NYSBA SPRING 2010 | VOL. 30 | NO. 1

The New York Environmental Lawyer

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

Message from the Outgoing Chair

Alan J. Knauf

It is hard for me to believe, but my term as Chair of the Environmental Law Section has come to an end. It has been an exciting time for me. Please join me in welcoming Barry Kogut as the Section's new Chair. Barry's term began June 1, 2010.

Our Section is launching an effort to green the legal profession in New York State. Since lawyers make such a big contribution to paper generation, hopefully we can lead the way in reducing it, and making the legal industry more environmentally friendly. As a Section, we have continued to use conference calls and web-based tools for our programs, and we are reducing paper materials at

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Message from the Incoming Chair

Barry R. Kogut

I am pleased and honored to have the opportunity to serve the Environmental Law Section as Chair and promise to provide a full and interesting year. For my introductory column, I would like to cover three items.

First, I want to thank Alan Knauf for his outstanding leadership over the last year. In particular, I congratulate him for his work last Fall in offering Section members the opportunity to see the beauty of Canandaigua Lake in the context of an excellent series of CLE programs that were presented in concert with our friends at the Municipal Law Section.

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meetings and CLEs by using CDs. Not only does this reduce our carbon footprint, but it enables members of our Section to attend programs with a smaller investment of time and money. Led by our Pollution Prevention Committee Co-Chairs Megan Brillault and Kristen Wilson, our plans include encouraging New York law offices to enroll in the ABA-EPA Law Office Climate Challenge, greening the State Bar Association through the strategies our Section has already launched, and encouraging changes to the state court system, including electronic filing and service.

I am working on a panel to take *pro bono* environmental cases, as suggested by EPA Region 2 Administrator Judith Enck at our Annual Meeting. Please let me know if you are interested in helping to get any of these projects off the ground.

The Section has some great events this past spring, including the Petroleum Spills Symposium (which you can still watch by webcast available on the Section's web page), the Legislative Forum (where we had the privilege of being addressed by Court of Appeals Associate Judge Susan P. Read), CLEs on Conservation Easements, and the EPA Region 2 Conference.

Our incoming Chair, Barry Kogut, who put together the program for our Annual Meeting at the New York Hilton, has put together a program for this summer in each of the DEC Regions to commemorate the 40th anniversary of the Department of Environmental Conservation, and the 30th anniversary of our Section. Look for details about this series on our web site. Plus mark your calendar for the Fall Meeting in Cooperstown to take place October 1-3.

The Section Cabinet has continued to hold periodic meetings with DEC General Counsel Alison Crocker and her key staff. We greatly appreciate Alison's willingness to open the lines of communication. Let one of the Section officers know if you want to pass along any ideas or concerns.

The Section continues to consider and submit comments on current topics such as the Brownfield Cleanup Program and drilling in the Marcellus Shale. Our Environmental Impact Committee is currently studying whether to recommend legislation to establish a statute of limitations for SEQRA claims, and our Hazardous Waste/Site Remediation Committee is looking at options for a Voluntary Cleanup Program. Under our Policy and Procedures for Section Comments on Legislation, Regulations and Guidance Documents, which is posted on our web site, any Section member can ask the Section to submit a position. The positions we have taken in recent years are posted on our web site.

As this is my last Message from the Chair, I will take this opportunity to editorialize. As many of you know, in the course of my private law practice, I recently had the privilege of taking the *Lighthouse Pointe* case to the Court of Appeals, resulting in a unanimous opinion that rejected the way DEC was restricting eligibility to the Brownfield Cleanup Program. I can't tell you what an exciting experience the argument was. I was barely able to blurt out one sentence before being barraged with questions.

Our Section was out front advocating for brownfield legislation in New York, and once it was passed, environmental lawyers joined DEC in encouraging participation in the BCP. We had a common goal of cleaning up toxic waste across our state. Unfortunately, the door to the program was nearly closed by DEC policies that were contrary to the law, and drifted away from the agency's mission of environmental protection. Many of us who had encouraged our clients to apply to the BCP were left redfaced, and then had to advise new clients not to spend the time and money on even filing a BCP application.

It is a testament to the strength of our legal system that the courts can compel the executive branch to comply with the law as written. Government officials, however, need to follow the law as written, without requiring a trip to the State's highest court, and leave it to the Legislature to change the law.

I hope that in the future, we can all work together to use the BCP to improve environmental quality by remediating the thousands of brownfields in New York, and provide a huge boost to the New York economy through jobs and tax revenue that will flow from brownfield development. This, indeed, was the purpose for which the BCP was adopted. I don't think anyone can dispute that brownfield development is a real "win-win."

I am optimistic that the efforts our Section is making, and the work our members are doing, will address responsibly the critical environmental issues we face. We are all working to achieve a common goal of improving environmental quality, while staying true to the rule of law.

In closing, I want to thank everyone who has helped me in my efforts leading the Section over the past year, particularly Lisa Bataille and the rest of the staff at the State Bar. It has been a true honor to act as Section Chair. While I will be happy to have the extra time for my family and law practice, I will certainly miss being Chair, and will continue as an active member of the Section.

Alan J. Knauf

A Message from the Incoming Chair

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Alan was the fourth Section Chair under whom I had the pleasure to serve, following Walter Mugdan, Lou Alexander and Joan Leary Matthews. The amount of time and effort that each of them provided to the Section was significant and underscored the commitment necessary to keep the Section vibrant and a meaningful participant in the dialogue on the environmental issues of the day.

Second, I want to introduce the other members of Section Cabinet team for this year:

- First Vice-Chair: Philip H. Dixon, Esq., Whiteman Osterman & Hanna, LLP
- Second Vice-Chair: Carl R. Howard, Esq., USEPA, NYC
- Treasurer: Kevin A. Reilly, Esq., NYS Supreme Court, Appellate Division, 1st Dept., NYC
- Secretary: Terresa M. Bakner, Esq., Whiteman Osterman & Hanna, LLP
- Section Council Representative: Joan Leary Matthews, Esq., Associate Commissioner, Hearings and Mediation Services, NYSDEC
- Section Delegate (to the NYSBA House of Delegates): John L. Greenthal, Esq., Nixon Peabody LLP

We will be having our Section Cabinet conference calls on the third Thursday of every month. I invite members of the Section who desire to have a matter on the Cabinet meeting agenda to let one of the Cabinet members know at least five (5) days prior to the scheduled meeting.

One of my goals is to build upon past efforts to improve Section infrastructure and opportunities for membership to network. One item of particular note is my desire to eliminate the position of Second Vice-Chair. Five (5) years is a long time to serve on the officer track and the position of Second Vice-Chair has no defined role in our Section by-laws. There will be more detail on this at the next Executive Committee meeting.

