaning—if they are recognized and internalized by attorneys.

Professionalism entails both the application of the Rules and promotion of an overarching system of ethics in which they are rooted. With this understanding, lawyers should treat the Rules of conduct as the regulations that they are, but also study and discuss the normative ethics that are expressed through the Rules.

Endnotes

1. 22 N.Y. Comp. Codes R. & Regs. § 1500.12(a) ; 22 N.Y.C.R.R. § 1500.22(a).
2. See 22 N.Y.C.R.R. § 1500.2(c).
3. Immanuel Kant, The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right (W. Hastie, ed., location 213).
4. John Austin, The Philosophy of Positive Law (Robert Campbell ed., 6th ed., Murray Press 1869).
5. Rule Utilitarianism asserts that compliance with laws has an inherent moral value when the laws are drafted to provide the best general outcome; however, even this theory cannot escape the problem of subjective determinations about what is "good." One can also point to laws and entire systems of law through history that were enacted and enforced for the "greatest good" with horrific consequences.
6. 22 N.Y.C.R.R. § 1500.2(c).
7. 22 N.Y.C.R.R. § 1200.0. 1.2(c).
8. 22 N.Y.C.R.R. § 1200.0 .1.2(e).
9. 22 N.Y.C.R.R. § 1200.0. 1.6(b).
10. 22 N.Y.C.R.R. § 1200.0. 1.7(b).
11. 22 N.Y.C.R.R. § 1200.1. 1.7(e)(2).
12. See, inter alia, N.Y. St. Bar Assoc. Comm. on Prof. Ethics, Ops. 522 (1980); 533 (1981); 674 (1995); and 809 (2007).

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Legal Update

By Robert A. Stout Jr. and David Everett

New Law Increases Transparency Requirements

A new law effective February 2, 2012, imposes openness requirements on public bodies prior to public meetings conducted pursuant to the Open Meetings Law. Public bodies will be required to make certain records available to the public prior to such meetings. Records already subject to the Freedom of Information Law ("FOIL") as well as any proposed resolution, law, rule, regulation, policy, or amendment thereto scheduled to be discussed at such a meeting must be made available upon request to the extent practicable prior to or at the meeting during which it will be discussed. A reasonable fee, determined in the same manner as under FOIL, may be charged.

When providing materials at a meeting, public bodies must now make sure that a sufficient number of copies of materials are made available. Public bodies must make a judgment call as to which records may not be practicable to provide. For instance, more voluminous materials or oversized maps and plans might be made available for a fee prior to a meeting, while less voluminous materials might be reproduced and distributed at a meeting. Public bodies must also ensure that their professionals diligently prepare materials in advance of meetings in order to allow sufficient time to comply with the new law's mandate.

Significantly, if the municipality or agency maintains a "regularly and routinely updated website and utilizes a high speed internet connection" the records must be posted on the website to the extent practicable prior to the meeting.

The posting requirement, coupled with the expansive inclusion of records subject to FOIL in the new law, poses an interesting issue. Must a public body post all records subject to FOIL on its website if such records are related to an item scheduled to be discussed at the meeting? Of course, these records were always available upon request pursuant to FOIL, but some may read this new law as placing an affirmative obligation on a municipal body to post such information on its website. While it may not be practicable to anticipate every permutation of FOIL-able information that an agenda item implicates, care should still be taken in considering just what constitutes a record "scheduled to be the subject of discussion." A related concern is the posting of items that are specifically exempt from FOIL by law. All records should be reviewed for privacy and other statutory exemptions prior to posting.

The memorandum in support of the bill asserts that this law will actually decrease the burden imposed on agencies by reducing the likelihood of FOIL requests after meetings are held. Therefore, there is an argument to be made that this law should not be read as increasing the burden on the public body. In any event, it represents an additional step toward transparency, meriting consideration prior to each and every meeting of a public body.

Land Bank Application Process Opens

A new law allows local governments to establish land banks for the purpose of acquiring real property that is tax delinquent, vacant, tax foreclosed, or abandoned. Once acquired, a municipality can redevelop or otherwise improve the land banked real property. Land banks would be created by the adoption of a local law, ordinance, or resolution. Land banks would be formed as type C not-for-profit corporations. The law provides that no more than ten land banks may exist at any time and their creation must be approved by the New York State Urban Development Corporation d/b/a Empire State Development ("ESD"). ESD anticipates approving applications in several rounds. A maximum of five applications will be approved in this round. The application, along with ESD's criteria for assessment of applications can be found at http://www.esd.ny.gov/ and must be submitted to ESD regional offices by 3:00 p.m. on March 30, 2012.

The intent of the Act is to convert vacant, abandoned, or tax delinquent properties to productive use. In order to achieve this, land banks have the power to acquire such properties. Land banks may also acquire other real property from municipalities and may purchase non-municipally owned real property consistent with an approved redevelopment plan. The Act also provides that delinquent tax liens may be purchased from a municipality. A land bank does not have the power of eminent domain.

While land banks may receive grants and loans from municipalities, the state and the federal government, they are not otherwise supported by state funds. Land banks may raise funds for redevelopment by issuing bonds, borrowing money and disposing of property as well as any other activity permitted by the Act.

Land banks must keep an inventory of property acquired and maintain such property in accordance with all local laws. Land banks may convey, exchange, sell, transfer, lease as lessor, grant, release and demise and pledge any and all interests in, upon, or to the real property of the land bank. The local law, resolution, or ordinance creating the land bank may establish a hierarchical ranking of priorities for the use of the real property to be conveyed, which may include but not be limited to: 1) use for purely public spaces and places; 2) use for affordable housing; 3) use for retail, commercial and industrial activities; and 4) use as wildlife conservation areas.

Land banks are intended to remove barriers to redevelopment, especially in upstate cities and municipalities that are experiencing a significant lack of investment in real property. Any area that contains vacant, abandoned, or tax delinquent properties should investigate the use of a land bank.

Legal Challenges to Zoning Laws Addressing Hydraulic Fracturing for Natural Gas

While many municipalities have embraced natural gas drilling by hydraulic fracturing, many have also adopted zoning bans or moratoria on natural gas drilling within their borders. The Towns of Dryden and Middlefield determined that the extraction of natural gas poses a significant threat to their residents' health, safety, and welfare and, thus, should not be a permitted land use, absent further studies and data concluding that these uses will not detrimentally affect their groundwater supply, community character, roads, agriculture, or local tourism, among other things. The natural gas industry and property owners have challenged these bans in two lawsuits. *See Anschutz Exploration Corp. v. Town of Dryden*[1] and *Cooperstown Holstein Corp. v. Town of Middlefield*.[2] For a discussion of these cases and the issues raised, see the article in this issue, *The Billion Dollar Question—Are Municipalities Preempted Under New York State Law from Using Their Zoning Powers to Control Hydraulic Fracturing for Natural Gas?* by David Everett and Robert Rosborough.

Endnotes

1. Sup Ct, Tompkins County, Rumsey, J., Index No. 2011-0902.
2. Sup Ct, Otsego County, Cerio, Jr., A.J., Index No. 2011-0930.

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Administrative Decisions Update

Prepared by Robert A. Stout Jr.

In the Matter of the Alleged Violations of Article 19 of the Environmental Conservation Law of the State of New York, and Part 217 of Title 6 of the NYCRR by Gurabo Auto Sales Corp., Manuel R. Inoa and Ramon B. Reyes

Decision and Order of the Commissioner

February 16, 2012

Summary of the Decision

DEC claimed that respondents completed 1,416 motor vehicle inspections using non-compliant air emissions equipment and procedures and issued 1,416 certificates of inspection for those inspections without testing the vehicles' onboard diagnostic (OBD) systems. For the inspections at issue, DEC claimed the respondents did not check the vehicles' OBD systems, but instead simulated the inspections, based on a 15-field profile that DEC identified in the inspection data transmitted to the Department of Motor Vehicles (DMV). The Commissioner found that respondents Gurabo Auto Sales Corp. ("Gurabo"), Manuel R. Inoa, and Ramon B. Reyes (collectively, the "Respondents") violated 6 NYCRR 217-4.2 by operating an official emissions inspection station using equipment or procedures that were not in compliance with DEC procedures or standards. A civil penalty of One Hundred Twenty Thousand ($120,000) Dollars was assessed against Gurabo, Sixty-Four Thousand Five Hundred ($64,500) Dollars against Inoa, and Fifty-Five Thousand Five Hundred ($55,500) Dollars against Reyes.

Background

By complaint dated August 24, 2010, DEC alleged violations of 6 NYCRR Parts 217-4.2 and 1.4 for the completion of 1,416 motor vehicle inspections using non-compliant air emissions equipment and procedures and the issuance of 1,416 certificates of inspection for these inspections without testing the vehicles' onboard diagnostic systems. Mr. Inoa and Mr. Reyes worked at Gurabo and performed vehicle inspections. DEC requested a civil penalty of Seven Hundred Eight Thousand ($708,000) Dollars, with each respondent held jointly and severally liable.

Decision and Order of the Commissioner

The Commissioner concurred with the ALJ in finding Respondents liable for operating an official emissions inspection station using equipment or procedures that were not in compliance with DEC procedures or standards in violation of 6 NYCRR Part 217-4.2. The second cause of action, related to alleged violations of 6 NYCRR Part 217-1.4, was dismissed. 6 NYCRR Part 217-1.4 states

that "no official inspection station as defined by 15 NYCRR 79.1(g) may issue an emission certificate of inspection, as defined by 15 NYCRR 79.1(a), for a motor vehicle, unless that motor vehicle meets the requirements of section 217.3 of this Subpart." The Commissioner and the ALJ both noted that 15 NYCRR 79.1(g) defines an "official safety inspection station" as one which has been issued a license by the Commissioner of DMV "to conduct safety inspections of motor vehicles exempt from the emissions inspection requirement." No evidence was presented that established Respondents held that license or that Gurabo was an official safety inspection station conducting safety inspections of motor vehicles exempt from the emissions inspection requirement.

The Respondents challenged the ALJ's decision arguing that the ALJ drew a negative inference based on the fact that the Respondents did not testify during the hearing or present evidence to refute DEC's charges. The Commissioner found the Respondents' liability to be fully supported by the record evidence and the reasonable conclusions that can be drawn from that evidence. As such, he did not reach this issue.

The Respondents also claimed that the DEC is collaterally estopped and barred by res judicata from bringing charges for those inspections for which the Department of Motor Vehicles has already found the Respondents liable. The Commissioner found that the enforcement activities of the DMV and DEC are not duplicative, in that their respective enforcement authorities are based on separate statutes, regulations and jurisdictions. Of the 1,416 inspections DEC cited in the proceeding, 40 also served as the basis of the DMV's determinations. The Commissioner analyzed whether multiple penalties may be imposed for multiple offenses arising from a single inspection. To that end, the elements of each offense were examined to determine whether each offense required proof of a fact not required for the other. A violation of 6 NYCRR Part 217-4.2 requires proof that the Respondents conducted inspections using equipment or procedures that were not in compliance with DEC's procedure or standards. On the other hand, DMV's penalty assessments and license revocations were "strictly on the basis of the violation of Vehicle and Traffic Law Section 303(e)(3), meaning fraud, deceit or misrepresentation in securing the license or certificate to inspect vehicles or in the conduct of licensed or

certified activity, and required facts not required for the proof of the offense in the DEC proceeding." Each offense charged by DEC also required proof of facts not required for the proof of the offense charged in the DMV proceeding. Therefore, multiple offenses and penalties were authorized by the Commissioner.

With respect to the civil penalty, the ALJ found that the DEC request of Seven Hundred Eight Thousand ($708,000) Dollars was excessive. Further, the ALJ and the Commissioner found that joint and several liability is not appropriate. In light of the penalty that the DMV assessed and the revocation of Gurabo's inspection license, among other things, the ALJ adjusted the penalty downward, recommending a penalty of One Hundred Twenty Thousand ($120,000) Dollars against Gurabo and Sixty Thousand ($60,000) Dollars each against Inoa and Reyes. The ALJ noted that the penalties account for the seriousness and large number of violations and the aggravating factor of Respondents' knowing, intentional violations of inspection procedure. The ALJ underscored the significance of the OBD testing to the control of air pollution and found that the use of a simulator to bypass required emissions testing undermines the regulatory scheme created to protect the environment and public health. The Commissioner found that the adverse impacts of automotive emissions, including ozone, are well documented, and rejected the Respondents' argument that no evidence was presented as to any pollutants "being emitted into the air, or the impact of same." Rather, the Commissioner found that the Respondents' actions subverted the regulatory scheme designed to address and control the adverse impacts of automotive emissions. The Commissioner modified the ALJ's penalty recommendation to reflect the fact that Inoa conducted approximately one hundred more improper inspections than Reyes (760 vs. 656). As such, a penalty of Sixty-Four Thousand Five Hundred ($64,500) Dollars was assessed against Inoa and Fifty-Five Thousand Five Hundred ($55,500) Dollars against Reyes, to be generally proportionate to the number of improper inspections that each performed.

On the same date, the Commissioner issued a Decision and Order related to *In the Matter of the Alleged Violations of Article 19 of the Environmental Conservation Law of the State of New York and Part 217 of Title 6 of the NYCRR by AMI Auto Sales Corp., Manuel R. Inoa and Ramon B. Reyes*. AMI Auto Sales Corp. (AMI) previously conducted an auto inspection business at the same location as Gurabo employing the same two individual respondents. In that matter, close to 4,000 violations served as the basis for the complaint. The Commissioner assessed a civil penalty of Three Hundred Forty Five Thousand ($345,000) Dollars against AMI, One Hundred Eighty Thousand Dollars ($180,000) Dollars against Inoa and One Hundred Sixty Five Thousand ($165,000) Dollars against Reyes. The reasoning in the AMI decision largely tracked that of the Gurabo decision. However, AMI asserted an additional defense, claiming that it had been dissolved by proclamation on June 25, 2003. The violations that served as the basis of the complaint occurred during the period between March 28, 2008 and October 13, 2009. The Commissioner noted that "it has been consistently held that a dissolved corporation continues its corporate existence to pay liabilities or obligations, be sued, and participate in administrative proceedings in its corporate name, even if the activities which gave rise to the liability occurred after corporate dissolution." The Commissioner points out that AMI continued to operate as an official emissions inspection station licensed by the DMV until October 2009. Further, the Commissioner notes that AMI held itself out to DEC, DMV and the general public as a corporation and cannot now deny the existence and viability of its corporate entity in an attempt to avoid liability.

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Recent Decisions and Legislation in Environmental Law

Recent Decisions

American Bottom Conservancy v. U.S. Army Corps of Engineers, No. 10-3488, 2011 WL 2314757 (7th Cir. June 14, 2011)

Facts

The American Bottom Conservancy (ABC), an environmental advocacy group whose mission is to preserve wetlands, filed suit against Waste Management of Illinois, Inc. (WMI), a waste management and disposal company, seeking to "invalidate" a permit granted by the Army Corps of Engineers, co-defendant to suit.[1] The permit authorized WMI to destroy certain wetlands for the building of a new landfill.[2] The wetlands sat atop portions of a Mississippi flood plain. The flood plain, or "American Bottom,"—a popular name for that segment of the Mississippi—is rich in biota and functions as a "habitat for many different species of birds, butterflies, and other wildlife."[3]

The proposed landfill would occupy approximately 180 acres of a 220-acre tract of land that abuts the Mississippi River for several miles.[4] Horseshoe State Park—used by members of ABC to watch "birds and other wildlife"—runs parallel to the Mississippi on the opposite side.[5] The 220-acre tract mentioned above contains five wetland areas, totaling 26.8 acres.[6] The majority of the 26.8 acres (of wetlands) lie within a half mile of the park, at its southernmost end.[7] This area of the park is the location most frequented by bird watchers and wildlife enthusiasts.[8] 18.4 of the 26.8 acres, or 69 percent, of the wetlands area would be destroyed by the proposed landfill.[9]

ABC contends that the destruction of 18.4 acres of wetlands will cause harm to its members that frequent the park to "watch birds and other wildlife" because said wildlife are certain to decrease in numbers (or perhaps disappear totally) pursuant to the slated reduction in habitat.[10]

Procedural History

The District Court on its own initiative dismissed the claim for lack of standing. On appeal, the Circuit Court reversed "with instructions to reinstate suit."[11]

Issue

In order to establish Article III standing, and where the injury is probabilistic, must the plaintiff merely allege facts demonstrating that the relief sought, if granted, will mitigate or reduce the probability of said injury occurring, irrespective of the magnitude of said injury (e.g., a purely aesthetic injury)?

Rationale

The mere fact that the injury is "probabilistic rather than certain does not defeat standing."[12] Similarly, if the injury is cognizable, as was the case here, standing need not be precluded where the significance or magnitude of said injury is not readily quantifiable, nor otherwise ascertainable.[13] To establish standing, plaintiff need only seek relief, which if granted would "compensate for or mitigate said injury."[14] The Circuit Court, unlike the lower court, did not require a showing that ABC members were upset by the potential diminution in "bird and wildlife activities" or that said members "would no longer visit the park," nor was the Court swayed by the quasi-speculative nature of the claim.[15] Rather, the Court considered the proximity of the wetlands to the park and noted that many bird and other wildlife species cohabit both but nonetheless depend on the wetlands for food, reproduction, and shelter.[16] Furthermore, faced with declining pollution densities or extinction, many wildlife species—due to range and lifespan limitations—may not be able to traverse the distances needed to find substitute habitat.[17] Viewed in this light, the destruction of 18.4 of 26.8 acres of wetlands stands to negatively impact the biota of the park in the manner complained of by ABC members,[18] and the relief, as requested, would prevent the injury complained of; as such, the standing requirements were satisfied.