Third, with respect to the theme of my term, I want to focus on the things that unite us rather than what divides us. There is always a tension between environmental protection and economic development and the way to bridge the gap (which I do not believe is as wide as some believe) is education. For that reason, I intend to focus in my term on providing quality CLE opportunities for the membership.

Consequently, one of my initial initiatives was to celebrate the 30th anniversary of the Environmental Law Section and the 40th anniversary of the New York State Department of Environmental Conservation (DEC) with a series of CLE programs in each of the 9 DEC Regions. This allows us to showcase the work being done at each of the Regions in a comprehensive way and allow additional networking opportunities for our younger members. The Section website has details on each of the Regional Programs and I am particularly grateful to the Department, which has been a strong supporter of these programs.

The next set of CLE programs will come October 1-3 at my favorite New York State jewel—the Village of Cooperstown. The CLE theme will be historical as we first look back at the 30-year history of CERCLA and then examine the evolution of environmental common law jurisprudence over the life of the Section. We will end the Saturday session with an examination of the ethical issues that arise in conducting investigations with an environmental focus.

Continuing with a recent tradition of conducting a more aggressive outreach to younger Section members, we are reserving Friday afternoon for a CLE program that offers a primer on the Clean Water Act, Climate Change and Alternative Dispute Resolution. The program will also be of interest to the more experienced practitioner, particularly the panel that will look at issues that confront the environmental lawyer when addressing media inquiries.

There will be much more to the journey as the year unwinds and it will be recounted in future columns. For now, I invite you to become more fully engaged in the environmental issues of the day by enriching the work of the Section through our Committees and CLE networking opportunities.

This invitation comes at a critical time as the Section enters its fourth decade. Despite the burden of competing demands for our time and energy, there is a need that must be met for the good of the profession and the natural splendor that we enjoy in New York.

Barry R. Kogut

From the Editor-in-Chief

Miriam E. Villani

This issue, which would not cease growing (both in space and in time), has now overlapped with the catastrophic oil spill in the Gulf of Mexico. Called the "worst environmental disaster America has ever faced" by President Obama, the spill is anticipated to cover an estimated 4,000 square miles. The latest information puts the volume of discharge of oil into the Gulf at 60,000 barrels per day and the volume of economic displacement in the millions. While the spill shuts down fisheries and tourism along the Gulf Coast, wildlife, including crabs, seabirds, and sea turtles, wash ashore covered in oil. Estuaries and other high-functioning coastal habitats supporting the continued existence of many species are being significantly impaired by the spill. The attention so far has been focused on interrupting and capturing the oil flow, but continued health and environmental threats from the Gulf oil spill could last for years, if not decades, after the flow is stopped. It appears at this time that officials lack knowledge on how long chemicals in the spilled oil and in dispersants will remain toxic.

This tragedy, like the Silent Spring or a burning Cuyahoga River, should serve as a turning point for the United States. It is time to work together to develop clean energy alternatives on a scale that can power the country. It is time for each of us to make an immediate effort to reduce our carbon footprint. In this issue you will find enlightening articles addressing these subjects. Julia Green Sewruk's article on *Wind Energy Development: Municipal Perspective*, Jennie Shufelt, Jessica Reinhardt, and Julie Sanchirico's article on *Moving New York Towards a Clean Energy Future: The Critical Role of Solar*, and Walter Mugdan and Cullen Howe's article on *Reducing Your Carbon Footprint: How to Reduce Your Own Greenhouse Gas Emissions Without Really Trying* are all timely.

It will take each one of us to make this push for clean energy a success. Whether we act as individuals, or as attorneys on behalf of clients in the industry, or municipal clients, we have the tools to get this movement off the ground. Good luck to us all.

Miriam E. Villani

From the Issue Editors

Keith H. Hirokawa

Justin M. Birzon

Collaboration is often considered a fundamental component of a good problem-solving strategy. As a lawyering tool, collaboration exposes us to insights that alone we might miss, mistake, or misunderstand. In environmental law, perhaps more than other areas, lawyers often find themselves engaged in the collaborative process from the beginning to the resolution of a dispute due to the intensely interdisciplinary nature of our work. Unlike other practice areas, environmental issues span legal jurisdictions and stakeholder groups affecting all levels of government, industry, trade associations, and public citizens. As esteemed Section member Yvonne Hennessey notes, "[i]n my legal career, collaboration has never been as crucial as it is in environmental law."

Most agree that the collaborative model will (and must) pervade the future of environmental law. More than protection, preservation, or conservation, environmental law compels us to manage our relationship with the physical, non-human world. In preparing for climate change, the collaboration approach ensures that we face the oncoming circumstance of resource scarcity through convergence and care for one another, and not through division and competition.

The paradigmatic example of this approach is found in New York's Intermunicipal Agreement (IMA) authorization. Recognizing the cross-jurisdictional nature of environmental issues, municipalities are empowered under the Town, Village, and General City Law to enter into IMAs to accomplish their environmental and land-use objectives. IMAs allow neighboring municipalities to pool agency resources and enter into joint enforcement and monitoring programs. Municipalities may enter into IMAs to regulate cross-boundary challenges involving wetlands, floodplains, aquifers, erosion, and corridor development plans. By increasing the resources available for economic development, housing demand, and resource protection, municipalities benefit from their combined strengths while receiving assistance to compensate for their weaknesses.

This issue of *The New York Environmental Lawyer* illustrates how high our expectations rise when the products of our lawyerly endeavors illustrate the benefits of cooperation and the collaborative process. This issue results from the cooperative planning and editing efforts of a wide variety of participants, including the authors, the Chair, Editor-in-Chief, and Issue Co-Editors. The substantive articles envision the importance of collaboration both in message and in form. Perhaps best of all, in the newly formed Student Editorial Board, our future environmental law stars from Albany Law School and St. John's Law School cooperate with one another and with the Section to produce high quality, thoughtful work.

Justin M. Birzon

Keith H. Hirokawa

From the Student Editorial Board

In a time of legal reticence in many fields, environmental lawyers move boldly forward providing opportunities for the public, practicing attorneys, and law students. In fact, it is a very exciting time to be a law student pursuing a career in environmental law. The field is waxing as others are waning and public discourse turns to it frequently, as the issues are recognized as permeating nearly every area of law. The scope is awesome, in the truest sense of the word.

The issues appear so vast—global to the extent of affecting paralysis on even enlightened political systems—that a student cannot help but find a niche. The United States is facing such a wide variety of challenges, ranging from traditional pollution enforcement to land use, energy, environmental justice, and even a resurgence of tort, affording a panacea of "something for everyone" in potential practice. New York is at the forefront of the nation: adopting nation-leading collaborative initiatives such as the Regional Greenhouse Gas Initiative, forming agencies and authorities to deal with environmental issues, and broadly keeping the populace involved in the conversation through entities such as the Climate Action Council. From the Adirondack Park, the largest state-protected park in the nation, New York City, the largest city in the nation, and all the places in between, this is a State with tremendous potential for law students and practitioners alike.

As law students, we are fortunate to be entering the field in a time of such change and positive momentum. The volatility in the field attracts highly capable individuals to the forefront as leaders and role models. The New York State Bar Association has an abundance of such examples, which is precisely why law students must use their time in law school to meet mentors and even possible employers. NYSBA does well by incorporating motivated law students into the field and allowing us to contribute in a meaningful manner. It is an excellent segue into the professional world from which all students will immensely benefit.

Miriam Villani, the intrepid editor-in-chief of *The New York Environmental Lawyer*, has afforded us exactly the tangible route that we as students crave as we browse the ethereal concepts of law. The Student Editorial Board works inter-school and tracks new law, staying on the cutting edge of important environmental issues, and is afforded input to the editing process. In this first issue as a Student Board, engaging the bar and environmental law has been incredibly rewarding for all of us.

This year, Nadya Kramerova, from St. John's Law School, and I, from Albany Law School, are the only third year students to graduate from the newly fashioned Student Board. We leave behind an exceptional group of law students whose qualities and abilities ensure the success of this collaborative effort by law students and the bar. Thank you all for supporting the New York State Bar Association and the Environmental Section, and thank you for providing this meaningful conduit into the legal community. I know we all look forward to joining the ranks of the capable environmental lawyers here in New York and continuing an era of excellence and progress in the field.

Andrew B. Wilson on behalf
of the Student Editorial Board

Request for Articles

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

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Articles should be submitted in electronic document format (pdfs are not acceptable), along with biographical information.

www.nysba.org/EnvironmentalLawyer

EPA Update

By Marla E. Wieder and Chris Saporita[1]

A. Introduction

1. Administrator Jackson Expands EPA's Top Priorities

As we reported in the last EPA Update column, EPA Administrator Lisa P. Jackson began her tenure with, and took immediate action to implement, a list of five priorities to guide the Agency's work. On January 12, 2010, Administrator Jackson announced an expansion of that list. The Agency's expanded priorities are: (1) taking action on climate change; (2) improving air quality; (3) assuring the safety of chemicals; (4) cleaning up our communities; (5) protecting America's waters; (6) expanding the conversation on environmentalism and working for environmental justice; and (7) building strong state and tribal partnerships.[2] This column will highlight just some of EPA's many efforts over the last several months, both nationally and regionally, to implement this ambitious agenda.

2. Region 2 Gets a New Regional Administrator

In late 2009 a new cast of appointees joined EPA's ranks. In November 2009, President Obama announced his selections for Regional Administrators (RAs) in EPA Regions 1, 2, 3, 6 and 9; in January 2010, the RAs for Regions 7 and 10 were selected. EPA's RAs are responsible for carrying out EPA's mission in their respective states and jurisdictions. They work closely with state and local officials, and are often the front line for communities facing environmental and health concerns. Region 2 welcomed Judith A. Enck as its new RA in late November, 2009. Administrator Enck has been a passionate and tireless advocate for the environment for nearly 30 years. Most recently she served as the Deputy Secretary for the Environment in New York State since 2007. She has worked as a policy advisor to the Attorney General of New York, Executive Director of Environmental Advocates of New York, and as a Senior Environmental Associate with the New York Public Interest Research Group.[3]

3. Local Environmental Justice Advocate Goes to Washington

In November, EPA welcomed another familiar face from New York to its ranks as Lisa H. Garcia joined Administrator Jackson in Washington as her Senior Advisor for Environmental Justice. As part of the Administration's commitment to environmental justice, Ms. Garcia will be directly responsible for ensuring that issues confronting vulnerable communities are a priority throughout the agency. Ms. Garcia has a long and impressive history in promoting environmental justice. She most recently served as the Chief Advocate for Environmental Justice and Equity at the New York State Department of Environmental Conservation. In that position she developed statewide environmental justice initiatives to tackle critical environmental challenges, and served as co-chair of the Governor's Environmental Justice Interagency Task Force.[4]

B. Science and Regulation

1. EPA Begins Historic Efforts to Reduce Greenhouse Gases (GHG)

During the latter part of 2009, EPA finalized several significant and long-overdue measures aimed at reducing greenhouse gases and encouraging other nations to follow its lead. It is no exaggeration to say that in the past year, this administration has done more to promote clean energy and prevent climate change than was even attempted in the last 8 years. Administrator Jackson recently noted that 2009 "saw historic progress in the fight against climate change" and urged EPA to "continue this critical effort and ensure compliance with the law."[5]

On December 7, 2009, Administrator Jackson made history by signing two distinct findings regarding greenhouse gases under section 202(a) of the Clean Air Act. With the Endangerment Finding, the Administrator found that the current and projected concentrations of the six key well-mixed greenhouse gases (carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6)) in the atmosphere threaten the public health and welfare of current and future generations, and with the Cause or Contribute Finding, she found that the combined emissions of these well-mixed greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the greenhouse gas pollution that threatens public health and welfare. While the findings themselves do not impose any requirements on industry or other entities, the action is a prerequisite to finalizing the EPA's proposed greenhouse gas emission standards for light-duty vehicles, proposed in September 2009.[6]

The greenhouse gas findings are long overdue. In April 2007, the U.S. Supreme Court handed down perhaps the most significant decision in environmental law jurisprudence. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Supreme Court found that greenhouse gases are air pollutants covered by the Clean Air Act. The Court held that the EPA Administrator must determine whether emissions of greenhouse gases from new motor vehicles cause or contribute to air pollution, which may reasonably be anticipated to endanger public health or welfare, or whether the science is too uncertain to make a reasoned decision.[7] EPA's prior Administrator did not act on the decision.