Conclusion

The Court found that ABC had stated facts, which if believed, would sustain a finding of Article III standing.

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Endnotes

1. *American Bottom Conservancy v. U.S. Army Corps of Engineers*, No. 10-3488, 2011 WL 2314757, at *1-3 (7th Cir. June 14, 2011).
2. *Id.*
3. *Id.* at *1.
4. *Id.* at *1, *8.
5. *Id.* at *1, *4, *8.
6. *Id.* at *1.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at *4.
11. *Id.* *4, *8.
12. *Id.* at *5.
13. *Id.* at *3.
14. *Id.*
15. *Id.* *5-6.

16. *Id.* at *4.
17. *Id.*
18. *Id.* at *4.

* * *

Anacostia Riverkeeper, Inc. v. Jackson, F. Supp. 2d, 2011 WL 3019922 (D.D.C. July 25, 2011)

Facts

Under the Clean Water Act (CWA) each state, including the District of Columbia, is required to maintain certain water quality standards for navigable waters.[1] The standards are determined by the designated uses of the river and criteria which define the maximum allowable pollutant levels to protect these uses.[2] The designated uses range from ecological-sustaining plant and animal life, to recreational and aesthetic-suitable for swimming, boating, etc.[3] The water quality criteria are expressed numerically, based on quantitative data, and narratively, using terms such as "free from visible waste" or "sufficient clarity for aesthetic purposes."[4]

If the discharge of pollutants into a navigable waterway exceeds the water quality standards, the state is required to submit for approval by the United States Environmental Protection Agency (EPA) total maximum daily loads (TMDLs) for pollutants.[5] Once approved, the state must "attain and maintain" these water quality standards.[6]

States are required to monitor navigable waters and assess water quality standards.[7] Every two years the states must submit to the EPA a list of waters not attaining the required quality standards.[8] This is known as a 303(d) list.[9] EPA approves or rejects proposed TMDLs.[10] If a TMDL is approved, EPA must also subdivide the daily limits among the point and non-point sources of pollutant discharge.[11] The standards set may be described using "Secchi depth" and/or "Nephelometer Turbidity Units" (NTUs). A Secchi depth is the depth underwater at which a Secchi disc cannot be seen from the surface of the water.[12] The disc is merely eight inches in diameter and has alternating black and white quadrants.[13] NTUs describe the level of contaminants in the water by measuring how much light can pass from the surface to a detector placed underwater.[14]

In 2007, the District of Columbia and the state of Maryland jointly submitted TMDL proposals for the Anacostia River that would effectively protect aquatic plant and animal life.[15] The EPA approved the TMDL.[16]

Procedural History

From April 6, 2007 to May 7, 2007, a draft TMDL for the Anacostia River was produced and made subject to comments.[17] Plaintiff, Earthjustice, submitted objections.[18] The objections included the alleged TMDL failure to address all applicable water standards, to include a large enough margin of safety (required), and to subdivide waste-load allocation properly.[19] The District and Maryland submitted a response to the objection and then submitted a final draft to the EPA the next day.[20] It was approved.[21]

In 2009, environmental organizations Anacostia Riverkeeper and Earthjustice brought suit against EPA administrator, Lisa Jackson, under the CWA and the Administrative Procedure Act ("APA") in federal district court for the District of Columbia.[22] A group of local water authorities (Municipal Intervenors) and WASA, the District's sewer authority, sought to intervene on behalf of the EPA.[23] Plaintiffs consented.[24] Plaintiffs moved for summary judgment and defendants made cross motions for summary judgment.[25] The District Court granted plaintiffs' motion in part.[26]

Issues

1. Whether or not the states and the EPA are required to evaluate the TMDLs capacity to protect *all* uses of a navigable water?
2. Whether the TMDL approved for the Anacostia River protected *all* designated uses and not just aquatic life?
3. Whether EPA reasonably concluded that pollution occasionally exceeding the TMDL was acceptable?
4. Whether EPA's reliance on Secchi depth was sufficient in approving the TMDL?
5. Whether EPA's subdivision of the TMDL across point and non-point sources was appropriate?
6. Whether there was an adequate margin of safety in the calculation of the TMDL?

Rationale

The District Court looks at the plain language in the CWA and the Act's implementing regulations to determine how the EPA and the states should evaluate TMDL submissions.[27] The CWA clearly states that TMDLs should restrict contaminants "at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety."[28] The Act's implementing instructions go on to clarify that water quality standards defines "the water quality goals of a water body.…"[29] The uses designated to the Anacostia River by D.C. and the state of Maryland are recreational, aesthetic enjoyment and protection of aquatic life.[30] Consequently, the District Court ruled that it is the EPA's responsibility to evaluate the TMDL's capacity to protect *each* of these designated uses.[31]

The final draft of the TMDL did not address recreational or aesthetic enjoyment uses of the River whatsoever.[32] It was not written to protect either of these uses.[33] WASA argued, though, that the TMDL fulfilled the relevant water quality standard.[34] The court, however, points out that it has only fulfilled one of the *designated uses*.[35] WASA misinterpreted the term "water quality standard" and substituted it for "designated use."[36] The TMDL was deemed sufficient for protecting one of the uses, but not all of them and thus did not satisfy the River's water quality standard.[37]

Municipal Intervenors additionally argued that pursuant to the CWA, it has the authority to rank contaminant issues in a river by designated use and allocate funds accordingly.[38] The court clarified that this is a misinterpretation of the CWA.[39] The language of the relevant part of the Act allows for states to rank *rivers* based on environmental hazard, and prioritize them.[40] It does not authorize ranking *designated uses* of each river.[41] The court found that EPA's approval of this partial TMDL was inconsistent with the CWA and was arbitrary and capricious.[42]

Plaintiffs contend that the TMDLs approved by the EPA allow for excess periodic violations during severe high flow events so that water quality standards will not be met.[43] In determining whether the EPA was reasonable in accounting for the effect that occasional violations would have on average water quality standards, the court first looked to EPA regulations.[44] The regulations are silent on this issue so the court focused on guidance written by the EPA in 2006, which asserts that the underlying standard should be used.[45] In other words, the allowable amount of violations was appropriately consistent with the water quality standard made *by the state*.[46] The court held that proposing a TMDL based on D.C. law was reasonable and appropriate.[47] It gave deference to the agency because the statute and regulation is silent on the issue.[48]

Plaintiffs additionally asserted that the TMDLs should not have been calculated only using Secchi depths and that NTU measurements should have been utilized, too.[49] The court rejected this argument, because there is a relationship between the two tests.[50] It was ruled in a circuit court opinion that substituting one criterion with another is "arbitrary and capricious" only if no "rational relationship" exists between the two criteria.[51] Because there is a relationship between Secchi depth and NTU measurements, the court ruled that the EPA's discretion was not abused.[52]

Another issue raised by plaintiffs was the EPA's approval of a TMDL, which allocates daily limits at each storm sewer system (also known as MS4s) and not at each individual pipe in each MS4.[53] The court noted that the rules regarding the daily limit allocation were promulgated by the EPA itself.[54] When rules are made because specific issues are not addressed in the statute, the agency should have more deference in their interpretation.[55] The District Court rejected plaintiffs' contention.[56]

The final issue plaintiffs raised regards the adequacy of the TMDL margin of safety.[57] Anacostia Riverkeeper argued that the EPA should have a qualitative way to show how large the margin of safety is.[58] Plaintiffs were dissatisfied with the claim that the margin of safety is implicit.[59] The Final TMDL, however, delineates many conservative assumptions made so that final models would over-predict the presence of contaminants.[60] The CWA requires the *existence* of a margin of safety, but is quiet on how it must be achieved or shown.[61] Additionally, EPA produced an agency memorandum specifically approving the use of an implicit margin of error.[62] In this case, the court deemed the agency's implicit method of determining a margin of safety reasonable and deferred to its judgment.[63]

Conclusion

The court granted plaintiffs' motion for summary judgment on the grounds that the EPA did act arbitrarily and capriciously in approving a TMDL proposal which violated the CWA and the APA—ignoring the protection of recreational activities and aesthetic enjoyment of the Anacostia River.[64]

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Endnotes

1. *Anacostia Riverkeeper, Inc. v. Jackson*, F. Supp. 2d, 2011 WL 3019922, 1 (D.D.C. July 25, 2011); *see also*, 33 U.S.C. § 1251.
2. *Anacostia Riverkeeper, Inc.*, 2011 WL 3019922, at 1.
3. *Id.* at 1 and 3.
4. *Id.* at 3.
5. *Id.* at 1.
6. *Id.*
7. *Id.* at 4.
8. *Id.*
9. *Id.*; *see also* 40 C.F.R. § 130.7(b)(3) & (d).
10. *Anacostia Riverkeeper, Inc.*, 2011 WL 3019922, at 4.
11. *Id.*
12. *Id.* at 21.
13. *Id.* at 22.
14. *Id.* at 30.
15. *Id.* at 1.
16. *Id.* at 8.
17. *Id.* at 7.
18. *Id.*
19. *Id.*
20. *Id.*

21. *Id.* at 7–8.
22. *Id*, at 8.
23. *Id.*
24. *Id.*
25. *Id.* at 9.
26. *Id.*
27. *Id.* at 10, 11.
28. *Anacostia Riverkeeper, Inc.*, 2011 WL 3019922, at 11; 33 U.S.C. § 1313(d)(1)(C).
29. *Anacostia Riverkeeper, Inc.*, 2011 WL 3019922, at 11; 40 C.F.R. § 130.3.
30. *Anacostia Riverkeeper, Inc.*, 2011 WL 3019922, at 12.
31. *Id.* at 21.
32. *Id.* at 12.
33. *Id.*
34. *Id.*
35. *Id.* at 15–17.
36. *Id.* at 15.
37. *Id.* at 18, 27.
38. *Anacostia Riverkeeper, Inc.*, 2011 WL 3019922, at 18; *see also,* 33 U.S.C. § 1313(d)(1)(A).
39. *Anacostia Riverkeeper, Inc.*, 2011 WL 3019922, at 18–21.
40. *Id.* at 18.
41. *Id.*
42. *Id.* at 21.
43. *Id.* at 28,
44. *Id.*
45. *Anacostia Riverkeeper, Inc.*, 2011 WL 3019922, at 29; *see also,* 2006 Guidance at 39–40.
46. *Anacostia Riverkeeper, Inc.*, 2011 WL 3019922, at 29–30.
47. *Id.* at 30.
48. *Id.*
49. *Id.*
50. *Id.* at 31.
51. *Chem. Mfrs. Ass'n. v. E.P.A.,* 28 F. 3d 1259, 1265 (1994).
52. *Anacostia Riverkeeper, Inc.*, 2011 WL 3019922, at 31.
53. *Id.* at 31–33.
54. *Id.* at 33.
55. *Id.*
56. *Id.*
57. *Id.* at 34–35.
58. *Id.* at 34.
59. *Id.*
60. *Id.*
61. *Id.* at 35.
62. *Anacostia Riverkeeper, Inc.*, 2011 WL 3019922, at 35; *see also,* EPA, Protocol for Developing Sediment TMDLs, Oct. 1999, *available at* www.epa.gov/owow/tmdl/sediment/pdf/sediment.pdf.
63. *Anacostia Riverkeeper, Inc.*, 2011 WL 3019922, at 35.
64. *Id.* at 35.

* * *

N.Y. Blue Line Council, Inc. v. Adirondack Park Agency, 86 A.D.3d 756, 927 N.Y.S.2d 432 (3d Dep't 2011)

Introduction

This case[1] is a cross appeal from a judgment of the Supreme Court of Essex County decided on December 2, 2009.[2]

Facts

The Adirondack Park Agency (APA) is charged with regulating land use and development within the Adirondack Park and to carry out this obligation the APA is empowered to "adopt, amend and repeal…such rules and regulations, consistent with this article, as it deems necessary to administer this article, and to do any and all things necessary or convenient to carry out the purposes and policies of this article and exercise powers granted by law."[3]

In 2008, the APA made nine amendments to its existing regulations.[4] Four of these nine amendments were subsequently challenged by petitioners through an Article 78 proceeding in Supreme Court.[5] The four challenged amendments affected "(1) the expansion of preexisting, nonconforming shoreline structures, (2) subdivisions involving wetlands, (3) parcels divided by roads, and (4) hunting and fishing cabins."[6] The effects of all four of the challenged amendments would be to increase the restrictiveness of the zoning laws within the Park.[7]

There are two sets of petitioners in this case: (1) a group of municipal governments located within the Adirondack Park and (2) the New York Blue Line Council, which represented two not-for-profit corporations, a construction company, a lumber company, and two individual property owners.[8] The Supreme Court addressed the claims of the two sets of petitioners individually. The Supreme Court first determined that the municipal governments lacked the capacity to sue on the four claims set forth in the complaint, and therefore denied their claims in their entirety.[9] The Supreme Court then addressed the claims as they relate to the Blue Line Council and dismissed two of its four claims.[10] The parties subsequently filed cross-appeals with the Supreme Court Appellate Division, Third Department.[11]

Issue

Whether the parties had the capacity to challenge the 2008 APA amendments?

Discussion

The capacity of the municipal petitioners was addressed first. The Court established that capacity "con-

cerns a litigant's power to appear and bring its grievance before the court."[12] The Court stated that, as relevant here, "municipal corporate bodies, as subdivisions of the state, cannot contest the actions of the state [or state agencies] which affect them in their governmental capacity or as representatives of their inhabitants,"[13] unless one of four exceptions apply.[14] The four exceptions, as set out in *City of New York v. State of New York*, are: "(1) an express statutory authorization to bring such a suit; (2) where the State legislation adversely affects a municipality's proprietary interest in a specific fund or moneys; (3) where the State statute impinges upon 'Home Rule' powers of a municipality constitutionally guaranteed under article IX of the State Constitution; and (4) where the municipal challengers assert that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription."[15] In *N.Y. Blueline Council*, the municipal petitioners asserted that the challenged amendments affect them in their governmental capacity, because these amendments "directly steal" legislative power to regulate land use within their jurisdictional territory (the "Home Rule" exception).[16] The municipal petitioners further contended that they have express statutory authorization to sue under N.Y. Executive Law § 818(1), which states that "'any act of the APA may be challenged in a CPLR Article 78 proceeding by 'any aggrieved person.'"[17] To this end, as the Supreme Court argued, Executive Law § 818(1) was not "intended to trump the requirement that an aggrieved party must" first have the capacity to sue.[18] Furthermore, while the municipal petitioners "do have the capacity to raise their claims insofar as they argue that the 2008 amendments violated the home rule protections contained in article IX of the N.Y. Constitution," the Court held that the municipal petitioners' arguments lacked merit because the amendments address issues of "substantial state concern" and therefore are related to matters reserved to the state.[19] The Appellate Division affirmed the Supreme Court's dismissal of municipal petitioners' complaints in full.[20]

With respect to the Blue Line Council, the Appellate Division also dismissed its complaints in their entirety as being "not ripe for review."[21] The challenges against the APA amendments were made before the amendments were put into effect fully. In the Court's view, none of the allegations set forth by petitioners constituted "concrete injuries sufficient to state a justiciable claim" because "the mere fact that petitioners may have to endure the APA review process is not sufficient, without more, to constitute injury for this purpose."[22] Furthermore, none of parties represented by the Blue Line Council have claimed that they have been directly injured by being turned down by the APA for a proposed subdivision project; in fact, none of the petitioners have claimed that they have any current plans to subdivide their properties.[23] In short, the Court held, "the alleged injuries are merely hypothetical at this time" and, therefore, dismissed all of the claims.[24]

Conclusion

The Court held that all claims made by the petitioners of this case against the APA challenging the Agency's 2008 amendments were to be dismissed on the grounds that neither set of petitioners had the capacity or standing to bring suit at this time.

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Endnotes

1. *N.Y. Blue Line Council, Inc. v. Adirondack Park Agency*, 86 A.D.3d 756, 927 N.Y.S.2d 432 (3d Dep't 2011).
2. *Id.*
3. N.Y. Exec. L. § 804(9) (1971).
4. *N.Y. Blue Line Council, Inc.*, 86 A.D.3d at 757 (the four issues listed were each addressed by separate amendments).
5. *Id.*
6. *Id.*
7. *Id.* at 759.
8. *Id.* at 757, fn 1.
9. *Id.* at 758.
10. *Id.*
11. *Id.*
12. *Id.* (citing *Matter of Graziano v. County of Albany*, 3 N.Y.3d 475, 478–79 (2004)).
13. *Id.* (citations omitted).
14. *See City of New York v. State of New York*, 86 N.Y.2d 286, 291–92 (1995).
15. *Id.*
16. *N.Y. Blue Line Council, Inc.*, 86 A.D.3d at 759.
17. *Id.*
18. *Id.*.
19. *Id.* at 759–60.
20. *Id.* at 760.
21. *Id.* at 761.
22. *Id.* (citations omitted).
23. *Id.*
24. *Id.* at 762.

. . .