a. Building a Clean Energy Economy

In 2009, EPA finalized several groundbreaking measures aimed at reducing greenhouse gases. The Administration has been focused on revitalizing and modernizing the U.S. economy for a low-carbon, clean energy future. The American Recovery and Reinvestment Act of 2009, passed by Congress in 2009, contains more than $80 billion for renewable energy projects, such as the development of solar and wind generation, the construction of efficient smart-grid infrastructure to deliver clean energy, and the production and use of electric batteries for automobiles. Additionally, a new regulatory framework was established to foster alternative energy projects that tap into the vast energy potential of the Outer Continental Shelf. Closer to home, new energy efficiency standards have been fashioned for commercial and residential products like microwaves, dishwashers, light bulbs and other appliances that people use each day. EPA will continue to work closely with legislators to pass comprehensive clean energy reform. EPA is hopeful that such reforms will promote clean energy investments and lower U.S. greenhouse gas emissions by more than 80 percent below current levels by 2050.[8]

b. Regulating Mobile Sources

In addition to building a clean energy economy, EPA has taken significant steps to monitor and reduce greenhouse gas emissions from the most pervasive sources, including automobiles. In September 2009, EPA and the Department of Transportation's National Highway Safety Administration proposed an historic national program that would dramatically reduce GHG emissions and improve fuel economy for new cars and trucks sold in the U.S. The new proposed standards will require an average fuel economy of 35.5 mpg in 2016 for cars and light trucks. EPA anticipates that the new national standard will reduce oil consumption by an estimated 1.8 billion barrels, prevent GHG emissions of approximately 950 million metric tons—the equivalent of about 42 million cars—and at the same time, save consumers more than $3,000 in fuel costs.[9] For more on EPA's standards and regulations for controlling GHG emissions from mobile sources, see: http://www.epa.gov/otaq/climate/regulations.htm.

c. Regulating Stationary Sources

One week after unveiling the clean cars program, EPA announced that the U.S. will require its largest sources of greenhouse gases to report their greenhouse gas emissions. Starting in January 2010, EPA began tracking approximately 85 percent of total U.S. emissions. The Final Mandatory Reporting of Greenhouse Gases Rule requires reporting of GHG emissions from large sources and suppliers in the U.S. The reporting system is intended to provide a better understanding of where GHGs are coming from and inform future policy decisions. Under the rule, suppliers of fossil fuels or industrial GHGs, manufacturers of vehicles and engines, and facilities that emit 25,000 metric tons or more per year of GHG emissions, are required to submit annual reports to EPA.

For more information on the new reporting system and reporting requirements, see: http://www.epa.gov/climatechange/emissions/ghgrulemaking.html.

On the heels of finalizing EPA's greenhouse gas registry, Administrator Jackson signed a proposed rule to focus a requirement for best available greenhouse gas emissions controls on large facilities being constructed or modified. The rule will help control the GHG emissions from sectors that account for nearly 70 percent of the U.S.'s non-vehicle emissions. While cutting harmful emissions, this measure will also help us promote emerging innovations and accelerate the use of efficient, clean technologies.[10] For more information about the proposed new Clean Air Act permitting requirements, see: http://www.epa.gov/nsr/actions.html,[11] and for further information on all these new developments, see: http://www.epa.gov/climatechange/index.html.

2. EPA Proposes Stricter Limits on Ground-Level Ozone ("Smog")

On January 7, 2010, EPA started the New Year off right by proposing the strictest health standards to date for smog, also known as ground-level ozone. Ground-level ozone forms when emissions from industrial facilities, power plants, landfills and motor vehicles react in the sun. Smog is linked to a number of serious health problems, ranging from aggravation of asthma to increased risk of premature death in people with heart or lung disease.[12]

EPA is proposing to set the "primary" standard, which protects public health, at a level between 0.060 and 0.070 parts per million (ppm) measured over eight hours. Children are at the greatest risk from ozone, because their lungs are still developing, they are most likely to be active outdoors, and they are more likely than adults to have asthma. Adults with asthma or other lung diseases, and older adults are also sensitive to ozone. EPA is also proposing to set a separate "secondary" standard to protect the environment, especially plants and trees. This seasonal standard is designed to protect plants and trees from damage occurring from repeated ozone exposure, which can reduce tree growth, damage leaves, and increase susceptibility to disease.

Depending on the level of the final standard, EPA estimates that the proposal would yield health benefits between $13 billion and $100 billion. This proposal would help reduce premature deaths, aggravated asthma, bronchitis cases, hospital and emergency room visits, and days when people miss work or school because of ozone-related symptoms.[13]

EPA will take public comment for 60 days after the proposed rule is published in the Federal Register. For more on this proposed rule, see: http://www.epa.gov/groundlevelozone.

3. EPA Establishes Stricter NO2 Standards

On January 25, 2010, EPA announced a new national air quality standard for nitrogen dioxide (NO2). NO2 is formed from vehicle, power plant, and other industrial emissions, and contributes to the formation of fine particle pollution and smog. Exposure to NO2 is linked to respiratory illnesses that lead to emergency room visits and hospital admissions, particularly in at-risk populations such as children, the elderly, and people with asthma. The agency set the new one-hour standard for NO2 at a level of 100 parts per billion (ppb), and is retaining the existing annual average standard of 53 ppb. The new standard will prevent short-term exposures in high-risk NO2 zones, including urban communities and areas near roadways. For more information, visit: http://www.epa.gov/air/nitrogenoxides.

4. EPA Releases Results of National Lakes Assessment

On December 21, 2009, EPA released its first-ever baseline study of the ecological health and water quality of U.S. lakes. The draft study, which was a collaboration between EPA, states, and tribes, randomly sampled a total of 1,028 U.S. lakes, and rated 56 percent of the lakes as good, and the remainder as fair or poor. The leading problems were degraded lakeshore habitat (found in 36% of lakes) and high levels of nitrogen and phosphorus (found in 20% of lakes). For more information, visit: http://www.epa.gov/lakessurvey.

5. EPA Releases Results of National Fish Study

Another recent study by EPA, which examined fish from lakes and reservoirs in all 50 states, showed potentially harmful levels of chemicals such as mercury and polychlorinated biphenyls (PCBs). The data showed mercury concentrations in game fish exceeding EPA's recommended levels in 49% of lakes and reservoirs nationwide, and PCBs in game fish at levels of potential concern in 17% of the lakes and reservoirs studied. For more information, visit: http://www.epa.gove/waterscience/fishstudy.

6. EPA Promulgates New Stormwater Effluent Limits

On November 23, 2009, EPA issued a final rule to help reduce water pollution from construction sites. Construction activities like clearing, excavating and grading significantly disturb soil and sediment. If that soil is not managed properly it can easily be washed off of the construction site during storms and pollute nearby water bodies. Soil and sediment runoff is one of the leading causes of water quality problems nationwide, and has reduced the depth of small streams, lakes and reservoirs, leading to the need for dredging. The final rule, which took effect in February 2010, and will be phased in over four years, requires construction site owners and operators that disturb one or more acres to use best management practices to ensure that soil disturbed during construction activity does not pollute nearby water bodies. In addition, owners and operators of sites that impact 10 or more acres of land at one time will be required to monitor discharges and ensure they comply with specific limits on discharges to minimize the impact on nearby water bodies. This is the first time that EPA has imposed national monitoring requirements and enforceable numeric limitations on construction site stormwater discharges. For more information, visit: http://www.epa.gov/waterscience/guide/construction.

7. EPA Releases Most Up-to-Date Information Ever About Chemicals in Our Communities

Now it is even easier to learn how many pounds of toxic air pollutants were generated by your local power plant, or how many pounds of toxic chemicals were released by a facility near your home or your child's school. With just a few clicks of a mouse, you can tap into EPA's Toxics Release Inventory (TRI). The TRI is a comprehensive inventory of toxic release data, reported annually by certain industries, and maintained by EPA. In December 2009, EPA announced that, for the first time, it was making the data available in the same calendar year that the reporting facilities submitted the information to the Agency.[14] For more detailed TRI information, see: http://www.epa.gov/tri/index.htm, and to view an area fact sheet, see: http://www.epa.gov/triexplorer/statefactsheet.htm.

8. EPA Increases Transparency on Chemical Risk Information

As part of Administrator Jackson's commitment to strengthening and reforming chemical management, EPA recently announced a new policy to increase the public's access to information on chemicals. Going forward, EPA will reject a certain type of confidentiality claim, known as Confidential Business Information (CBI), on the identity of chemicals. The chemicals that will be affected by this action are those that are submitted to EPA with studies that show a substantial risk to people's health and the environment and have been previously disclosed on the Toxic Substances Control Act (TSCA) Chemical Inventory. This action represents another step toward using the agency's current TSCA authority to the fullest extent possible, while recognizing EPA's strong belief that the 1976 law is both outdated and in need of reform.

Under TSCA section 8(e), companies that manufacture, process, or distribute chemicals are required to immediately provide notice to EPA if they learn that a chemical presents a substantial risk of injury to health or the environment. The Section 8(e) reports are made available on EPA's Web site. However, until today, companies would routinely claim confidentiality for the actual identity of the chemical covered by the Section 8(e) submission, so the public posting of the information would not include the name of the chemical. The new policy ends this practice for chemicals on the public portion of the TSCA Inventory.

9. EPA and NYC Reach Agreement to Reduce Exposure to PCBs in Caulk

On January 19, 2010, EPA announced an agreement with the City of New York to address the risks posed by PCBs in caulk found in some city schools. PCBs are man-made chemicals that persist in the environment and were widely used in construction materials and electrical products prior to 1978. PCBs can affect the immune, reproductive, nervous, and endocrine systems and are potentially cancer-causing if they build up in the body over long periods of time. The greatest risks from PCBs involve sustained long-term exposure to high levels of PCBs. Although Congress banned the manufacture and most uses of PCBs in 1976, and they were phased out in 1978, there is evidence that many buildings across the country constructed or renovated from 1950 to 1978 may have PCBs at high levels in the caulk around windows and door frames, between masonry columns and in other masonry building materials. Exposure to these PCBs may occur as a result of their release from the caulk into the air, dust, surrounding surfaces, and soil, and through direct contact.

The agreement between EPA and the city settles potential violations of TSCA by the city for having caulk that contains PCBs above allowable levels in some schools, and is intended to result in a city-wide approach to assessing and reducing potential exposures to PCBs in caulk in schools. The agreement requires the city to conduct a study in five schools to determine the most effective strategies for assessing and reducing potential exposures to PCBs in caulk. The city will then produce a proposed plan for any cleanups needed in the five schools and use this information to develop a recommended city-wide approach. In addition, the agreement calls for the development of a citizens' participation plan to ensure that school administrators, parents, teachers, students, and members of the public are kept fully informed throughout the process.

For more information, visit: http://www.epa.gov/pcbsincaulk.

10. EPA Supports Innovative Environmental Justice Initiative in Camden, New Jersey

Highlighting the EPA's commitment to ensuring that everyone enjoys the same degree of protection from environmental and health hazards, the people of Camden, New Jersey will be receiving an important environmental information tool put together by the Heart of Camden, a local community-based organization, to help them better understand environmental conditions in their community. A recent environmental justice grant from EPA will enable Heart of Camden to collect and analyze environmental and health data and match it up with geographic information related to the neighborhoods of Waterfront South and South-Central Camden to create an online tool to help build the communities' awareness and knowledge of exposure to a variety of contaminated sites and pollution sources found in the area. The analysis will include emissions data, contaminated soil sites, and the status of pending air pollution mitigation and site remediation effort data, as well as a description of known and potential health effects related to the identified pollutants. In addition, the group will analyze the rates at which people in the Waterfront and South-Central Camden communities visit the hospital, particularly for respiratory and cardiovascular disease, compared to other urban and suburban communities in New Jersey.

Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income in the development, implementation and enforcement of environmental laws, regulations and policies. Just last year, EPA awarded approximately $800,000 in grants to organizations working with communities throughout the country facing environmental justice challenges. Forty grants, up to $20,000 each, went to community-based organizations and local and tribal governments in 28 states for community projects aimed at addressing environmental and public health issues. In the 15 years since initiating the environmental justice small grants program, EPA has awarded more than $20 million in funding to assist 1,130 community-based organizations and local and tribal governments.

For more information, see: http://www.epa.gov/Region2/ej.

C. Protection and Restoration

1. Air and Climate

a. New Mobile Source Model

An updated version of the Motor Vehicle Emission Simulator (MOVES) model—MOVES2010—is now available for use to estimate air pollution from cars, trucks, and other on-road mobile sources. The model can also calculate the emissions reduction benefits from a range of mobile source control strategies, such as inspection and maintenance programs and local fuel standards. EPA will soon publish a Federal Register notice approving MOVES2010 for meeting official state implementation plan and transportation conformity requirements. The MOVES2010 model replaces EPA's MOBILE6.2 emissions factor model. For the first time, the model can estimate emissions on a range of scales from national emissions impacts down to the impacts of individual transportation projects. Another improvement is the ability to express output as either total mass (in tons, pounds, kilograms, or grams) or as emissions factors (grams-per-mile, and in some cases, grams-per-vehicle). These changes to how EPA approaches mobile source emissions modeling are based, in part, upon recommendations made to the agency by the National Academy of Sciences.

For more information, visit: http://www.epa.gov/otaq/models/moves/index.htm.

b. Clean Diesel

On October 14, 2009, EPA released a report to Congress detailing the health, environmental, and economic benefits of the Agency's Diesel Emission Reduction Program. The program, funded at $50 million in FY2008, allowed EPA to fund the purchase or retrofitting of 14,000 diesel-powered vehicles and pieces of equipment, preventing respiratory illnesses and saving money in communities nationwide. The benefits of the program include: (1) reducing 46,000 tons of nitrogen oxide, a key contributor to elevated smog levels, and 2,200 tons of particulate matter over the lifetime of diesel vehicles, (2) conserving 3.2 million gallons of fuel annually under the SmartWay Clean Diesel Finance Program, which saves operators $8 million annually, and (3) generating public health benefits of between $500 million to $1.4 billion. In addition to its budget funding, EPA recently awarded $300 million in clean diesel funding through the American Recovery and Reinvestment Act, and competitions for FY2009 clean diesel funding grants totaling more than $60 million are now in progress.