Brod v. Omya, Inc., No. 09-4551-CV, 2011 WL 2750916 (2d Cir. July 18, 2011)

Facts

Plaintiffs-appellants, consisting of private citizens and an environmental advocacy group (collectively, "RCO"), commenced this action pursuant to the citizen suit provision of the Resource Conservation and Recovery Act ("RCRA") against defendant, a mineral processing facility, Omya, Inc., in the United States District Court for the District of Vermont.[1] RCO alleged (1) that Omya, through

its waste disposal practices—dumping hazardous materials into unlined pits and allowing the same to seep into the groundwater—"created an imminent and substantial [threat]" to human safety, as prescribed by RCRA,[2] and (2) that Omya violated other RCRA provisions that prohibit the unauthorized disposal, or open dumping, of hazardous/toxic materials into the waters and lands of the United States.[3]

Prior to commencing the action, RCO filed a Notice of Intent (NOI) on Omya, the Administrator for the United States Environmental Protection Agency (EPA), the Vermont Department of Environmental Conservation, and various other agencies outlining the nature of the charges as well as its intent to sue, "as required by the citizen suit provision of RCRA."[4] In the NOI, RCO listed several contaminants but failed to include within said list the "contaminants upon which liability was ultimately premised," e.g., arsenic and aminoethylethanolamine (AEEA).[5] Field sampling conducted by RCO and a study commissioned by Omya—both completed during motion pleading—revealed that arsenic and AEEA were present at elevated levels in the groundwater and the source of the contamination was shown to be Omya's unlined pits.[6] The study further alleged that AEEA in sufficiently great concentrations may cause birth defects in humans.[7] Based on the new data RCO argued that AEEA posed an "imminent and substantial [threat] to human health," and, as such, liability for the endangerment claim should be premised upon the fact that AEEA was present in the groundwater.[8] RCO further argued that even though arsenic was detected in the groundwater at concentrations of 8 to 12 parts per billion (ppb), which is far below that prohibited by the open dumping regulations[9] promulgated pursuant to RCRA, Omya could nonetheless be held liable under the statute because the EPA, in capping the maximum allowable concentration for arsenic at 10 ppb for "community water systems" under the Safe Drinking Water Act (SDWA),[10] also meant to simultaneously override and conform the RCRA groundwater specifications (50 ppb for arsenic) to the more stringent SDWA regulations which are 10 ppb for arsenic.

Procedure

The District Court granted summary judgment to RCO on the endangerment liability claim and to Omya on the open dumping claim.[11] The Court thereafter vacated the endangerment liability Order entered against Omya, and ultimately dismissed all claims pertaining to AEEA.[12] RCO then appealed the judgment that vacated the liability Order that was entered against Omya.[13] RCO also appealed the District Court's dismissal of the open dumping claim.[14] The Second Circuit affirmed in totality the judgment rendered by the District Court.[15]

Issue

Must a private plaintiff in alleging that defendant unlawfully used, stored, or disposed of hazardous substances in violation of RCRA provisions and regulations identify the hazardous substances or contaminant(s) with reasonable specificity upon which the claim is based?

Rationale

The Second Circuit noted that the citizen suit notice requirements of RCRA were by nature jurisdictional and non-waivable.[16] As a matter of policy "[such requirements] serve the [dual] purpose of 'giving the appropriate governmental agency an opportunity to act and the alleged violator an opportunity to comply," while simultaneously discouraging the use of the federal courts as the medium of first resort.[17] As such, the NOI "must identify with reasonable specificity each pollutant that the defendant is alleged to have discharged unlawfully."[18]

Conclusion

The Second Circuit held that both claims were properly dismissed because RCO had failed to notify Omya as to the contaminants upon which RCO sought to ultimately premise liability.[19] As such, the remainder of RCO's contentions need not be addressed.[20]

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Endnotes

1. *Brod v. Omya, Inc.*, 09-4551-CV, 2011 WL 2750916, at *1, (2d Cir. July 18, 2011) (citing 42 U.SC §§ 6972(a)-(b) (citizen suit provision).
2. *Id.* at *1-2 (citing 42 U.S.C. §§ 6901 ("RCRA"), 6972 (b)(2)(A)).
3. *Id.* (citing 42 U.S.C. § 6945(a) (open dump provision)).
4. *Id.* at *2 (citing 42 U.S.C. § 6972(b)).
5. *Id.* at *2, *8.
6. *Id.* at *3.
7. *Id.*
8. *Id.*
9. *Id.* at *3 (citing 40 C.F.R. § 257, App. 1).
10. *Omya*, 2011 WL 2750916 at *3, 42 U.S.C. § 300f et seq., 40 C.F.R. § 142.62.
11. *Omya*, 2011 WL 2750916 at *4.
12. *Id.* at *6.
13. *Id.* at *1
14. *Id.*
15. *Id.* at *13.
16. *Id.* at *7.
17. *Id.* at *8 (quoting *Dague v. City of Burlington*, 935 F.2d 1343, 1354 (2d. Cir. 1991)).

18. *Id.* at *9 (quoting *Catskills Mountain of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 488 (2d. 2001)).
19. *Id.* at *13.
20. *Id.*

* * *

Chevron Corp. v. Salazar, No. 11 Civ. 3718(LAK)(JCF), 2011 WL 3424486 (S.D.N.Y., 2011)

Facts

Chevron initiated a series of subpoenas in the United States following an Ecuadorian court's eighteen billion dollar judgment for a group of Ecuadorians, known as the Lago Agrio plaintiffs (LAPs), against Chevron Corporation (Chevron) for massive environmental damage to Ecuador's rainforest by an oil operation of Texaco, Inc. (subsequently acquired by Chevron).[1] The subpoenas are to be used for three purposes. First, they are to be used in the Lago Agrio litigation.[2] Second, the subpoenas are for the arbitration before the Bilateral Investment Treaty between the United States and Ecuador pursuant to the United Nations Commission on International Trade Law rules in which Chevron seeks insulation from any liability.[3] Last, they are to be used in an Ecuadorian criminal proceeding alleging that the Ecuadorian government abused its criminal justice system by bringing charges against two Chevron lawyers involved in related litigation.[4]

Procedural History

Prior to the eighteen billion dollar judgment, Chevron filed an action in the United States District Court for the Southern District of New York, "alleging the LAPs, their attorneys, various consultants, and a number of environmental activist groups had engaged in a racketeering conspiracy" in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), under 18 U.S.C. § 1961.[5] Chevron's ninth cause of action in that suit sought a declaratory judgment pursuant to 28 U.S.C. § 2201(a) "establishing that any judgment by the Lago Agrio court would be unenforceable on the ground that it would have been obtained through fraud and without procedures compatible with due process[,]" was separated from the RICO complaint by the Court, giving way to the instant proceeding.[6]

In this action, the attorneys representing the LAPs: Laura Garr, Andrew Woods, Joseph C. Kohn, and the firm of Kohn, Swift & Graf, P.C. (Respondents) objected to the subpoenas served on them.[7] Respondents asserted the "attorney-client privilege and the work product doctrine, and submitted privilege logs identifying the documents at issue."[8] Chevron filed a motion to compel.[9]

In a separate but related proceeding filed in the same district, the court held that the LAPs' lead attorney Mr. Donziger waived any privilege to which he may have been entitled after failing to submit a timely privilege log with respect to subpoenaed documents.[10]

Issue

Whether any privilege to which the Respondents may have been entitled was waived by either the transfer of the waiver by Mr. Donziger or the application of the crime-fraud exception to privilege.

Rationale

The Court found that the waiver of privilege aimed at Mr. Donziger extended to the Respondents.[11] Consequently, all of the documents on Respondents' privilege logs, falling within the scope of the Donziger subpoena, were waived.[12] Therefore, the subpoenas issued pursuant to Rule 45 of the Federal Rules of Civil Procedure, requires Respondents to produce any designated documents, electronically stored information or tangible things in Mr. Donziger's possession custody or control.[13]

Additionally, the Court found that Chevron had made a showing of probable cause regarding the crime-fraud exception to privilege by alleging intimidation of the Ecuadorian judiciary, improper conduct relating to expert reports, and the LAP's involvement in the criminal prosecution of Chevron's attorneys in Ecuador.[14]

Conclusion

The Court overruled the Respondents' objections to Chevron's subpoenas, except as to documents that had not existed at the time the Donziger waiver was made.[15] Moreover, those documents not in existence at the time of the Donziger waiver were ordered to be submitted to the Court to determine whether the crime-fraud exception applied to them.[16]

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Endnotes

1. *Chevron Corp. v. Salazar*, No. 11 Civ. 3718(LAK)(JCF), 2011 WL 3424486, **1-2 (S.D.N.Y. 2011).
2. *Id.* at *2.
3. *Id.* at *2.
4. *Id.* at *2.
5. *Id.* at *3
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at *2.
11. *Id.* at **8-9.
12. *Id.*

13. *Id.* (citations omitted).
14. *Id.* at *16.
15. *Id.* at **12, 17.
16. *Id.* at *13.

* * *

CRP Sanitation, Inc. v. Solid Waste Comm'n of Cnty. of Westchester, 86 A.D.3d 608 (N.Y. App. Div. 2d Dep't 2011)

Facts

Plaintiff, CRP Sanitation, Inc. ("CRP"), was a solid waste hauler licensed to do business in Westchester County. Its general manager was indicted in June 2006 and pled guilty to two counts of racketeering conspiracy.[1] When CRP sought a renewal of its license in 2008, the Solid Waste Commission of County of Westchester ("SWC"), pursuant to section 826-a.700 of the Laws of Westchester County, required the plaintiff to contract with an independent auditor in order to continue operating in Westchester County.[2]

The aforementioned statute states: "The commission may, in the event that the information disclosed and reported by an applicant, licensee or registrant pursuant to this chapter produces adverse information which may indicate a violation of the standards set forth in this chapter and specifically with regard to the standards outlined in Article VI hereof, require, without a hearing and as a condition of the issuance, reinstatement and/or renewal of a license or registration, that the applicant, licensee or registrant enter into a contract with an independent auditor approved or selected by the commission, all at the sole cost and expense of the applicant."[3]

Procedural History

CRP, along with Tarrytown R & T Corp., initiated a hybrid proceeding, pursuant to CPLR Article 78, against SWC and the County of Westchester asking the court to review the determination by SWC requiring CRP to contract with an independent auditor; to compel the SWC to review and issue certain licenses; and to order an action for declaratory judgment finding section 826-a.700 unconstitutional.[4] The Supreme Court of New York, Westchester County, with Justice Robert A. Neary presiding, denied CRP's application and dismissed the petition.[5]

Issues

1. Whether section 826–a.700 of the Laws of Westchester County is unconstitutionally vague or overbroad under the due process clause?
2. Whether imposing a requirement to enter into contract with an independent auditor violates due process rights?
3. Whether the determination of SWC to require CRP to enter into a contract with an independent auditor as a condition of license renewal was arbitrary and capricious?

Rationale

In consideration of CRP's claims of vagueness, the court considered whether the statute in question gave fair notice and provided clear standards of enforcement.[6] Without much discussion, the court held section 826–a700 was not unconstitutionally vague and that the issue of overbreadth was not relevant to the disputed conduct.[7]

As for the claim of violating due process rights, SWC was recognized to have wide authority on how it manages its licensing, including imposition of conditions like an independent auditor.[8] The court found CRP was not entitled to a license without such a condition and therefore CRP had no protected property interest as part of its due process rights.[9]

Lastly, the court inquiry on whether the independent auditor requirement for license renewal was arbitrary and capricious was governed by the rational basis standard. CRP's former general manager's involvement in a conspiracy to maintain certain customers and territory in the carting industry was deemed an adequate rational basis for SWC's determination to require an independent auditor as part of CRP's license renewal.[10]

Conclusion

The court concluded that the constitutional claims were without merit and that the lower court judgment should include a provision proclaiming section 826–a.700 is not unconstitutional.

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Endnotes

1. *CRP Sanitation, Inc. v. Solid Waste Comm'n of Cnty. of Westchester*, 86 A.D.3d 608, 608-09, 927 N.Y.S.2d 384, 385 (N.Y. App. Div. 2d Dep't 2011).
2. *Id.* at 609.
3. *Id.; see also* Laws of Westchester County § 826–a.700[1].
4. *CRP Sanitation*, 86 A.D. at 609.
5. *CRP Sanitation, Inc. v. Solid Waste Comn'n of the County of Westchester*, 2009 WL 6901579 (2009).
6. *CRP Sanitation*, 86 A.D. at 610.
7. *Id.*
8. *Id.*
9. *Id.* at 611.
10. *Id.*

* * *

Develop Don't Destroy Brooklyn, Inc. v. Empire State Development Corp., 927 N.Y.S.2d 571 (Sup. Ct. N.Y. Co. 2011)

Facts

The largest single-developer project in New York City's history,[1] The Atlantic Yards Project (AYP), extends over 22 acres and is to be constructed in two phases.[2] Phase I includes a new sports arena for the New Jersey Nets, several buildings near the arena, a new MTA/Long Island Railroad rail yard and various transit access improvements.[3] Phase II entails 11 of the Project's 16 high-rise buildings, which will be for both commercial and residential use, and also the development of eight acres of publicly accessible open space.[4]

Procedural History

These Article 78 proceedings were brought under the State Environmental Quality Review Act (SEQRA) to challenge modifications made to the development plan for the AYP.[5] In prior proceedings, petitioners challenged the acceptance of the modified general project plan (MGPP) by Empire State Development Corp. (ESDC).[6] The court denied the petitions on March 10, 2010.[7] On November 9, 2010 the court granted leave to reargue and renew.[8] On reargument the court held that ESDC did not adequately demonstrate that its continuing use of a 10-year build plan for the project was acceptable and did not elaborate enough on the issue of why a Supplemental Environmental Impact Statement (SEIS) was not necessary.[9] The ESDC failed to speak to the impact of the build date based on the terms of the Development Agreement with Forest City Ratner Companies (FCRC) and a renegotiated agreement between the Metropolitan Transportation Authority (MTA) and FCRC.[10] The court remanded the proceedings to ESDC to determine the impact of the build date and if a SEIS was needed.[11] ESDC had an environmental consultant prepare a Technical Analysis of the extended construction period for the project and ESDC also issued a response to the Supreme Court.[12]

Issues

Whether the Empire State Development Corporation's continuing use of the 10-year build date of a development plan for environmental analysis had a rational basis? Whether a SEIS was required under SEQRA?

Rationale

Petitioners argued that the MTA Agreement and the Development Agreement, which were both negotiated by ESDC, rendered the 10-year build date an inaccurate time frame from which to assess the environmental impact.[13] Naturally, the respondents contended that the 10-year build date was a reasonable time frame on which to base their environmental analysis.[14] It should be noted that in earlier proceedings, the ESDC was characterized as having committed a failure of transparency because ESDC failed to disclose to the court a particular provision in the Development Agreement that allowed a significant time extension outside of 25 years for Phase II of the Project.[15] In support of its argument that the 10-year deadline could be relied on if commercially reasonable effort was used to meet the goal, ESDC maintained that the provision was simply the product of transactional lawyers anticipating risks.[16] While the court agreed with ESDC that the MTA and Development Agreements allowed for a build-out in 10 years, it was also true that the agreements where structured in such a way as to compensate for the poor economy in order to begin the project.[17] ESDC also acknowledged that construction on a portion of the Project had lagged, which jeopardized the Project from being complete on a 10-year schedule. The poor economic conditions only added to this problem.[18] ESDC tried to present a number of reasons why the Project would be completed in 10 years, such as FCRC having a financial incentive to complete the Project as fast as possible, but the court found these arguments as well as the others to be unsupported by any type of analysis.[19] The court found ESDC's "invocation of the commercially reasonable effort provision" to be unfounded based on the deadlines set forth in the Development Agreement.[20]

Next, the court had to determine if ESDC was required to prepare a SEIS prior to its approval of the MGPP.[21] Based on a Technical Analysis prepared by its environmental consultant, the 2006 FEIS and the Technical Memorandum prepared at the approval of the MGPP—ESDC concluded that a SEIS was not required.[22] An agency may use its own discretion in deciding whether to submit a SEIS, but the agency, in this case ESDC, has a responsibility to review reports and other analyses in order to make that determination.[23] Although the determinations should be reasonable, not every conceivable environmental impact must be identified.[24] The court took issue with the Technical Analysis because it made many assumptions without any studies to corroborate those notions.[25] Due to the unsupported statements in the Technical Analysis the court found the analysis to fall short of the standard provided by SEQRA in that ESDC failed to "take a hard look at the environmental impacts" of the MGPP.[26] The court determined that a SEIS was required because a prior renegotiation of the MTA Agreement and the extended deadlines available through the Development Agreement significantly changed the construction of Phase II of the Project and ESDC failed to address the environmental impacts stemming from these changes.[27] The court did not take a position on the desirability of the Project or the extended timetable for construction because, as SEQRA provides, that is for ESDC to determine; the court merely ensures that ESDC performs this responsibility.[28]

Conclusion

The petitioners requested that the Project be invalidated and construction stopped pending ESDC looking further into the environmental impacts, but the court declined to grant this request.[29] Phase I construction was already well under way and a large amount of both private and public funds have been committed to Phase I.[30] The court viewed a stay of Phase II construction to be unnecessary because Phase II construction will not start for many years, and it is unlikely that FCRC will proceed before the environmental review has been completed.[31] The court found ESDC's use of the 10-year build date for the MGPP was void of a rational basis and was "arbitrary and capricious."[32] A SEIS was required due to a potentially drastic change in the construction schedule.[33]

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Endnotes

1. *Develop Don't Destroy (Brooklyn), Inc. v. Empire State Development Corp.*, 927 N.Y.S.2d 571, 574 (Sup. Ct. N.Y. Co. 2011) (quoting *Develop Don't Destroy (Brooklyn) v. Urban Dev. Corp.*, 59 A.D.3d 312, 326, 874 N.Y.S.2d 414 (1st Dept. 2009)).
2. *Develop Don't Destroy*, 927 N.Y.S.2d at 574.
3. *Id.*
4. *Id.* at 575.
5. *Id.* at 573.
6. *Id.* at 573–74.
7. *Id.* at 574.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 575.
14. *Id.*
15. *Id.* at 576.
16. *Id.* at 578.
17. *Id.* at 579.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 583.
22. *Id.*
23. *Id.* (citing *Riverkeeper, Inc. v. Planning Bd. of Town of Southeast*, 9 N.Y.3d 219, 231–32, 851 N.Y.S.2d 76 (2007)).
24. *Develop Don't Destroy*, 927 N.Y.S.2d at 583 (citing *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 417, 503 N.Y.S.2d 298 (1986)).
25. *Develop Don't Destroy*, 927 N.Y.S.2d at 584.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 584–85.
30. *Id.* at 585.
31. *Id.*
32. *Id.* at 578.
33. *Id.* at 584.

* * *

Deerfield Plantation Phase II-B Property Owners Ass'n, Inc. v. U.S. Army Corps of Engineers, 2011 U.S. Dist. LEXIS 75766 (D. S. Car. 2011)

Facts

Deertrack Golf, Inc. (Deertrack) owned an 85-acre golf course (Deerfield Tract) in Horry County, South Carolina. In about 2005, Deertrack closed the golf course and entered into a purchase contract with Bill Clark Homes of Myrtle Beach (BCH), which intended to redevelop the Deerfield Tract into a residential subdivision. In February 2006, a BCH consultant submitted a request for a jurisdictional determination (JD) by the U.S. Army Corps of Engineers (Corps) as to whether the Deerfield Tract contained "waters of the United States" subject to jurisdiction under Section 404 of the Clean Water Act (CWA). Located on the Deerfield Tract were two non-navigable tributaries of the Atlantic Ocean and a series of ponds interconnected by a series of ditches and swales. In August 2006, the Corps determined that the Deerfield Tract did not contain wetland areas or other waters of the United States, and therefore none of the waters on the Tract were subject to federal jurisdiction under the CWA. In April 2009, Deerfield Plantation Phase II-B Property Owners Association, Inc. (Deerfield) filed suit against the Corps, the Environmental Protection Agency (EPA), and Deertrack, challenging the Corps' 2006 JD.[1]

Procedural History

In August 2009, the parties jointly moved to voluntarily remand the action so the Corps could reconsider its 2006 JD. The court granted the motion, and in March 2010, the Corps issued a superseding JD (2010 JD) concluding it had jurisdiction over two non-navigable tributaries constituting 0.37 acres of the Deerfield Tract. Deerfield challenged the 2010 JD, contending that additional ponds and channels on the property should also be considered "waters of the United States." Before the Court in this case were cross motions for summary judgment.[2]

Issue

Whether the Corps' 2010 JD was arbitrary and capricious in concluding that only two tributaries, but none of the ponds, ditches, and swales located on the Deerfield Tract, were subject to federal jurisdiction under the CWA?

Rationale

The Court began by giving a statutory and case law background on federal jurisdiction under the CWA, first noting that the CWA protects navigable waters, which are defined by the CWA as "the waters of the United States."[3] The Court went on to discuss the U.S. Supreme Court's holdings in *U.S. v. Riverside Bayview Homes, Inc.*,[4] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANNC)*,[5] and *Rapanos v. U.S.*,[6] as well as the "Rapanos Guidance" prepared by the Corps and the EPA to instruct personnel on how to make CWA jurisdictional determinations in compliance with the new rules announced in *Rapanos*.[7] *Rapanos* set out two jurisdictional standards: one by the plurality opinion, and one by Justice Kennedy known as the "significant nexus" test. The Rapanos guidance provides that CWA jurisdiction exists over a body of water if either of these tests is met.[8]

The Court discussed that under the Rapanos Guidance, the Corps and EPA would continue to assert jurisdiction over all traditional navigable waters and wetlands adjacent to traditional navigable waters. In accordance with the plurality opinion in *Rapanos*, the Guidance provides that CWA jurisdiction is proper over non-navigable tributaries of traditional navigable waters that are relatively permanent and over wetlands that have continuous surface connection to such tributaries.[9] Non-permanent and non-navigable tributaries are to be evaluated under the significant nexus test, which provides that jurisdiction exists if such tributaries and their adjacent wetlands have a significant nexus to a traditionally navigable body of water.[10] The significant nexus test assesses whether the non-navigable and non-permanent tributaries and their adjacent wetlands affect the "chemical, physical and biological integrity of downstream traditional navigable waters."[11]

Turning to the jurisdictional determination at issue in this case, the Court noted that in making its 2010 JD, the Corps reviewed its own records, aerial photography, a USDA soil survey of the area, a U.S. Geological Survey of the area, and a Fish and Wildlife Service wetland inventory map of the area, and noted any potential wetland areas suggested in the surveys and inventories. The Court also noted that to resolve any conflicts between the surveys, the Corps conducted two on-site inspections of the Deerfield Tract, from which the Corps could not conclusively determine whether the site was ever a wetland.[12]

The Court found that each of the Corps' determinations correctly adhered to the CWA jurisdictional tests as described in the Rapanos Guidance. In its determination of jurisdiction over the two non-navigable tributaries, the Corps based its 2010 JD on geological and vegetative characteristics of the tributaries suggesting that they flowed continuously and were therefore "relatively permanent" waters.[13] With respect to the remaining ponds, ditches, and swales on the Tract, the Corps stated in the 2010 JD that they contained such a low volume, duration, and frequency of water flow that they did not have a significant nexus to a traditionally navigable body of water.[14]

Using the standard of review applicable to challenges to a federal agency action under the CWA, the court acknowledged that agency actions, findings, and conclusions will be set aside only when they are found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[15] The Court held that the Corps reasonably concluded, based on its research and on-site inspections, that the ponds, ditches, and swales located on the Deerfield Tract displayed no evidence of relatively permanent flow and that the Corps reasonably applied its longstanding interpretation that the ponds, ditches, and swales are not "waters of the United States" under the Rapanos plurality test.[16] Similarly, the Court held that the Corps reasonably concluded that the ditches, ponds, and swales lacked a significant nexus to downstream navigable waters due to their low volume and frequency of flow.[17]

Conclusion

The Court concluded that the Corps' 2010 JD was not arbitrary, capricious, or an abuse of discretion, and, therefore, granted the Corps' and the EPA's motion for summary judgment.

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Endnotes

1. *Deerfield Plantation Phase II-B Property Owners Ass'n, Inc. v. U.S. Army Corps of Engineers*, 2011 U.S. Dist. LEXIS 75766, at *3-5, 26 (D. S. Car. 2011).
2. *Id.*
3. *Id.* (quoting 33 U.S.C. § 1311(a) and 1362(7)).
4. In *Riverside*, 474 U.S. 121 (1985), the U.S. Supreme Court held that wetlands adjacent to traditionally navigable waters fell within the CWA's definition of "navigable waters," reasoning that Congress had included a broad definition of "navigable waters" in the CWA to regulate at least some waters that would not be deemed "navigable" as that term is traditionally understood.
5. In *SWANCC*, 531 U.S. 159 (2001), noting that "[i]t was the significant nexus between the wetlands and navigable waters that informed [its] reading of the CWA in *Riverside*[,]" the Supreme Court held that wholly isolated intrastate ponds were not "navigable waters" under the CWA.
6. Before the Court in *Rapanos*, 547 U.S. 715 (2006), was the application of CWA jurisdiction over four Michigan wetlands near ditches or man-made drains that eventually emptied into traditional navigable waters. The Supreme Court had to decide whether "navigable waters" in the CWA "extend[ed] to wetlands that d[id] not contain and [were] not adjacent to waters that [were] navigable in fact." The court was split, and proposed two different approaches so as not to allow CWA jurisdiction over wetlands lying alongside remote and insubstantial ditches and drains. The four-justice plurality concluded that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the [CWA]." Citing *SWANCC*, Justice Kennedy wrote that a "significant nexus" test is the appropriate

approach. Under that test, in order to be "navigable" under the CWA, "a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." Justice Kennedy concluded that "wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"

7. *Deerfield Plantation*, 2011 U.S. Dist. LEXIS 75766 at *15-16.
8. *Id.* at *16 (quoting the Rapanos Guidance).
9. *Id.* at *16-17.
10. *Id.* at *17.
11. *Id.* at *17-18.
12. *Id.* at *20-22.
13. *Id.* at *23-25.
14. *Id.* at *26-27.
15. *Id.* at *28-29.
16. *Id.* at *41-42.
17. *Id.* at *53.

* * *

In re Endangered Species Act Section 4 Deadline Litigation, 2011 WL 4005349 (D.D.C. Sept. 9, 2011)

Facts

Plaintiffs, the Center for Biological Diversity and WildEarth Guardians, filed suit against the Fish and Wild Service (FWS), seeking to compel the FWS to make the determination of whether to list species as endangered or threatened under the Endangered Species Act (ESA) in a timely fashion.[1]

The Safari Club International (SCI) moved to intervene in the action, arguing that if the FWS did ultimately determine that three specific species—the greater sage grouse, the New England cottontail, and the lesser prairie-chicken—were listed as endangered, it would impair the group's ability to hunt such species.[2]

Procedural History

The Plaintiffs and the FWS reached a settlement in July of 2011, following mediation.[3] The proposed settlement established a schedule for FWS to "resolve the backlog of candidate (i.e. warranted-but-precluded) species," which consisted of 251 species.[4] While the settlement required the FWS to resolve the backlog, it did not require that the FWS "reach any particular substantive outcome on any petition or listing determination."[5]

SCI moved to intervene as a defendant in the case, seeking to oppose the settlements because they would require FWS to take action on three species of particular hunting interest to SCI.[6]

Issue

Whether a hunting organization has Article III standing to intervene in an action to compel the FWS to make a determination on candidate species for listing under the ESA?

Rationale

Species are added to the ESA through a notice and comment procedure, initiated either by the Secretary or an "interested person."[7] Pursuant to the ESA, the FWS must undertake a specific process to determine whether the species warrants consideration, and if so, the FWS must decide within twelve months of a listing petition whether, and how, the species should be classified.[8] The FWS must, within that twelve months, make a finding that the listing is either (1) warranted; (2) not warranted; or (3) warranted, but precluded by higher listing priorities.[9] Plaintiffs challenged the FWS's failure to meet the statutory deadlines for classification of hundreds of species the Plaintiffs petitioned for listing.[10]

SCI moved for intervention as a matter of right, or in the alternative, permissive intervention. Intervention as a matter of right, governed by Rule 24(a) of the Federal Rules of Civil Procedure (FRCP), requires that an intervenor establish Article III standing.[11] To demonstrate such standing, the potential intervenor must establish "(1) an injury-in-fact that is (a) concrete and particularized and (b) actual and imminent, (2) causation, and (3) redressability."[12] While SCI asserts an interest in "the hunting and sustainable use conservation" of the specific species at issue, SCI failed to demonstrate either causation or redressabiilty because the injury is based on the substantive outcome of the FWS listing, which is not addressed in the settlement agreement and, therefore, not before the court.[13]

SCI's motion to intervene with the Court's permission was also denied.[14] Permissive intervention is governed by Rule 24(b) of the FRCP, which requires an intervenor to demonstrate "(1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action."[15] If those criteria are satisfied, the next step is to consider whether the intervention will unduly prejudice or delay the adjudication.[16]

Finding that the permissive intervention of SCI could lead to undue delay, since the settlement agreements are already pending before the Court, permissive intervention was denied.[17] Additionally, the Court found that forcing FWS to continue to litigate would cause prejudice, consuming scarce resources that may interfere with settlement obligations.[18] Since SCI would still be able to participate in the administrative review process of the FWS's eventual listing determination, its own substantive interests were not prejudiced by denial of intervention.[19]

Conclusion

As SCI failed to demonstrate causation or redressability to satisfy the requirements of intervention as of right, and because permissive intervention would cause undue delay and prejudice, the Court denied SCI's request for intervention.[20]

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Endnotes

1. *In re Endangered Species Act Section 4 Deadline Litigation*, 2011 WL 4005349, *1 (D.D.C., Sept. 9, 2011).
2. *Id.*
3. *Id.* at 3.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at *2.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at *3.
12. *Id.* at *4 quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992).
13. *Id.* at *4.
14. *Id.* at *8.
15. *Id.* at *6 citing *E.E.O.C. v. National Children's Center, Inc.*, 146 F.3d 1042, 1046 (C.A.D.C., 1998).
16. *Id.* at *6.
17. *Id.*
18. *Id.*
19. *Id.* at *7.
20. *Id.* at *8.

* * *

Friends of Animals v. Caldwell, 2011 U.S. App. LEXIS 13094 (3rd Cir. 2011)

Facts

Between 1983 and 2009, the population density of white tailed deer in the Valley Forge National Historical Park, located outside of Philadelphia among rapidly growing suburbs, increased from roughly 33 deer per square mile to 241 deer per square mile. However, the deer density needed to maintain natural forest regeneration in the Park was estimated to be between 10 and 40 deer per square mile, and as a result, the National Park Service (NPS) sought to take action for preserving the Park's vegetation.[1]

After a three-year study, publishing of notices, distribution of a draft environmental impact statement (EIS), and public meetings and comment periods, the NPS published a final EIS identifying objectives that included the protection of native plant communities and the cultural landscape by reducing the deer population.[2] The NPS established four alternatives in the EIS for meeting this objective: take no action (alternative A); employ rotational fencing of selected forest areas and introduce chemical reproductive control agents (alternative B); directly reduce deer population by using sharpshooters (alternative C); use sharpshooters to reduce the population and maintain it with chemical reproductive control agents (alternative D).[3] The NPS ultimately chose alternative D.

The EIS also briefly summarized other alternatives considered but rejected by the NPS, which included the reintroduction of predators. Coyotes were among those predators considered for reintroduction, but the NPS rejected that alternative, relying on a 1997 study showing that coyotes could not effectively control deer populations.[4]

The Connecticut-based nonprofit Friends of Animals, and the Pennsylvania-based nonprofit Compassion for Animals, Respect for the Environment ("FOA"), filed a complaint in November 2009, challenging the procedures used by the NPS in concluding that the massive deer cull was the best option for preserving vegetation in Valley Forge Park.[5]

Procedural History

In April 2010, FOA moved to supplement the record with three studies related to the feeding and human-interaction habits of coyotes, which was denied by the District Court in early October 2010. After the NPS announced in late October 2010 that it would commence the deer cull in the upcoming winter, FOA moved for a preliminary injunction. The District Court then granted the NPS's motion for summary judgment and denied FOA's motion for preliminary injunction as moot.[6] FOA appealed.

Issues

FOA put forth several arguments. First, that the NPS, in failing to include introduction of coyotes as an alternative in its EIS, failed to consider all reasonable alternatives as required under NEPA.[7] Second, it argued that the EIS contained false alternatives—that alternatives A and B were only "straw men"—and as a result, the NPS left itself with only one viable option: to shoot the deer.[8] Third, FOA argued that the District Court gave undue deference to the NPS without properly reviewing the administrative record because it concluded that increasing the number of coyotes in an urban park environment was against "common sense."[9] Finally, it took issue with the District Court's denial of its motion to supplement the record with three studies addressing coyote hunting habits and tendencies in human interaction, arguing that some cir-

cuits have adopted a more permissive approach to allowing extra-record review in NEPA cases.[10]

Rationale

Addressing FOA's first argument, the Third Circuit first noted that it "must evaluate the NPS's choice of alternatives in light of the stated objectives of the action."[11] The Court stated that "[a]n alternative is properly excluded from consideration in an [EIS] only if it would be reasonable for the agency to conclude that the alternative does not bring about the ends of the federal action."[12] The Court reasoned that since the NPS's primary objective was to protect the native vegetation and landscape of the Park, and it determined that the deer density of 241 deer per square mile had negative impacts on plant and animal communities, then "any reasonable alternative would have to result in the reduction of the deer population or in the prevention of such a high density of deer from accessing the vegetation and landscape."[13]

The Third Circuit found that the NPS clearly researched the idea of reducing the deer population through the use of predators.[14] The Court reasoned that although the NPS only relied on the 1997 study concluding that coyotes could not control a deer population, with no evidence suggesting that coyotes *could* reduce the deer population at Valley Forge Park, the NPS's conclusion that coyote reintroduction was not a reasonable alternative and did not require further study was neither arbitrary nor capricious.[15] The court further noted that, although not dispositive, FOA did not offer a detailed counterproposal that had a chance of success.[16] In fact, two of the three studies that FOA moved to supplement the record with actually supported the NPS's conclusion that coyote predation was not a reasonable alternative.[17]

Addressing FOA's second argument, the Court recognized that other Circuits have interpreted the requirements of NEPA—that federal agencies study in detail all reasonable alternatives—to preclude agencies from defining the objectives of their actions in terms so unreasonably narrow that they can be accomplished by only one alternative.[18] However, the court noted that NEPA does not mandate particular results, and courts only consider whether an agency's decisions regarding which alternatives to discuss and how extensively to discuss them were arbitrary.[19] The Court concluded that the NPS seriously considered options other than using sharpshooters to kill the deer and included a reasonable range of alternatives, and, therefore, did not violate the NEPA requirements.[20]

Addressing FOA's third argument, the Third Circuit declined to state conclusively if the District Court's own "common sense" interpretation of the NPS constituted an error, noting that the District Court clearly had reviewed the record.[21] The Court concluded that even if it was error, remand was not required because the NPS complied with NEPA in determining that coyote predation was an unreasonable alternative.[22]

With regard to FOA's final argument, the Third Circuit declined to address whether a specific exception applied in NEPA cases for a more permissive approach to allowing extra-record evidence. Instead, it reasoned that there was no reason to supplement the record because FOA's proposed evidence either did not conflict with the NPS findings or was irrelevant because the EIS focused on the failure of coyotes to control the deer population, not on the issues surrounding human-coyote interactions.[23]

Conclusion

The Third Circuit affirmed the District Court's decision granting summary judgment in favor of the NPS.