For more information, visit: http://www.epa.gov/otaq/diesel/grantfund.htm.

2. Water

a. New Water Enforcement Priorities

On October 15, 2009, Administrator Jackson announced that the agency is stepping up its efforts on Clean Water Act enforcement. The Clean Water Action Enforcement Plan is a first step in revamping the compliance and enforcement program, which seeks to improve the protection of our nation's water quality, raise the bar in federal and state performance, and enhance public transparency. The goals of the plan are to target enforcement to the most significant pollution problems, improve transparency and accountability by providing the public with access to better data on the water quality in their communities, and strengthen enforcement performance at the state and federal levels. The plan outlines how the agency will strengthen the way it addresses water pollution caused by numerous, dispersed sources, such as concentrated animal feeding operations, sewer overflows, and contaminated water that flows from industrial facilities, construction sites, and urban streets, including: (1) developing more comprehensive approaches to ensure enforcement is targeted to the most serious violations and the most significant sources of pollution, (2) working with states to ensure greater consistency throughout the country with respect to compliance and water quality, (3) ensuring that states are issuing protective permits and taking enforcement to achieve compliance and remove economic incentives to violate the law, and (4) using 21st century information technology to collect, analyze, and use information in new, more efficient ways and to make that information readily accessible to the public.

For more information, visit: http://www.epa.gov/compliance/civil/cwa/cwaenfplan.html.

b. EPA Submits Comments on New York State Marcellus Shale Natural Gas Drilling Environmental Impact Statement

On December 30, 2009, EPA submitted comments to the New York State Department of Environmental Conservation (DEC) on its September 2009 draft Supplemental Generic Environmental Impact Statement (dSGEIS) on horizontal drilling and high-volume hydraulic fracturing in New York State. The draft environmental impact statement is required by the State Environmental Quality Review Act in order for the state to review and process permit applications for the horizontal drilling and hydraulic fracturing of natural gas-bearing shales, including the Marcellus Shale. EPA expressed concern with, and asked the DEC to more fully consider, the environmental impacts of the withdrawal of large volumes of surface or ground water, the potential impacts on surface and ground water quality, the capacity for treating the enormous quantities of toxic wastewater generated by the fracturing process, the impacts of mining sites and trucks on local and regional air quality, the management of naturally occurring radioactive materials disturbed during drilling, the cumulative environmental impacts, and the impact on New York City's drinking water supply. EPA's comments can be found at: http://www.epa.gov/region2/spmm/r2nepa.htm#r2letters.

c. EPA Issues Stormwater Guidance for Federal Facilities

On December 14, 2009, EPA issued guidance to help federal agencies minimize the impact of federal development projects on nearby water bodies. The guidance was issued in response to a change in law and an Executive Order signed by President Obama, which calls upon all federal agencies to lead by example to address a wide range of environmental issues, including stormwater runoff. Under the new requirements, federal agencies must minimize stormwater runoff from federal development projects to protect water resources. Federal agencies can comply using a variety of stormwater management practices, often referred to as "green infrastructure" or "low impact development" practices, including reducing impervious surfaces, using vegetative practices, using porous pavements and installing green roofs. For more information, visit: http://www.epa.gov/owow/nps/lid/section438/.

3. Superfund

a. Hudson River PCBs Dredging Update

The first phase of the long-awaited dredging of the Upper Hudson River, which was conducted by the General Electric Company (GE) and overseen by EPA, concluded in November 2009. At the end of Phase 1, nearly 300,000 cubic yards of PCB-contaminated sediment and

debris had been removed from the river. Although the volume of dredged sediment exceeded established goals for Phase 1, not all of the dredge areas originally targeted for Phase 1 were completed (10 out of 18 areas were completed) due to sediment contamination in some areas that was deeper than expected and the presence of woody debris and PCB oil in the sediment. Phase 2 will begin with the dredge areas that could not be completed during Phase 1. In the meantime, habitat reconstruction work will be conducted in the completed Phase 1 areas in spring 2010. For a quick summary of the first phase of the dredging, see EPA's Phase 1 Dredging Factsheet, November 2009, at http://www.epa.gov/hudson/EndofPhase1.pdf.

In March 2010, EPA released a detailed technical assessment of the Phase 1 dredging to a panel of independent scientific experts for review. The EPA report and a similar one prepared by GE were submitted to the panel in accordance with the agreement under which GE performed the first phase of the dredging, to ensure that the Hudson River dredging project is evaluated using the best scientific and technical information. The EPA report details the effectiveness of the first phase of dredging, as well as the challenges encountered during the project. The Report also lays out the Agency's modifications to the engineering performance standards for dredging resuspension, residuals, and productivity proposed for the second phase of the project, set to begin in 2011.[15]

During the independent peer review, EPA is also seeking public comments on the reports. These comments will be provided to the panel members for consideration during their evaluation. Comments on the evaluation reports can be made at: http://www.hudsondredgingdata.com/comments.

The peer review panel publicly discussed its views on the reports in May 2010. The panel members then submitted their individual views on the questions presented to them by EPA; these views were compiled into a report.

EPA is now considering the panel's recommendations and will determine whether changes to the performance standards should be made. EPA will inform GE about any modifications required during the second phase of the dredging project, and GE will then have the option to agree to conduct Phase 2. If the company agrees to perform Phase 2, the work will be carried out under the terms of the consent decree. If GE does not agree to conduct the Phase 2 dredging, EPA has reserved all of its enforcement authorities, including its right to direct the company to perform the dredging and/or sue in district court to require GE to perform Phase 2, or to reimburse EPA for its costs if the Agency conducts Phase 2 using government funds.

EPA's report is available at: http://www.hudsondredgingdata.com/report; GE's report can be found at: http://www.hudsondredging.com. Additional information on the Hudson River PCBs Superfund Site can be found at: http://www.epa.gov/hudson.

b. National Priorities List (NPL) Sites

In November, 2009, EPA added the Raritan Bay Slag Site to the NPL. The Site is located in Sayreville and Old Bridge Township, New Jersey.[16] The Raritan Bay Slag Site consists of areas with lead-contaminated material, including slag and pieces of battery casings. At this point, identified areas include two areas that contain contaminated slag material used to construct a seawall and a jetty along the southern shore of the Raritan Bay in Old Bridge Township and Sayreville, as well as areas of Margaret's Creek in Old Bridge. The first location is on the Laurence Harbor seawall, adjacent to the Old Bridge Waterfront Park in the Laurence Harbor section of Old Bridge Township. The second section consists of the western jetty in Sayreville and extends from the Cheesequake Creek Inlet into Raritan Bay. The third area, which is approximately 50 acres, is associated with Margaret's Creek where elevated lead levels have been identified. For more information, visit: http://www.epa.gov/superfund/sites/npl/nar1793.htm.