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Endnotes

1. *Friends of Animals v. Caldwell*, 2011 U.S. App. LEXIS 13094, at *1-3 (3rd Cir. 2011).
2. *Id.* at *3.
3. *Id.* at *3-4.
4. *Id.* at *4.
5. *Id.* at *4-5.
6. *Id.* at *7.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at *9.
12. *Id.*
13. *Id.* at *9-10.
14. *Id.* at *10.
15. *Id.* at *10, *12.
16. *Id.* at *11.
17. *Id.*
18. *Id.* at *12 (citing *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1174-75 (10th Cir. 1999)).
19. *Id.* at *12-13.
20. *Id.* at *14.
21. *Id.* at *15.
22. *Id.* at *16.
23. *Id.* at *17.

* * *

Goldman v. A & E Club Properties, __ A.D.3d __, 2011 WL 5222873 (2d Dep't 2011)

Facts

Here the Defendant, A & E Club Properties (A & E), owns and leases out property that is operated as a beach and tennis club located at the end of a private road.[1] The property is operated in its current capacity under a special use permit that is conditioned on the property owner maintaining the private road.[2] The Plaintiffs are four property owners whose properties are also located on the private road and immediately adjacent to the tennis club.[3] Plaintiffs brought this action seeking to enjoin A & E's use of the property as a tennis club on the theory that it is in violation of a condition of its special use permit requiring it to maintain the private roadway that had allegedly fallen into disrepair.[4]

Procedural History

Plaintiffs brought their action seeking an injunction against A & E's use of the tennis club in violation of its special use permit.[5] Defendant moved for dismissal in Supreme Court under CPLR 3211(a)(3) stating that Plaintiffs lacked standing to sue on the violation of the special use permit.[6] The Supreme Court denied Defendant's motion to dismiss on the grounds that it failed to demonstrate that the Plaintiffs were not aggrieved by the violation of the special use permit condition.[7] The Appellate Division affirmed.[8]

Issue

Whether property owners have standing to sue an adjacent property owner for a violation of conditions of a special use permit.

Rationale

The Supreme Court and the Appellate Division both reached the determination that adjacent property owners have standing to sue on a violation of conditions of a special use permit.[9] The Appellate Division stated that the Defendant failed to demonstrate, under CPLR 3211(a)(3), that Plaintiffs were not aggrieved by the violation of the special use permit condition requiring Defendant to maintain the private roadway.[10] As a result of failing to show that Plaintiffs were not aggrieved by the violation, the Appellate Division affirmed the Supreme Court's denial of the Defendant's motion to dismiss for lack of standing.[11]

Conclusion

The Appellate Division affirmed the Supreme Court's denial of A & E's motion to dismiss for lack of standing.[12] Where a property owner has violated a condition of a special use permit, adjacent property owners who are aggrieved by the violation will have standing to sue on that violation.[13]

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Endnotes

1. *Goldman v. A & E Club Properties*, __ A.D.3d __, 2011 WL 5222873, *1 (2d Dep't 2011).
2. *Id*.
3. *Id*.
4. *Id*.
5. *Id*.
6. *Id*.
7. *Id*.
8. *Id*.
9. *Id*.
10. *Id*.
11. *Id*.
12. *Id*.
13. *Id*.

* * *

Hinds Investments, L.P. v. Angioli, __ F.3d __, 2011 WL 3250461 (9th Cir. 2011)

Facts

Plaintiff Hinds Investments ("Hinds") alleged that defendants, manufacturers of dry cleaning machines, were contributors to waste disposal regulated under the Resource Conservation and Recovery Act of 1976[1] ("RCRA") because of the design of the machines.[2]

Hinds owned two shopping locations which leased space to dry cleaners that emitted a common dry cleaning chemical, perchloroethylene (PCE), which polluted the groundwater.[3] Hinds claimed that defendants designed the dry cleaning machines "so that wastewater contaminated with PCE would and did flow into drains and into the sewer system."[4] Hinds similarly contended that defendants' instruction manuals "instructed users that they should dispose of contaminated waste water in drains or open sewers."[5]

Procedural History

The United States District Court for the Eastern District of California granted defendants' motion to dismiss for failure to state a claim and the United States Court of Appeals for the Ninth Circuit affirmed.[6]

Issue

Whether Hinds's claim that defendants contributed to the disposal of hazardous waste was plausible on its face due to the design of and instructions for the dry cleaning machines used on Hinds' properties?[7]

Rationale

The Ninth Circuit, reviewing the district court's decision de novo, first looked to the definition of the word "contribute."[8] When RCRA does not define a term, it is accorded its plain and ordinary meaning.[9] The dictionary definitions for the word contribute are to "lend assistance or aid to a common purpose" or to "have a share in any act or effect" or "to be an important factor in; help to cause."[10] The Court next looked to the context of the statute prohibiting "contributing to," noting that it prohibited "handling, storage, treatment, transportation, or disposal," all of which were "active functions with a direct connection to the waste itself."[11] The Court also looked to the purpose of the defendants' machinery, noting that it had a "purpose helpful to society, like the dry cleaning of clothes."[12] The Court then looked to other courts' decisions on the scope of RCRA, noting that the sale of an asbestos-laden building was not "contributing to" waste disposal because there was no "handling or storing" of the materials.[13]

Conclusion

The Ninth Circuit held that the defendants' mere designing of equipment to generate waste did not give them control over, or active involvement in, the disposal of the waste by others.[14]

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Endnotes

1. 42 U.S.C. § 6901-6992.
2. *Hinds Investments, L.P. v. Angioli*, 2011 WL 3250461, *1 (9th Cir. 2011).
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 2.
7. *Id.*
8. *Id.* at 3.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 4.
14. *Id.* at 5.

* * *

Lampke v. Petro, Inc., No. 35947/2008, 2011 N.Y. Misc. LEXIS 1823 (N.Y. Sup. Ct. Suffolk Co. 2011)

Facts

Plaintiffs Edna and Robert Lampke, residential property owners in Remsenburgh, New York, commenced an action against Defendants, Petro, Inc. and Matson Heating and Air Conditioning, Inc. ("Matson"), for damages due to Matson's "negligent installation of a furnace and oil burner" resulting in a petroleum spill at their residence.[1] Plaintiffs then proceeded to move for partial summary judgment regarding the liability of the Defendants, claiming them to be "dischargers" under N.Y. Navigation Law §172 (8).[2]

Petro, Inc. contracted with Matson to install the furnace and oil burner on the Plaintiffs' property.[3] Plaintiffs alleged that "petroleum discharged onto the concrete basement floor of their residence, as well as into the soil beneath it, requiring excavation of the soil from the area below the basement floor."[4] Additionally, Plaintiffs asked the court to take judicial notice of the flow of petroleum into the groundwater considering the sandy nature of the soil.[5]

Petro, Inc. claimed that it was not responsible as a "discharger" of petroleum because it merely delivered the oil and the spill was not due to the manner in which the delivery occurred.[6] Petro, Inc. further claimed that the spill was due to the negligent installation of the oil furnace and burner by Matson.[7] Petro, Inc. also argued against the Plaintiffs' claim for judicial notice stating that lacking evidence as to the amount of spillage, the depth of seepage, and the depth of the underground water, there is no proof of groundwater contamination.[8] On the contrary, Matson argued that based on Navigation Law §172 (8), a discharge did not occur because the petroleum seeped to a depth of only two feet, and therefore did not contaminate the groundwater ten feet below the surface.[9]

Procedural History

The Supreme Court granted the Plaintiffs' motion for partial summary judgment against the Defendants regarding the issue of liability.[10] Additionally the Court placed the action back on the calendar for a trial to determine the issue of damages.[11]

Issue

Whether Petro, Inc. and Matson are considered "dischargers" of petroleum, and thus strictly liable under N.Y. Navigation Law §181?

Rationale

The Supreme Court of New York, Suffolk County granted Plaintiffs' motion for partial summary judgment, concluding that the Plaintiffs had "made an initial *prima facie* showing of entitlement to judgment as a matter of law on the issue of liability."[12] Defendants were unable to meet their burden, lacking sufficient evidentiary proof to defeat a motion for summary judgment.[13]

The Court relied on Navigation Law §172 (8) to define "discharger" as "any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum into the waters of the state or onto lands from which it might flow or drain into said waters, or into waters outside the jurisdiction of the state when damage may result to the lands, waters or natural resources within the jurisdiction of the state."[14] Applying Navigation Law Article 12 liberally, the Court determined that Petro, Inc. was subject to liability as a "discharger" for having contracted with Matson for the installation of the furnace and oil burner.[15]

The Plaintiffs successfully showed that Petro, Inc. and Matson caused the oil leak—directly or indirectly—leading to the seepage of petroleum into the soil underneath the Plaintiffs' basement, and that they had not negligently contributed to the discharge by the Defendants.[16] However, the only evidentiary proof put forth by the Defendants were affirmations of counsel made without personal knowledge, which the court concluded were "insufficient to defeat a motion for summary judgment."[17] Although Matson produced a letter written by the company hired to clean up the spill to the Department of Environmental Conservation stating that the groundwater had not been affected by the spill, the Court found this letter to be hearsay and thus inadequate to overcome a motion for summary judgment.[18]

Conclusion

The Supreme Court of New York, Suffolk County, granted partial summary judgment in the Plaintiffs' favor holding the Defendants liable as "dischargers" of petroleum, due to the negligent installation of a furnace and oil burner.[19] The Court further set a calendar date for a trial to determine the issue of damages.[20]

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Endnotes

1. *Lampke v. Petro, Inc.*, No. 35947/2008, 2011 N.Y. Misc. LEXIS 1823, at *1–2 (N.Y. Sup. Ct. Suffolk Co. 2011).
2. *Id.* at 2.
3. *Id.* at 7.
4. *Id.* at 2–3.
5. *Id.* at 3.
6. *Id.* at 3.
7. *Id.*
8. *Id.* at 3–4.
9. *Id.* at 4.
10. *Id.* at 1.
11. *Id.* at 1, 8.
12. *Id.* at 7 (citation omitted).
13. *Id.* at 8.
14. *Id.* at 6 (citing N.Y. Navigation Law §172 (8)).
15. *Id.* at 7 (citation omitted).
16. *Id.* (citing *Young v. Abbott & Mills, Inc.*, 82 A.D.3d 1218, 919 N.Y.S.2d 395 (2d Dep't 2011)); *Tifft v. Bigelow's Oil Serv., Inc.*, 70 A.D.3d 1248, 894 N.Y.S.2d 594 (3d Dep't 2010); *cf. Hjerpe v. Globerman*, 280 A.D.2d 646, 721 N.Y.S.2d 367 (2d Dep't 2001).
17. *Id.* at 8.
18. *Id.* at 8–9.
19. *Id.* at 1, 8.
20. *Id.* at 9.

* * *

Milner v. Department of Navy, 131 S.Ct. 1259 (2011)

Facts

In *Milner v. Department of the Navy*,[1] a citizen made a Freedom of Information Act (FOIA) request for disclosure of maps and data identifying the locations of stored explosives on Naval Magazine Indian Island in Washington's Puget Sound.[2] The Department of the Navy denied the FOIA requests in 2003 and 2004 citing so-called Exemption 2,[3] which does not compel disclosure of information "related solely to the internal personnel rules and practices of an agency."[4] The Department stated, "disclosure would threaten the security of the base and surrounding community."[5]

Procedural History

Dismissal of Milner's suit to compel was affirmed by the Ninth Circuit.[6] The Supreme Court granted certiorari to resolve a longstanding circuit split about the scope of Exemption 2 and reversed the District Court and Appeals Court.[7]

Rationale

Writing for the eight-justice majority in her first term, Associate Justice Kagan explicitly and narrowly defined the scope of FOIA Exemption 2, overruling what had been applied as a two-tiered standard for the past thirty years.[8] Following the 1981 decision by the D.C. Circuit in *Crooker v. Bureau of Alcohol, Tobacco & Firearms*,[9] courts have read FOIA Exemption 2 broadly to "cover any 'predominantly internal' materials."[10] The *Crooker* approach encompassed two-standards, the lower threshold known as "Low 2," which prevented disclosure only of information about

"human resources and employee relations."[11] The broader interpretation known as "High 2" prevented disclosure of materials that would "significantly risk circumvention" of federal agency protections, and was relied on by the Department of the Navy in refusing Milner's request in the case at bar.[12] The Ninth, Second and Seventh Circuits have applied this broader, tiered *Crooker* approach, while the Eighth, Fifth and Sixth Circuits have defined Exemption 2 more narrowly.[13]

Justice Kagan opined that the *Crooker* approach was too broad, and that in order to effect the intent of the FOIA legislation, a single, narrow approach is required.[14] Analyzing under canons of statutory interpretation and noting "the Act's goal of broad disclosure," Justice Kagan found that Congressional intent had been misconstrued in *Crooker*; too broad an approach would "engulf other FOIA exemptions, rendering ineffective the limitations Congress placed on their application."[15] The Court held that Exemption 2 "encompasses only records relating to issues of employee relations and human resources."[16] Thus, Milner's request for maps and information about the explosives stored by the Navy at Indian Island was not precluded under Exemption 2.

Justice Breyer's dissent warns of the possibility that overturning three decades of precedent could lead to over-classification of information by governmental agencies and thwart the intent and application of the law.[17] He found that the circuit split for which the Court granted certiorari preceded *Crooker* and as such, there was no disagreement or need to overrule stare decisis.[18] Justice Breyer found that FOIA's intent had been met through this precedent and that with the decision of the Court to narrow Exemption 2, governmental agencies did not have clear enough information to be able to implement the ruling in a timely manner.[19]

Conclusion

On its face, the result of the ruling in Milner should be increased citizen access to government information through the FOIA process because the scope of exclusion has been narrowed. The government will have a greater burden of demonstrating that Exemption 2 applies, and may no longer rely on the broader scope of *Crooker*. However, it is also important to recognize that the Milner controversy is not over. In a concurring opinion, Justice Alito identified an alternative and potentially applicable reason to deny the FOIA request, under Exemption 7.[20] Though not raised by the Department, Exemption 7 applies to information that is classified as a legitimate law enforcement purpose.[21] It remains to be determined whether the requested maps and information fall within the classification of law enforcement purposes.

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Endnotes

1. 131 S. Ct. 1259 (2011).
2. *Id*. at 1263–64.
3. *Id*.
4. 5 U.S.C. § 552(b)(2) (2009).
5. *Milner*, 131 S. Ct. at 1264.
6. *Id*.
7. *Id*.
8. *Id*. at 1271.
9. *Crooker v. Bureau of Alcohol, Tobacco and Firearms*, 670 F.2d 1051 (D.C. Cir. 1981).
10. *Milner*, 131 S. Ct. at 1263 (quoting *Crooker,* 670 F.2d 1051, 1056-57).
11. *Id*. at 1263.
12. *Id*. at 1263 (quoting *Crooker*, 670 F.2d 1051, 1074).
13. *Id*. at 1269.
14. *Id*. at 1269–70.
15. *Id*. at 1265 (quoting *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989)).
16. *Id*. at 1271.
17. *Id*. at 1277–78 (Breyer, J., dissenting).
18. *Id*. at 1274.
19. *Id*. at 1275.
20. *Id*. at 1272–73 (Alito, J., concurring).
21. 5 U.S.C. § 552(b)(7) (2009).

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Nonnon v. City of New York, 2011 N.Y.Slip Op. 06463, 2011 WL 4089536 (1st Dep't 2011)

Facts

This is a consolidated action brought against the City of New York for the personal injuries and wrongful deaths that allegedly arose from the plaintiffs' exposure to hazardous substances from the Pelham Bay Landfill, located in the Bronx.[1]

Pelham Bay landfill was operated by the Department of Sanitation from 1963 until its forced closure in 1978.[2] The City of New York owned the landfill while it was in operation and continues to own it to this day.[3] The landfill was designated as an "inactive hazardous waste site" after it had been found that the site, while in operation, had allowed several corporations to illegally dispose of hazardous waste in the landfill.[4]

From 1991 to 1993, nine separate actions were brought against the City by residents of the neighborhoods closest to the landfill who were allegedly exposed to toxins over the years.[5] These actions alleged that the "extended exposure to the hazardous materials emanating from the landfill caused the development of either acute lymphoid leukemia (ALL) or Hodgkin's disease."[6] Plaintiffs presented expert opinions on epidemiology and toxicology and the subsequent studies done on those affected.[7]

Procedural History

The New York State Court of Appeals upheld the denial of the City's motion to dismiss the nine actions for failure to state a claim.[8] The motion was premised upon the alleged insufficiency of evidence presented by plaintiffs' experts to establish causation.[9] On October 12, 2007, the City made a motion for summary judgment on all nine actions.[10] The motion was denied by the court.[11]

Issue

Whether the plaintiffs' expert testimony has provided an adequate scientific foundation in raising a triable issue of fact regarding the existence of a causal connection between the landfill and the plaintiffs' current illnesses.

Rationale

When there is a question as to the legitimacy of an expert's opinion, courts apply the *Frye* test, which looks to the reliability and general acceptance of the principles used by the expert, not to the reliability of the expert's conclusion.[12] Here, because epidemiology and toxicology are well-accepted methodologies, the court looked to the experts' procedures to determine the legitimacy of the evidence proffered.[13]

The Court then applied the test set forth in *Parker v. Mobil Oil Corp.* to determine whether the expert opinions were able to demonstrate causation.[14] The test requires that the expert's opinion show: (1) the plaintiff was exposed to a toxin; (2) the toxin is able to cause the alleged illness; and (3) the plaintiff was "exposed to the toxin levels sufficient to cause illness."[15]

Due to the difficulty in quantifying a person's actual exposure to a toxin, the Court of Appeals recognized that a precise level of exposure is not needed to satisfy specific causation.[16] Rather, specific causation can be satisfied where the plaintiffs' expert opinions provide a sufficient "'scientific expression' of plaintiffs' exposure levels."[17] Courts have also held that specific causation can be satisfied where the relative risk in an epidemiological study translates to a "50% likelihood that an exposed individual's disease was caused by the agent."[18]

Here, the presence of such toxins in the areas neighboring the landfill is well documented.[19] The City has admitted, through concessions and consent decrees, that the surface and groundwaters had been polluted by contaminants from the landfill.[20] The court determined that all plaintiffs living in close proximity to the landfill were exposed over the years to the toxins that originated from the landfill.[21] The court further determined that all of the plaintiffs' suffering from ALL had sufficiently demonstrated, through epidemiological and toxicological data, a connection between the landfill and their present illnesses to warrant a trial on their claims.[22]

Conversely, the court held that the plaintiffs suffering from Hodgkin's disease were unable to provide sufficient and similar evidence to survive the City's motion for summary judgment.[23]

Conclusion

The First Department affirmed in part the lower court's decision to deny the City's motion for summary judgment by holding that the plaintiffs suffering from ALL sufficiently raised a triable issue of fact regarding the issue of causation.[24]

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Endnotes

1. *Nonnon v. City of New York*, 2011 WL 4089536, *1 (1st Dep't 2011).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at *2. *See also Nonnon v. City of New York*, 32 A.D.3d 91, 95, 819 N.Y.S.2d 705, **4–5 (1st Dep't 2006).
6. *Nonnon*, 2011 WL 4089536 at *2.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at *6.
12. *Id.*
13. *Id.* (citing *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 447 (2006)).
14. *Id.*
15. *Id.* (citing *Parker*, at 824).
16. *Id.* at *7 (citations omitted).
17. *Id.* (citing *Jackson v. Nutmet Technologies, Inc.*, 43, A.D.3d 599, 602, 842 N.Y.S.2d 588, 590 (3d Dep't 2007)).
18. *Id.* at *8. (Here, the relative risks statistics were more than double for the areas surrounding the landfill.)
19. *Id.* at *9.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*

* * *

Natural Res. Def. Council, Inc. v. Wright-Patterson Air Force Base, No. 10 Civ. 3400(SHS), 2011 WL 3367747 (S.D.N.Y. 2011)

Facts

Plaintiff Natural Resources Defense Council, Inc. (NRDC) brought this action against Wright Patterson Air Force Base and the United States Department of the Air Force (Air Force) for failure to conduct an adequate search for records in response to NRDC's Freedom of Information Act (FOIA) request concerning a six billion dollar "coal-to-liquid facility" (Facility).[1] Plaintiff claimed that the Facility would be hazardous to human health and to the environment because it would emit over twenty-six (26) million tons of carbon dioxide per year.[2] In its FOIA request, the NRDC sought information from transactions and communications concerning the Facility made by Baard Energy, the Air Force, the Department of Defense, the Ohio Department of Development, the Ohio Air Quality Development Authority and the Columbiana County Port Authority.[3]

In response to NRDC's FOIA request, the Air Force issued a "No Records" response after searching for dispositive records at Detachment 1, Air Force Research Laboratory (AFRL) Directorate of Contracting. The Air Force then forwarded to the NRDC an article about the AFRL's alternative fuel program and a document entitled "The Dayton Region's Wright Patterson Air Force Base Strategic Vision[.]"[4] Following an NRDC appeal, the Air Force searched its Headquarters Air Force Material Command and Aeronautical Systems Center offices at the Wright Patterson Air Force Base.[5] After the commencement of the instant action, the Air Force provided evidence of "miscommunication" regarding the existence of responsive documents and provided those responsive documents at issue to the NRDC.[6]

Procedural History

The NRDC made an administrative appeal of the Air Force's initial "No Records" response.[7] Following an affirmation of that response and the Air Force's dismissal of the NRDC's appeal, the NRDC brought an action challenging the adequacy of the Air Force's search.[8] The Air Force moved for summary judgment.[9] The NRDC opposed the motion and cross-moved for limited discovery.[10]

Issue

Whether the Air Force conducted an adequate search for records responsive to the NRDC's FOIA request.[11]

Rationale

In order to determine the adequacy of the search, the Court looked to the declarations of Darrin Booher, the Air Force action officer assigned to the NRDC's FOIA request, and John Pellett, the Air Force counsel responsible for reviewing the NRDC's administrative appeal.[12] The Court was satisfied that both Air Force representatives had the requisite "personal knowledge" to allow the Court to base its determination on their sworn statements.[13]

The Court found the Air Force's declarations to be sufficiently detailed, due to their identification of branches that were searched and the particular search terms used.[14] Furthermore, upon administrative appeal by the NRDC, the Air Force had re-contacted those branches and searched additional branches.[15] The Court held that any records obtained by the NRDC did not affect whether the Air Force's search had been adequate and that the Air Force was not obligated to locate every existing record.[16] Although the Air Force had initially failed to turn over certain records due to a "miscommunication," its subsequent disclosure of those records absolved it from any wrongdoing.[17] Finally, the Court found no evidence to suggest the Air Force had failed to contact anyone or failed to search anywhere where responsive information would have been found.[18]

Conclusion

The Court held that the Air Force had conducted an adequate search.[19] Summary judgment was granted for the Air Force and the NRDC's request for discovery was denied.[20]

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Endnotes

1. *Natural Res. Def. Council, Inc. v. Wright-Patterson Air Force Base*, No. 10 Civ. 3400(SHS), 2011 WL 3367747, *1 (S.D.N.Y. 2011).
2. *Id.*
3. *Id.*
4. *Id.* at *2.
5. *Id.* at *3.
6. *Id.*
7. *Id.* at **2, 3.
8. *Id.* at *3.
9. *Id.*
10. *Id.*
11. *Id.* at *4.
12. *Id.* at **2–4.
13. *Id.* at *4.
14. *Id.* at *5.
15. *Id.*
16. *Id.* at *6.
17. *Id.* at **3, 6.
18. *Id.* at *7.
19. *Id.*
20. *Id.*

* * *

In the Matter of New York State Superfund Coalition, Inc. v. New York State Department of Environmental Conservation, __N.E.2d __, No. 189, Slip Op. 08996 (2011)

Facts

Petitioner is a not-for-profit corporation with members holding land that is listed on a registry of hazardous waste disposal sites and subject to Department of Environmental Conservation (DEC) regulation.[1] Petitioner challenged DEC regulations of remedial programs aimed at cleaning inactive hazardous waste disposal sites that are recognized as "significant threat[s]."[2] Petitioner's Article 78 challenge of the regulations was based on the argument that the regulations were *ultra vires* and impermissibly wide in scope.[3]

The DEC adopted regulations to restore inactive hazardous waste disposal sites and included a requirement to achieve as part of the clean-up "pre-disposal conditions, to the extent feasible."[4] The authority enabling the DEC to implement such remedial programs is derived from article 27, title 13 of the New York State Environmental Conservation Law.[5] This statute provided the DEC with the regulatory authority to create remedial programs to clean up waste disposal sites and remove any substantial danger these sites posed to the environment.[6]

Procedural History

The Supreme Court, Appellate Division, Third Department modified an order by the Supreme Court, Albany County, which annulled two of the regulations originally challenged.[7] The Third Department's modification served to reverse the portion of the lower court order annulling the aforementioned regulations.[8] The Court of Appeals granted leave to appeal for consideration of the issue.[9]

Issue

Whether the breadth of DEC regulations requiring restoration of inactive hazardous waste disposal sites to meet pre-disposal conditions exceeds the agency's enabling authority under Environmental Conservation Law § 27–1313(5)(d).

Rationale

The Court will defer to the governmental agency charged with the responsibility of administering a statute when making a judicial interpretation of such a statute involves specialized knowledge and operational practices.[10] In its interpretation here, the Court noted that the DEC sought "cost-effective" remedial efforts to reduce the dangers of environmental contamination, to the extent feasible.[11]

Part of the Court's opinion focused on Environmental Conservation Law § 27–1301(3) to demonstrate that remedial programs for waste disposal sites include measures to abate or control, not just elimination and removal. The Court inferred this inclusion of lesser measures to indicate there was "a preference [for] the most thorough cleanup that makes sense in light of technical feasibility and cost-effectiveness."[12]

These interpretations taken together led the Court to hold that Environmental Conservation Law § 27–1313(5)(d) requires a threshold finding of a significant threat, but that a remedial program is not limited if circumstances call for a more thorough clean-up.[13] The overall effect of the Court's interpretation is to authorize the DEC to regulate and require remedial programs that may encompass a wide array of measures in removing toxic waste.[14]

The Court was careful to point out that the DEC's authority to order remedial programs was not "unfettered," but rather was limited "to the extent feasible" and, therefore, the DEC may not unilaterally fashion a remedial program without consideration of practicalities as they relate to each particular regulated site.[15]

Conclusion

The New York Court of Appeals affirmed the order of the Appellate Division holding the challenged DEC regulations to be reasonable interpretations of the statutory scheme authorizing the agency to identify and remediate inactive hazardous waste disposal sites.[16]

Dissent by Judge Pigott

In dissent, Judge Pigott argues that the appropriate interpretation of ECL 27-1313(5)(d) would be to find that a remedial program's objective is limited to complete clean-up of a site via "elimination of the significant threat."[17]

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Endnotes

1. *N.Y. State Superfund Coal., Inc. v. N.Y. State Dep't of Envtl. Conservation*, __ N.E.2d __, No. 189, slip op. at 2 (N.Y. Dec. 15, 2011) (Jones, J.).
2. *Id.* at 4.
3. *Id*. at 2.
4. *Id.* at 6.
5. *Id.* at 2–3; N.Y. Envtl. Conserv. Law § 27-1313 (McKinney 2011).
6. *See* N.Y. Envtl. Conserv. Law § 27-1313(5)(d) (McKinney 2011).
7. *N.Y. State Superfund Coal., Inc. v. N.Y. State Dep't of Envtl. Conservation*, 68 A.D.3d 1588, 892 N.Y.S.2d 594 (App. Div. 2009).
8. *See* N.Y. Comp. Codes R. & Regs. tit. 6 §§ 375–1.8(f)(9)(i), –2.8(a) (West 2011).
9. *N.Y. State Superfund Coal., Inc.*, No. 189, slip op. at 5.
10. *Id*. at 7–8.

11. *Id.* at 9.
12. *Id.* at 10.
13. *Id.* at 11.
14. *Id.*
15. *Id*. at 12–13.
16. *Id.* at 13–14.
17. *N.Y. State Superfund Coal., Inc. v. N.Y. State Dep't of Envtl. Conservation*, __ N.E.2d __, No. 189, slip op. at 16 (N.Y. Dec. 15, 2011) (Pigott, J., dissenting).

* * *

New York v. West Side Corp., No. 07-CV-4231, 2011 WL 2342752 (E.D.N.Y. June 3, 2011)

Facts

The New York State Department of Environmental Conservation (DEC) brought action against multiple defendants; West Side Corp. (West Side), who owned and operated a chemical redistribution and storage center for percholrethylene (PCE), a chemical commonly used in the dry cleaning industry, in Jamaica, Queens, as well as multiple manufacturers that contracted with the owner regarding chemical redistribution and repackaging operations: Sheldon F. Schiff, Dow Chemical Company (Dow), Ethyl Corp. (Ethyl), and PPG Industries, Inc. (PPG).[1] The DEC alleged liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and New York's common law doctrines of public nuisance, restitution, and indemnification.[2]

The DEC claimed that during the delivery process of PCE, there were spills and leaks. This occurred during the transfer because the above-ground storage tanks did not have the required spill prevention equipment.[3] The DEC also alleged that the manufacturer defendants had knowledge and control over the spills that occurred during their arrangement with West Side.[4] The site, here, is located near multiple drinking water supply wells that have been decommissioned by the New York City Department of Environmental Protection due to contamination.[5] DEC declared the site an "inactive hazardous waste disposal site" and New York State has claimed that it incurred response costs at the site of over six million dollars.[6]

Procedural History

The DEC alleged six causes of action: (1) defendants are jointly and severally liable for all response costs incurred by the state to date as well as future costs; (2) defendants are jointly and severally liable for all costs incurred by the state to abate the public nuisance caused by hazardous substances; (3) defendants have been unjustly enriched by the state and are liable for that benefit; (4) indemnification; the state seeks all the costs of performing defendant's duties; (5) defendants are jointly and severally liable to the state for damages to natural resources of the state and for costs of assessing this injury; and (6) defendants are jointly and severally liable for damages to natural resources under the common law doctrine of nuisance.[7] The manufacturer defendants moved to dismiss the state law claims.[8]

Issue

Whether, at the pleading stage, the failure to plead a claim seeking damages distinct from damages available under CERCLA, in this case state law claims, requires repleading or dismissal?[9]

Rationale

Defendants contend that allowing the plaintiffs to proceed with the state law causes of action would undermine the intent of CERCLA.[10] The defendants also claim that this would present the plaintiffs with the opportunity for double recovery.[11] The court found both of these arguments unpersuasive.[12] In passing CERCLA, Congress intended to preserve the rights of states to impose additional liability.[13] The court also found the issue of double recovery to be premature. The double recovery remains only a threat and it was too soon for the court to make such a determination. The defendants' motions to dismiss the state law claims on preemption grounds were, therefore, denied.[14]

The defendants also claimed that the state's claim of public nuisance was time barred by the New York State statute of limitations.[15] Significant evidence recognized by the court demonstrated that the discovery of the injury occurred beyond the allowable statute of limitations. This was due to the court acknowledging that the DEC classification of the site as a hazardous waste site and the preliminary site assessment constituted adequate discovery of the injury.[16] For these reasons, the court determined that the claim was time barred.[17]

Defendants also claimed that the plaintiff's claim of restitution fails under New York law.[18] They claimed that because the restitution claim is based on public nuisance, which is time barred, it fails under New York law. The court found that the plaintiff properly alleged the elements of the restitution claim under New York law and that claim is not time barred.[19]

The last claim that defendants moved to dismiss was indemnification.[20] To make a valid claim for indemnity a plaintiff must allege that multiple parties are subject to an obligation or duty to a third party under circumstances that one of them should perform it rather than the others.[21] The court noted that "since the state never identified and alleged in its complaint that it had a duty or legal obligation to remediate the West Side site" its indemnification claim fails.[22] The court granted the defendants' motion to dismiss but granted plaintiff leave to replead within thirty days.[23]

Conclusion

The court granted the defendants' motions to dismiss the public nuisance claims in the second and sixth causes of action. The motion to dismiss the indemnification claim was also granted, but with leave to replead. The remaining motions by the defendants were denied.[24]

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Endnotes

1. *New York v. West Side Corp.*, No. 07-CV-4231, 2011 WL 2342752, at *1 (E.D.N.Y. June 3, 2011).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *West Side Corp.*, 2011 WL 2342752, at *1.
7. *Id.* at *2.
8. *Id.*
9. *Id.* at *9.
10. *Id.* at *10.
11. *West Side Corp.*, 2011 WL 2342752, at *10.
12. *Id.* at *10.
13. *Id.* at *9.
14. *Id.* at *10.
15. *Id.* at *11.
16. *West Side Corp.*, 2011 WL 2342752, at *14.
17. *Id.*
18. *Id.* at *15.
19. *Id.* at *16.
20. *Id.*
21. *West Side Corp.*, 2011 WL 2342752, at *16.
22. *Id.* at *17.
23. *Id.*
24. *Id.*