Newtown Creek, a 3.8 mile long water body off the East River in the City of New York, and bordering Brooklyn and Queens, was proposed for NPL listing on September 23, 2009. The public comment period expired on December 23, 2009. EPA is currently reviewing the public comments, and expects to make a listing decision later in 2010. By the 1850s, the area surrounding and adjacent to Newtown Creek had become a major industrial center in New York City and by the end of the 19th century, Newtown Creek was lined with oil refineries and petrochemical plants, fertilizer and glue factories, copper-smelting and fat-rendering plants, shipbuilders, sugar refineries, hide tanning plants, canneries, sawmills, paint works, and lumber and coal yards. Thereafter the shoreline adjacent to Newtown Creek remained heavily industrialized. As a result of its industrial past, including countless spills and discharges, Newtown Creek became severely contaminated. For updates on Newtown Creek, visit: http://www.epa.gov/Region2/superfund/npl/newtowncreek.

The Gowanus Canal, located in Brooklyn, was proposed for listing in April 2009. The canal has been severely impacted by contamination in the sediment as a result of its long industrial history. EPA solicited and received public input on its listing proposal and is currently preparing responses to those comments. In December 2009, EPA also began fieldwork for the Remedial Investigation/Feasibility Study which will assist the Agency with better characterizing the extent of the contamination and its associated risks. EPA is continuing its responsible party search and has issued notices of potential liability to parties such as the City of New York and the U.S. Navy.

In January 2010, EPA completed a study of variations in depth for the entire length of the canal. During that same period, EPA began sampling to characterize the con-

tamination in the deep sediment of the canal. This sampling continues, and the Agency will soon begin sampling the surface of the sediment, the water in the canal and the air along the banks to provide information needed to complete an ecological and human health risk assessment. EPA has also identified locations where wells can be installed to monitor water under the ground near the canal. These wells will be used to locate the sources and any influence of contaminated groundwater on the Gowanus Canal. EPA plans to install the wells in early summer 2010.[17]

In early March 2010, EPA announced that it has officially placed the Gowanus Canal on the NPL. The Agency will continue to work closely with all interested parties as it advances its work to turn the notoriously contaminated canal into a useable resource for all.[18] For the latest news and information on the Gowanus Canal, visit: http://www.epa.gov/region2/superfund/npl/gowanus.

In addition to the Gowanus Canal, in March 2010, EPA added nine other sites in various states to the NPL and proposed eight more for inclusion on the list.[19] Two of the eight proposed sites, Black River PCBs (in Jefferson County, NY) and Dewey Loeffel Landfill (in Village of Nassau, Rensselaer County, NY) are located in New York State.

c. The Current Financial Crisis and Bankruptcy

As the Administration continues to manage the $7.22 billion in projects and programs funded under the American Recovery and Reinvestment Act of 2009 around the country[20] while looking for innovative ways to stimulate the economy and create green jobs, EPA and the state agencies are finding themselves coping more and more with issues at the precarious intersection between bankruptcy and environmental law.

In 2009, there was a nearly 40% rise in business bankruptcies from 2008 filings.[21] Many recent bankruptcies, such as ASARCO,[22] W.R. Grace,[23] Tronox,[24] Chrysler,[25] and General Motors,[26] have involved major U.S. companies which owned and/or operated a significant number of contaminated facilities. Addressing the environmental liabilities of those companies has been a complex, resource-intensive undertaking. Despite the many hurdles to recovery, EPA continues to vigorously pursue all potentially responsible parties, including bankrupt parties, for the cleanup of Superfund sites. In recent years EPA, represented by the Department of Justice, has had considerable success in ensuring that environmental claims get the priority they deserve.

i. The W.R. Grace and ASARCO Settlements

In fiscal year 2008, in connection with the W.R. Grace bankruptcy settlement, W. R. Grace paid $250 million to clean up asbestos contamination at the Libby Montana Superfund Site.[27] The Libby settlement set a record for the amount of money paid in bankruptcy to clean up a Superfund site. In addition, W. R. Grace agreed to an allowed claim in bankruptcy of $34 million for the cleanup of 32 Superfund sites in eighteen states.[28]

In December 2009, the U.S. announced that in connection with the largest environmental bankruptcy in U.S. history, $1.79 billion will be paid to fund environmental cleanup and restoration under the bankruptcy reorganization of American Smelting and Refining Company LLC (ASARCO).[29] ASARCO has operated for nearly 110 years—first as a holding company for diverse smelting, refining, and mining operations throughout the U.S. and more recently as the Arizona-based integrated copper-mining, smelting, and refining company. Unfortunately ASARCO was also responsible for a considerable number of contaminated sites around the country. The money from environmental settlements in the bankruptcy will be used to pay for past and future costs incurred by federal and state agencies at more than 80 sites contaminated by mining operations in 19 states.[30]

ASARCO filed for protection under Chapter 11 of the U.S. Bankruptcy Code on Aug. 9, 2005. By the time it filed for bankruptcy, ASARCO's core operating assets were limited to certain operations in the states of Arizona and Texas. However, it continued to own numerous non-operating properties that were highly contaminated and was subject to environmental claims at other non-owned sites. After lengthy litigation, a plan proposed by ASARCO's parent company, a subsidiary of Grupo Mexico, was approved. Grupo Mexico met its funding obligations and the plan was consummated on December 9, 2009.[31]

Under the terms of the plan, all allowed claims were paid in full along with interest. Funds were distributed as follows:

- The U.S. received approximately $776 million, which will be distributed in accordance with the underlying settlements to address 35 different sites;
- The Coeur d'Alene Work Trust was paid $436 million;[32]
- The three custodial trusts which address the owned but not operating properties of ASARCO and involve a total of 13 states and 24 sites were paid a cumulative total of approximately $261 million; and
- Payments totaling in excess of $321 million were paid to 14 different states to fund environmental settlement obligations at 36 individual sites.

The reorganized company remains liable for environmental liabilities at the properties that it will continue to own and operate. For more information on the ASARCO bankruptcy and settlement, see: <http://www.epa.gov/compliance/resources/cases/cleanup/cercla/asarco/index.html >.

ii. The Chrysler and General Motors Bankruptcies

The bankruptcies of both Chrysler and General Motors have also presented the U.S. with a unique set of

challenges. Aside from the billions of dollars infused into the companies in order keep them afloat leading into their respective reorganizations, the U.S. and the affected states have been heavily involved in sorting out the real estate, including the newly shuttered plants, industrial facilities and other properties yet to be addressed in the proceedings.