* * *

Stormes v. United Water N.Y., Inc., 84 A.D.3d 1352 (2d Dep't 2011)

Facts

This case involved two actions that were combined for the purpose of discovery and trial.[1] The defendant, United Water New York, Inc., operates two dams and reservoirs; one in New York and the other in New Jersey, each of which store water from the Hackensack River.[2] The plaintiffs, Stormes and Tsenebis, are "owners of homes and businesses located downstream from the defendant's dams."[3] Plaintiffs brought this action seeking damages under a negligent interference with surface water claim, for alleged damages sustained during a rainstorm on April 15, 2007 and April 16, 2007.[4]

Procedural History

The Rockland County Supreme Court denied the defendant's motion to dismiss for failure to state a cause of action with regard to the first action, and also denied the defendant's motion to dismiss for failure to state a cause of action with regard to the second action, in which the defendants failed to show that the water that entered the plaintiffs' property was not surface water.[5] The court concluded that the defendant had negligently maintained the dams and reservoirs, leading to greater flood conditions than normally expected, and that the flood waters from the defendant's facilities were considered surface water.[6]

Issue

Are waters impounded from rivers by dams and reservoirs considered to be surface water for the purposes of determining liability for damages due to discharged surface water onto the property of another?[7]

Rationale

The Supreme Court came to the determination that the waters flooding from the defendant's dams and reservoirs were considered surface water.[8] The Appellate Division relied mainly on one case to analyze what constitutes surface water. In *Drogen Wholesale Elec. Supply v. State of New York*, surface waters were defined as natural precipitation, accumulated on land until it is absorbed into the land, drains to stream channels, or evaporates.[9] Additionally, surface waters can result from flood waters that separate from a main current, and remain over land.[10] The current law regarding surface water liability, as held by the N.Y. Court of Appeals, states that "an owner of land cannot, by drains of other artificial means, collect surface water into channels and discharge it upon the land of the owner's neighbor to the neighbor's detriment."[11]

The court found that the plaintiff in the first action failed to present sufficient evidence demonstrating that the impounded water which was discharged during the rainstorm constituted surface water, and therefore the complaint failed to plead a cause of action.[12] The court determined that "water that is part of a watercourse, such as a river, is not considered to be surface water."[13] The defendant demonstrated that the water collected from the Hackensack River via the dams and reservoirs was not collected in a way that interfered with surface water as defined by the law.[14] In the second cause of action, because the plaintiffs did not raise a triable issue of fact regarding whether the impounded water is surface water, a claim of negligent interference with surface water could not be supported, and thus the defendant was free from liability.[15]

Conclusion

The Appellate Division reversed the decision of the Supreme Court and held in the first action that the plaintiffs failed to introduce sufficient evidence that the damaging flood water was indeed surface water.[16] Additionally, the court held in the second action that surface water does not include water from a watercourse, and therefore the defendant was not liable for negligent interference with surface water.[17]

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Endnotes

1. *Stormes v. United Water N.Y., Inc.*, 84 A.D.3d 1352, 1352–53, 923 N.Y.S.2d 719 (2d Dep't 2011).
2. *Id.* at 1353.
3. *Id.* at 1352.
4. *Id.*
5. *Id.* at 1352–53.
6. *Id.* at 1353.
7. *Id.*
8. *Id.*
9. *Id.* (citing *Drogen Wholesale Elec. Supply v. State of New York*, 27 A.D.2d 763, 276 N.Y.S.2d 1015 (3d Dep't 1967)).
10. *Stormes*, 84 A.D.3d at 1353 (citation omitted).
11. *Id.* (citing *Musumeci v. State of New York*, 43 A.D.2d 288 (4th Dep't 1974), *appeal denied*, 34 N.Y.2d 517 (1974).
12. *Stormes*, 84 A.D.3d at 1353.
13. *Id.* at 1354.
14. *Id.*
15. *Id.*
16. *Id.* at 1353–1354.
17. *Id.* at 1354.

* * *

Team Enterprises, LLC v. Western Investment Real Estate Trust, 647 F.3d 901 (9th Cir. 2011)

Facts

Plaintiff-Appellant Team Enterprises, LLC ("Team") operates a dry cleaning store that used machines that generated wastewater contaminated with perchloroethylene (PCE) from 1980 to 2004. Team filtered wastewater through the Rescue 800, a filter-and-still machine designed and manufactured by Defendant-Appellee R.R. Street & Co., Inc. ("Street") "to filter and recycle the PCE-laden wastewater for reuse."[1] Specifically, the device recycled distilled PCE to the dry cleaning machines and dispensed the wastewater, containing some PCE, into a bucket. Team employees would recapture and reuse the "pure" PCE that would separate from the water and would then dump the remaining wastewater down the sewer drain.[2] The PCE then leaked from the sewer system and contaminated the soil.[3] The California Regional Water Quality Control Board deemed the affected area in need of cleanup, and Team performed that cleanup at its own expense.[4]

Procedural History

In 2008, Team sued Street in the Eastern District of California for contribution under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[5] In 2010, the District Court granted summary judgment to Street.[6]

Issue

Whether the manufacturer of a device used by the owner to filter PCE may be held liable as an arranger under CERCLA when the device produces wastewater which contaminates the soil.

Rationale

Arranger liability, under CERCLA, attaches when an entity "enter[s] into a transaction for the sole purpose of discarding a used and no longer useful hazardous substance."[7] Team alleges that Street is subject to arranger liability under two separate theories: (1) that Street took "intentional steps" and "planned a disposal" of PCE; and (2) that Street had "authority to control and exercised control over the disposal process."[8]

The Supreme Court reasoned that an entity qualifies as an arranger when it "takes intentional steps to dispose of a hazardous substance" but that "knowledge alone is insufficient to prove that an entity 'planned for' the disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product."[9] The useful product doctrine allows sellers of a hazardous substance to avoid being subject to arranger liability under CERCLA even if the substance will require later disposal so long as the substance was a useful product at the time of sale.

The Court reasoned that though the useful product doctrine typically applies only to sellers of hazardous substances, "the presumption animating the doctrine—that people sell useful products for legitimate business purposes, not for the purpose of disposing of waste—is applicable to this case."[10] As a result, the relevant question was whether Street intended use of its filter to result in the disposal of PCE.

Team argued that Street designed its machine in such a way that disposal of wastewater down the drain was an inevitability, that it was in essence a "waste disposal machine."[11] The Court disagreed, finding that the purpose of Street's machine was to recapture useable PCE, and that

"at most, the design indicates that Street was indifferent to the possibility that Team would pour PCE down the drain."[12] The Court also rejected Team's argument that intent could be inferred from Street's failure to warn Team that contamination could result from improper disposal of PCE.[13]

Team argued that Street was liable as an arranger because Street had "exerted control over the disposal process" because the design of Street's machine "required a dry cleaner to toss contaminated waste water down the drain."[14] The Court rejected this argument, citing *Burlington Northern*, which established that a party is not an arranger even when use of its device invariably leads to disposal of a hazardous substance.[15]

Team also argued that a portion of the device's instruction manual that directed Team to dump wastewater in a bucket demonstrated Street's control, but the Court rejected this argument, reasoning that instruction manuals are akin to recommendations and do not demonstrate control over the actions of purchasers.[16]

Conclusion

The Court upheld the summary judgment for Street, holding that Team failed to present evidence giving rise to a triable issue as to whether Defendant had sold its product with the specific purpose of disposing of a hazardous substance or as to whether Defendant exerted control over the disposal process.[17]

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Endnotes

1. *Team Enterprises, LLC v. Western Investment Real Estate Trust*, 647 F.3d 901, 906 (9th Cir. 2011).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* (quoting *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S.Ct. 1870, 1874 (2009)).
8. *Id.* at 907.
9. *Id.* at 908 (quoting *Burlington*, 129 S.Ct. at 1879).
10. *Id.* at 908–09.
11. *Id.* at 909.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* (citing *Burlington*, 129 S.Ct. at 1880).
16. *Id.* at 910.
17. *Id.* at 911.

* * *

Wilner v. Beddoe, 2011 WL 3502771 (Sup. Ct. N.Y. Co.)

Facts

Petitioners, various individuals who had default judgments entered against them by the New York City Environmental Control Board (ECB), challenged a recently promulgated ECB rule that adopted new procedures for vacating default judgments entered by the agency.[1]

Codified as Title 48, Section 3-82 of the Rules of the City of New York, the new regulation became effective as of April 4, 2010.[2] The regulation requires that a request to vacate a default judgment be made by application, using a form prescribed by the executive director.[3] Additionally, if the request for a new hearing is received within 45 days of the hearing date upon which the respondent did not appear, the request should be granted unless made in bad faith.[4] If a request for a new hearing is made after 45 days upon which the respondent did not appear, respondent must submit appropriate supporting documentation and the new hearing must have been requested within one year of the time the respondent learned about the violation.[5]

The new rule was promulgated because the old rule encouraged forum shopping.[6] The rule was vague and was applied in disparate ways across the offices of the ECB.[7] Additionally, the requests were processed by "administrative personnel who had no legal or formal training."[8] Finally, there was no requirement of a formal standardized submission; applications were made as a list with a general statement explaining why respondent had defaulted.[9]

Petitioners challenge the validity of the new rule on 23 grounds.[10] Among other reasons, Petitioners argue that the ECB Vacate Default Rule "eliminat[es] discretion to consider *bona fide* reasons for the default rendering the rule arbitrary and capricious, and violates public policy to have disputes decided on the merits."[11] Furthermore, petitioners allege the new rule is inconsistent with enabling legislation and purpose for the new rule.[12] Petitioners also claim the rule is unconstitutional as it fails to provide adequate due process under the United States Constitution, and is vague with respect to denying timely applications on the grounds that they were made in bad faith.[13] The new rule is also attacked as it conflicts with the fundamental right to a trial guaranteed by the New York State Constitution; that ECB's method of notice is not calculated to provide real notice; because default judgments are entered in the maximum amounts allowed by law, respondents are improperly punished; and the rule is invalid because it does not specify whether the applications are heard by clerks or Administrative Law Judges (ALJs).[14]

Procedural History

The New York County Supreme Court determined by stipulation and order that four test cases would be

decided by the court, while other related petitions were stayed.[15] Petitions other than these four were given notice and the opportunity to have the petition treated as a related case under the order.[16] The four test cases identified by the order were consolidated for consideration and determination in a single decision.[17]

Issue

Whether the "Vacate Default Rule" promulgated by the ECB, adopting new procedures for vacating default judgments, is invalid.

Rationale

First, Petitioners argue that it is against public policy to eliminate discretion to consider *bona fide* reasons of the default.[18] The court concluded that an Agency has the discretion to control the manner in which it vacates defaults, and unless arbitrary and capricious, the procedures will be upheld.[19] Additionally, where there is no violation of a statutory or constitutional right, public policy alone is not enough for a court to adopt procedure.[20]

Although there is an inconsistency between the new rule, which will vacate a default without any showing provided it is made within 45 days of the date of default, and the New York City Charter rule that a party may avoid entry of a judgment after default by showing good cause within 30 days of the mailing of a notice of default, the court states the new rule cannot interfere with the New York City Charter rule, and the ECB Vacate Default Rule may not be implemented in a manner which conflicts with the City Charter.[21]

As to State and Federal Constitutional challenges, the rule complies with the constitutional requirements of providing notice prior to a default.[22] Additionally, the court rejected the argument that the ECB "must hold traverse hearings whenever service is contested," as an opportunity to be heard is not always equated with the right to a full-blown evidentiary hearing.[23] The court, in addressing the unconstitutionally vague claim, stated that vagueness challenges must be addressed to the particular facts before the court and that it cannot consider hypothetical situations.[24] Since the actual test cases did not involve such an application, the court did not reach this issue.[25] As to a fundamental right to a trial guaranteed by the New York Constitution, the Petitioners failed to show that such a right exists in administrative proceedings.[26]

Petitioners argue that the method of notice is improper because the ECB refuses to use electronic communications.[27] This argument does not hold up because the manner of notice is usually a matter of policy, which cannot be attacked unless it violates a constitutional or established statutory right.[28] Next, Petitioners claimed that they are being improperly punished because the default judgments are entered in the maximum amounts allowed by law.[29] The court found this is not a valid argument because the NYCC § 1049-a(d)(1)(d) gives authority to enter such judgment amounts.[30] Last, the court said there is no merit to the Petitioners' arguments that the rule does not specify whether the applications are heard by an ALJ or a clerk, because they have failed to show that the rule is required to specify this.[31]

Conclusion

The New York County Supreme Court found that the new Vacate Default Rule is not invalid. Furthermore, the court found that Petitioners failed to introduce precedents to support many of their contentions,[32] and it rejected Petitioners' arguments that the rule lacks discretion, is inconsistent, unconstitutional, and does not provide adequate notice.

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Endnotes

1. *Wilner v. Beddoe*, 21276 slip op. at 1 (Sup. Ct. N.Y. Co. Aug. 1, 2011).
2. *Id*.
3. *Id*.
4. *Id*. at 2.
5. *Id*.
6. *Id*. at 6.
7. *Id*.
8. *Id*. at 6.
9. *Id*.
10. *Id*. at 3.
11. *Id*. at 7.
12. *Id*. at 8.
13. *Id*. at 10.
14. *Id*. at 13.
15. *Id*. at 1.
16. *Id*.
17. *Id*.
18. *Id*. at 6.
19. *Id*.
20. *Id*. at 8.
21. *Id*. at 9.
22. *Id*. at 10.
23. *Id*. at 11.
24. *Id*.
25. *Id*.
26. *Id*.
27. *Id*. at 12.
28. *Id*.
29. *Id*. at 13.
30. *Id*.
31. *Id*.
32. *Id*. at 7.

* * *

Recent Legislation

Clean Water Cooperative Federalism Act of 2011, H.R. 2018

In July, the House of Representatives passed a controversial bill that would substantially restrict the Environmental Protection Agency's (EPA) authority under the Clean Water Act (CWA), particularly regarding state decisions. The stated purpose of the Clean Water Cooperative Federalism Act of 2011, sponsored by Representatives John L. Mica (R-FL) and Nick J. Rahall (D-WV), is to "preserve the authority of each State to make determinations relating to the State's water quality standards"[1] by making substantial amendments to the Clean Water Act.[2]

Sponsors of the bill have dubbed it an effort to "rein in" the EPA, and "reverse the erosion of states' authority" by the CWA.[3] Co-sponsor Rep. Mica said the bill is meant to protect farmers and industries from EPA's "overreaching and arbitrary regulatory regime," as well as restrict EPA's authority to "second-guess" permits and water quality certification decisions by states whose CWA programs have received EPA's blessing.[4] According to co-sponsor Rep. Rahall, coal mining companies would also benefit substantially from the legislation's relaxation of regulations.[5]

Meanwhile, the bill has generated an outcry from environmental groups characterizing the legislation as a "shortsighted and reckless"[6] "assault on Americans' health, environment and economy,"[7] which effectively "guts" the CWA.[8] The EPA, in a memorandum released shortly after the bill's introduction, said the bill "overturn[s] almost 40 years of federal legislation by preventing EPA from protecting public health and water quality" and jeopardizes the state-federal relationship developed since the passage of the Act.[9] House Democrats who opposed the bill said it would "endanger our rivers, streams, and lakes" as well as jeopardize local jobs and tourism derived from clean water and healthy habitat.[10] The Obama Administration opposes the legislation because it would "significantly undermine" the CWA and could "adversely affect public health, the economy, and the environment."[11]

The most contentious portions of the bill restrict EPA's authority to revise or create new water quality standards which are different from those already accepted by a state.[12] Under the new law, the EPA may not impose revised or new water quality standards unless a state agrees to the changes.[13] Further, if a state determines that a discharge complies with the CWA, the EPA will not have the authority to override that state's determination.[14] The bill also restricts the EPA's authority to object to individual permits[15] or to withdraw state authority to issue National Pollutant Discharge Elimination System permits if the EPA disagrees with that state's implementation of the federal program.[16]

With regard to permits for dredged or fill material, if the state disagrees with the EPA that an activity will have an unacceptable adverse impact on the environment, the EPA administrator will not have the authority to prohibit the activity.[17] The bill also requires that EPA perform an "analysis of impacts of actions on employment and economic activity" before taking any action.[18] This analysis requires an in-depth assessment on the "impact, disaggregated by State, of the covered action on employment levels and economic activity, including estimated job losses and decreased economic activity."[19] If the action is predicted to result in a loss of more than 100 jobs or a decrease of more than one million dollars per year in economic activity, the EPA will be required to hold public hearings in each impacted state "at least 30 days prior to the effective date."[20]

The bill has been introduced in the Senate, where it is currently stalled.[21] If the bill were to pass the Senate, it is anticipated that the President would veto it.[22]

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Endnotes

1. The Library of Congress, *Bill Summary & Status: 113th Congress (2011-2012): H.R. 2018. All Information*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/D?d112:1:./temp/~bd7cyD:@@@L&summ2=m&|/home/LegislativeData.php>.
2. For text of the impacted Clean Water Act sections, *see* 33 U.S.C. §§ 1313, 1341, 1342, and 1344.
3. Press Release, Transportation and Infrastructure Committee Chairman John L. Mica (R-FL), Committee Leaders Introduce Bipartisan Bill to Rein in EPA, (May 27, 2011) <http://transportation.house.gov/news/PRArticle.aspx?NewsID=1281>.
4. *Id.*
5. Press Release, House Passes Rahall Bill to Rein in EPA Regulatory Overreach—Legislation Restores Federal-State Partnership, Transportation and Infrastructure Committee (July 13, 2011) <http://democrats.transportation.house.gov/press-release/house-passes-rahall-bill-rein-epa-regulatory-overreach-%E2%80%93-legislation-restores-federal>.
6. Steve Fleischli, *House Votes to Roll Back Clean Water Act* (July 13, 2011) <http://switchboard.nrdc.org/blogs/sfleischli/house_votes_to_roll_back_clean.html>. *See also*, Steve Fleischli, *House Committee Launches Most Significant Attack on the Clean Water Act in at Least 15 Years* (June 21, 2011) <http://switchboard.nrdc.org/blogs/sfleischli/another_clean_water_act_rollba.html>.
7. Press Release, U.S. House of Representatives Votes to Gut the Clean Water Act, Sierra Club (July 13, 2011) <http://action.sierraclub.org/site/MessageViewer?em_id=210840.0>.
8. Kate Sheppard, *House GOP Moves to Gut the Clean Water Act* (July 15, 2011) <http://motherjones.com/mojo/2011/07/republicans-move-gut-clean-water-act>.
9. Memorandum from EPA Office of Congressional and Intergovernmental Affairs to Rep. Tim Bishop (June 21, 2011) *available at* <http://www.eenews.net/assets/2011/06/22/document_pm_06.pdf>.
10. Press Release, H.R. 2018—Clean Water Cooperative Federalism Act, Democratic Leader Nancy Pelosi, <http://www.democraticleader.gov/floor?id=0444> (last visited Sept. 12, 2011).

11. Press Release, Obama Administration, Statement of Administration Policy: H.R. 2018—Clean Water Cooperative Federalism Act (July 12, 2011) <http://www.presidency.ucsb.edu/ws/index.php?pid=90631#axzz1XnNDGeKS>.
12. H.R.2018 § 2(a).
13. *Id.* § 2(a)(C).
14. *Id.* § 2(b)(7) (Clean Water Act provisions included in this part are §§ 301, 302, 303, 306 and 307).
15. *Id.* § 2(d).
16. *Id.* § 2(c).
17. *Id.* § 3(a).
18. *Id.* § 8(a).
19. *Id.*
20. *Id.* § 8(b)-(d).
21. The Library of Congress, *Bill Summary & Status: 113th Congress (2011-2012): H.R. 2018*: Bill Summary and Status, THOMAS <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR02018:@@@X|/home/LegislativeData.php|>.
22. Obama Administration Press Release, *supra* note 11.

* * *

The Hazardous Waste Electronic Manifest Establishment Act, S. 710

The Hazardous Waste Electronic Manifest Establishment Act[1] was first introduced to the Senate on March 31, 2011.[2] It was sponsored by Senator John Thune (R-SD), and co-sponsored by Cardin (D-MD), Klobuchar (D-MN), and Inhofe (R-OK).[3] On that same day, the Act was referred to the Senate Committee on Environment and Public Works.[4] By April thirteenth, Lautenberg (D-NJ) signed on as a co-sponsor of the Act, with Boxer (D-CA) following on August second.[5] The purpose of the act was "[t]o amend the Solid Waste Disposal Act to direct the Administrator of the Environmental Protection Agency [(EPA)] to establish a hazardous waste electronic manifest system."[6]

The Hazardous Waste Electronic Manifest Act requires that the electronic manifest system be established under the control of the Administrator of the EPA to be used by all agencies or agents thereof involved in hazardous waste treatment, transportation, storage, or disposal.[7] It allots resources for a fee structure to be established and monitored according to demand and allowance,[8] as well as establishes the Hazardous Waste Electronic Manifest System Fund, which compiles the fees paid under the Act and the interest accrued therefrom.[9] The Act provides authority to enter into contracts funded by the System Fund, including specifics as to the contracts themselves in regards to terms, goals, cancelations, and enactments.[10] It also creates a Hazardous Waste Electronic Manifest System Advisory Board, which works to evaluate the effectiveness of the manifest system and develop recommendations on how to better achieve the goals of the Act.[11] Lastly, the Act creates a time frame to establish promulgation of the regulations under the Act, and establishes requirements of compliance with respect to the certain states, which may be affected in terms of waste generation, transportation, or storage.[12]

This amendment allows for a more up-to-date data field for the generation, transportation, storage or disposal of hazardous wastes,[13] which may prove to be more effective at tracking and regulating. With the establishment of an Administrator and an Advisory Board,[14] the Act ensures that it will continue to grow and be able to change with changing technologies and adaptability.

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Endnotes

1. The Hazardous Waste Electronic Manifest Establishment Act, S. 710, 112th Cong. (1st Sess. 2011).
2. 2011 Bill Tracking S. 710 (Legislative History Report (LexisNexis)); 157 Cong. Rec. 2046.
3. 2011 Bill Tracking S. 710.
4. *Id.* at *2.
5. *Id.* at *3.
6. S. 710.
7. *Id.* at § 2(b).
8. *Id.* at § 2(c)(1-3).
9. *Id.* at § 2(d).
10. *Id.*
11. *Id.* at § 2(f).
12. *Id.* at § 2(g).
13. *Id.* at § 3024(b).
14. *Id.* at § 3024(f)(1-3).

* * *

Military Environmental Responsibility Act, H.R. 332

On the 19th of January 2011, Representative Bob Filner introduced the Military Environmental Responsibility Act.[1] Broadly, this bill proposes to subject American military organizations to environmental standards, putting military operations and land uses in a situation similar to all others. Essentially, this bill removes any immunity concerning environmental standards held by the organizations covered by the bill.

This bill removes federal immunity from the agencies by amending Chapter 160 of Title 10 of the United States Code.[2] The amendment would add Federal Defense Agencies to groups already open to regulation. Federal Defense Agencies includes the Department of Defense, Department of Energy, the Nuclear Regulatory Commission, the Office of Naval Nuclear Reactors, and any other defense-related agency as designated by the President. The defense-related activities that would become available to regulation under these standards include installations, facilities and operations, whether these uses are located on foreign or domestic soil.

With the passage of this bill, the federal government will waive immunities and revoke any exemptions, which would have precluded enforcement actions. The standards that could now apply to the Federal Defense Agencies would include all federal laws, treaties and regulations, and all state laws created to protect the environment and the health and safety of the public. In particular, the bill provides that such agencies would have to satisfy, among other laws, The Atomic Regulatory Act of 1954,[3] The Clean Air Act,[4] The Coastal Zone Management Act,[5] The Emergency Planning and Right-To-Know Act of 1986,[6] The Federal Water Pollution Control Act,[7] and The Oil Pollution Act of 1990.[8]

If a Federal Defense Agency does not comply with the newly applicable federal standards, the head of the agency responsible for enforcing such standards may initiate enforcement proceedings.[9] Additionally, enforcement can begin as a result of a citizen suit.[10] When civil damages are sought, individuals, whether they be employees or officers of the Federal Defense Agency, cannot be held personally liable. However, where criminal sanctions are sought, individuals will be open to prosecution.

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Endnotes

1. Military Environmental Responsibility Act, H.R. 332, 112th Cong. (2011).
2. H.R. 332.
3. H.R. 332.
4. H.R. 332.
5. H.R. 332.
6. H.R. 332.
7. H.R. 332.
8. H.R. 332.
9. H.R. 332.
10. H.R. 332.

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National Wildlife Refuge Volunteer Improvement Act of 2010, 111 P.L. 357

The National Wildlife Refuge Volunteer Improvement Act of 2010[1] was first introduced in the House on March 25, 2010, and referred to the House Committee on Natural Resources.[2] The bill was sponsored by Frank Kratovil (D-MD) along with three co-sponsors,[3] and passed in the House as amended on July 13, 2010, before passing the Senate on December 17, 2010.[4] The bill was signed by the President and became public law on January 4, 2011.[5] The purpose of the National Wildlife Refuge Volunteer Improvement Act of 2010 was "[t]o amend the Fish and Wildlife Act of 1956 to reauthorize volunteer programs and community partnerships for national wildlife refuges, and for other purposes."[6]

The Act gives appropriations to the Secretary of the Interior in order to effectively execute the goals and elements of the Act in full up until 2014.[7] It inserts a National Volunteer Coordination Program into the Fish and Wildlife Act of 1956, assisting with implementing resource conservation management and providing ample opportunities for volunteers.[8] The Act spells out a volunteer coordination strategy within the program in order to organize and effectuate more volunteer efforts under the original Fish and Wildlife Act of 1956.[9] Lastly, the Act forces the Secretary of the Interior to submit reports to the Committee on Natural Resources of the House of Representatives and the Committee on Environment and Public Works of the Senate, which will evaluate the volunteer program in terms of accomplishments, missed goals or deadlines, and make recommendations to such agencies regarding the program.[10] This Act encourages volunteerism where it is most needed, and allows for regulation to occur to theoretically increase volunteer numbers and progress.

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Endnotes

1. National Wildlife Refuge Volunteer Improvement Act of 2010, Pub. L. No. 111-357.
2. *Id.* at *2; H.R. Rep. No. 111-531, 3.
3. 2010 Bill Tracking H.R. 4973 (Legislative History Report (LexisNexis)).
4. *Id.*
5. *Id.*; Pub. L. No. 111-357.
6. Pub. L. No. 111-357.
7. *Id.* at § 2(f).
8. *Id.* at § 3(1)-(1)(B).
9. *Id.* at § 3(2).
10. *Id.* at § 4(a).

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New Manhattan Project for Energy Independence, H.R. 301

On January 18, 2011, Representative J. Randy Forbes, with co-sponsors Jim Gerlach and Frank R. Wolf, introduced House Bill 301, more commonly known as the New Manhattan Project for Energy Independence.[1] Broadly speaking, the purpose behind this proposed legislation is to enhance the nation's ability to generate a sufficient amount of electricity to sustain itself. In furtherance of this goal, this legislation provides for a summit, which will seek to identify ways to achieve the various energy independence goals established by the Act.[2] Following the summit, the Department of Energy is authorized to

institute grant and prize programs that will further the legislative goals.[3] Additionally, the Act would create a commission, again attempting to achieve energy independence through the provided goals.[4]

To achieve the policy goal of American energy independence, the Act provides seven independent, yet interrelated, goals. First, the Act seeks to increase vehicle fuel efficiency and the use of alternative fuel sources. Specifically, this legislation proposes that fuel efficiency be increased to 70 miles per gallon in gasoline-powered vehicles, yet the vehicle must have equal horsepower and nearly cost the same as conventional vehicles. The legislation also would seek the development of more efficient "green buildings," and the creation of cost-effective biofuel. Lastly, the remainder of the goals addresses large-scale power generation, seeking the construction of a 300 megawatt solar electricity plant, the development of a carbon sequestration system, a more beneficial method to deal with nuclear waste, and the development of high output nuclear fusion.

The summit will consider these goals if this legislation is passed with the input of advisors and directors of Federal Agencies, leading researchers in private and public laboratories, and the members of the newly formed New Manhattan Project Commission on Energy Independence.[5] This commission would be tasked with drafting a report on how America can achieve 50% energy independence within ten years and 100% energy independence within twenty years.

This proposed legislation also provides that the Secretary of Energy must create a grant program. Under this grant program, the Secretary of Energy will be required to award financial grants supporting research and development towards the Act's goals. In addition, the Secretary of Energy must also create a prize program, offering monetary allotments for research and development on a competitive basis. This bill would fund such programs through appropriations totaling ten billion dollars for the Secretary of Energy's grant programs, with an additional fourteen billion dollars for the prize programs.

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Endnotes

1. New Manhattan Project for Energy Independence, H.R. 301, 122th Cong (2011).
2. H.R. 301.
3. H.R. 301.
4. H.R. 301.
5. H.R. 301.

* * *

Relates to Unlawful Tampering with Farm Animals, S.5172, 234th N.Y. Leg. Sess. (2011)

Sponsors: Sens. Ritchie, Adams, Young

If enacted, this bill would amend Agriculture and Markets Law to make "unlawfully tampering" with a farm animal or farm a misdemeanor provided that the farm has posted notice that the farm prohibits unlawful tampering.[1]

"Unlawful tampering" is defined as "interference with a farm animal or farm" through the use of unauthorized photography, video recording, and audio recording or by the unauthorized feeding, release, or injection of a substance into a farm animal.[2]

Violation of the act is a misdemeanor punishable by a prison term of up to one year or a fine of up to $1,000.[3] Additionally, a person who violates the act is liable for actual damages, attorney's fees, veterinarian's fees, and, if applicable, the cost of purchasing a replacement of the farm animal.[4]

If enacted, the bill would take effect immediately.[5]

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Endnotes

1. Relates to Unlawful Tampering With Farm Animals, S.5172, 234th N.Y. Leg. Sess. §1, §2.
2. S.5172 §1(1)(f).
3. S.5172 §1(2).
4. S.5172 §1(3).
5. S.5172 §2.

* * *

R.E.S.T.O.R.E. the Gulf Coast States Act of 2011, S.1400

A bill currently under consideration in the U.S. Senate would direct billions in environmental fines and penalties to Gulf Coast states impacted by the April 2010 Deepwater Horizon oil spill.

The Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies (R.E.S.T.O.R.E.) of the Gulf Coast States Act of 2011, sponsored by Sen. Mary L. Landrieu (D- La.), would divert roughly eighty percent (80%) of any Clean Water Act civil and administrative penalties stemming from the Deepwater Horizon spill into a Gulf Coast Restoration Trust Fund.[1] The trust fund would then be used exclusively to pay for "programs and projects to restore, protect, and make sustainable use of the natural resources, ecosystems, fisheries, marine habitats, coastal wetland, and economy of the Gulf Coast

States."[2] Gulf States eligible for the funds include Alabama, Florida, Louisiana, Mississippi, and Texas.[3]

Of the monies collected in the Gulf Coast Restoration Trust Fund, the bill states that thirty-five percent (35%) must be made available to Gulf Coast States, in equal shares, for ecological and economic restoration of the Gulf Coast.[4] Projects deemed eligible for these funds include: conservation and coastal land acquisition; natural resource mitigation and restoration; "implementation of a federally-approved marine, coastal, or comprehensive conservation management plan, including fisheries monitoring;" tourism, education, or marketing programs; state parks improvements; planning assistance; workforce development and job creation; coastal flood protection and infrastructure; and projects to mitigate ecological and economic impacts of the oil spill on the Continental Shelf.[5] States are prohibited from using any of their funding to import seafood,[6] and preference can be given to companies headquartered in a Gulf Coast State.[7]

The bill also calls for the establishment of a Gulf Coast Ecosystem Restoration Council, which will be responsible for creating a comprehensive plan.[8] The comprehensive plan must, among other things, identify projects that will restore and protect the natural resources, ecosystems, fisheries, marine and wildlife habitats, beaches, barrier islands, dunes, and coastal wetlands of the Gulf Coast ecosystem.[9] The Council would also be responsible for coordinating scientific and other research in the Gulf, as well as urging cooperation and collaboration among federal agencies, state and local governments, and private entities as they develop policies, strategies, plans, and activities related to restoring the Gulf Coast.[10] To fulfill these responsibilities, the Council would be given up to sixty percent (60%) of the trust's annual funding.[11] That portion of funding may be used for specific projects or programs, and a small portion may be set aside for the administration of the Council's many duties, according to the bill.[12]

In order to implement these changes, the bill makes substantial amendments to the Federal Water Pollution Control Act.[13] Both S.1400 and an earlier version of the bill, S.861, have been referred to the Senate Committee on Environment and Public Works.[14] Cosponsors of the S.1400 version of the bill include Senators Thad Cochran (MS), Kay Bailey Hutchinson (TX), Bill Nelson (FL), Marco Rubio (FL), Jeff Sessions (AL), David Vitter (LA), and Roger Wicker (MS).

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Endnotes

1. The Library of Congress, *Bill Summary & Status: 112th Congress (2011 – 2012):* S.1400. *All Information,* THOMAS <http://thomas.loc.gov/cgi-bin/query/z?c112:S.1400>.
2. *Id.* § 3(c)(1).
3. *Id.* § 4(33).
4. *Id.* § 4(t)(1)(A).
5. *Id.* § 4(t)(1)(B)(i)(I)-(XII).
6. *Id.* § 4(t)(1)(B)(ii)(II).
7. *Id.* § 4(t)(1)(L).
8. *Id.* § 4(t)(2)(C) (Membership on the Council would include seven federal members (to be chosen from the Council on Environmental Quality, Environmental Protection Agency, Coast Guard, and the Departments of Interior, Army, Commerce, and Agriculture) and the Governors of each of the five Gulf Coast States) (*id.* § 4(t)(2)(C)(ii)(I)-(XII)).
9. *Id.* § 4(t)(2)(C)(vii).
10. *Id.*
11. *Id.* § 4(t)(2)(A).
12. *Id.* § 4(t)(2)(B).
13. Federal Water Pollution Control (Clean Water) Act § 311, 33 U.S.C. 1321 (2011). Changes to the Clean Water Act proposed by the bill are enumerated in S.1400 § 4.
14. The Library of Congress, *Summary of Congressional Action for S.1400. All Information*, THOMAS <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN01400:@@@X> (last visited Sept. 12, 2011).

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