On April 30, 2009, Chrysler and 24 of its affiliates filed for bankruptcy protection under Chapter 11 of the U.S. Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York.[33] A few weeks later, on June 1, 2009, General Motors and certain subsidiaries also filed voluntary petitions for relief under Chapter 11 in the same court. Both companies utilized Section 363 of the U.S. Bankruptcy Code in hopes of effectuating a relatively quick wind down.[34] Through the use of Section 363, the companies have been able to sell off assets, rid themselves of certain liabilities, restructure debt and emerge as new companies.

Without getting into the procedural, legal and political complexities of either bankruptcy, Old Carco LLC (Old Carco) was created to deal with Chrysler's liabilities and Motors Liquidation Company (MLC) was formed to deal with GM's liabilities.[35] In late May 2009, the bankruptcy court approved the sale of substantially all of Chrysler's assets to the new Chrysler-Fiat Alliance. The New Chrysler completed its purchase of assets through the bankruptcy process on June 10, 2009.[36] As for GM, on July 5, 2009, an order was entered approving the sale of substantially all of the debtors' assets to a new and independent company (now known as General Motors Company). The sale closed on July 10, 2009.[37] Sorting out the properties that have been left with Old Carco and MLC through those sales is now where the rubber hits the road (so to speak).

Together, Old Carco and MLC are potentially liable parties for about 100 sites across the country, the vast majority of which are MLC-owned. Over the past few months, the federal government and many state and local governments have submitted claims for past response costs, for natural resource damages, for injunctive relief and/or have reserved their rights to bring future liability claims in the proceedings. EPA alone has incurred approximately $98 million in unreimbursed cleanup costs at sites where the companies are at least partially liable.[38] More troubling perhaps is that some estimates have put the combined liability of Old Carco and MLC for future cleanup costs at nearly $2 billion.[39] Additionally, it is worth noting that the nature and extent of contamination at a number of the identified sites is just starting to be quantified.

While much effort has gone into selling or otherwise providing for Old Carco's few sites and funds are being set aside to address the contamination at the MLC-owned sites, it remains to be seen whether there will be adequate funding to facilitate the complete cleanup of MLC's portfolio of sites. Additionally, as MLC is beginning to withdraw from active remediation efforts at various non-owned sites (generator sites), it remains to be seen whether the remaining responsible parties will be able to complete the remedial work. If the funding for any of these cleanups is not adequate, clearly this will create an undue strain on various state environmental programs and, most likely, the federal Superfund program.

iii. Hercules Chemical Company, Inc. Diamond Alkali Site

On December 14, 2009, the federal Bankruptcy Court for the District of New Jersey approved a Settlement Agreement between the United States and Hercules Chemical Company, Inc. in the bankruptcy proceeding *In re Hercules Chemical Company, Inc.*, Case No. 08-27822 (MS), with respect to the Diamond Alkali Superfund Site. The Settlement establishes that the claim of the United States on behalf of EPA, DOI and NOAA will be allowed as an unsecured claim in the total amount of $200,000. Of the total claim, EPA will receive 84.7 percent of the amount recovered, and the Fish & Wildlife Service and NOAA will collectively receive 15.3 percent. Based on the currently available information, EPA understands that the claims of unsecured creditors, including EPA's claim, will be paid at approximately 40 percent of face value. For EPA, that would mean a recovery of approximately $67,760. The Settlement releases Hercules for claims arising with regard to the Site under Sections 106 and 107 of CERCLA.

d. Financial Assurance Requirements

In related news, EPA has taken a significant step in an effort to help reduce the need for federal taxpayers to fund the cleanup of environmental releases. As part of EPA's effort under Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to examine the need for financial assurance requirements, EPA has identified three industry sectors for which it will begin the regulatory development process for any necessary requirements: (1) the chemical manufacturing industry; (2) the petroleum and coal products manufacturing industry, which primarily includes refineries and not coal mines; and (3) the electric power generation, transmission, and distribution industry.[40] Last July, EPA issued a notice that identified the hard-rock mining industry as its priority for the initiation of the regulatory development process for financial responsibility requirements.

Financial assurance requirements help ensure that owners and operators of facilities are able to pay for cleanup of environmental releases and help reduce the number of sites that need to be cleaned up by federal taxpayers through the Superfund program.

In addition, EPA has identified the following classes of facilities that require further study in order for the agency to decide whether to develop proposed regulations: waste management and remediation services, wood product manufacturing, fabricated metal product manufacturing,

electronics and electrical equipment manufacturing, and facilities engaged in the recycling of materials containing CERCLA hazardous substances.

EPA will be accepting public comment on this notice for 30 days after it is published in the Federal Register. For more information on these developments, see: http://www.epa.gov/superfund/policy/financialresponsibility/index.html.

D. Compliance and Enforcement

The following is a small sample of the enforcement actions taken by EPA Region 2 over the past several months.

In late spring, 2009, EPA Region 2 inspectors conducted a Compliance Evaluation Inspection at a coke plant owned and operated by Tonawanda Coke Corporation in Tonawanda, New York. Coke is used as a fuel in industries such as steel and automobile manufacturing, and is produced through a destructive distillation process in which coal is heated in ovens in an oxygen-deficient environment. EPA's inspection revealed numerous violations of the Clean Air Act (CAA), the Clean Water Act (CWA) and the Resource Conservation and Recovery Act (RCRA). The company is alleged to have violated the CAA by failing to properly control extensive emissions of ammonia and benzene, failing to properly inspect and maintain emissions controls, and failing to document and report those and numerous other deficiencies. The company is alleged to have violated the CWA by allowing pipes to leak toxic process wastewater, allowing a weak liquor storage tank to become highly corroded, failing to maintain adequate secondary containment, causing illegal discharges of process wastewater and tar decanter sludge runoff into storm sewers, and improperly locating and operating flow monitoring and effluent sampling devices. The company is alleged to have violated RCRA by illegally disposing of hazardous waste in and around two abandoned tar decanter sludge tanks and placing tar decanter sludge onto coal piles. As a result, EPA has issued several Administrative Compliance Orders directing the company to immediately cease its illegal discharges, emissions and disposal, and bring its facility into full compliance with all applicable regulations. And, on December 23, 2009, a criminal complaint and arrest warrant were issued in the matter, charging Mark L. Kamholz, the facility's Manager for Environmental Control, with knowingly violating CERCLA, RCRA and the CAA. The charges against Kamholz carry a maximum penalty of 5 years imprisonment, a fine of $50,000 per day of violation, or both.

On September 16, 2009, EPA Region 2 issued a Consent Agreement and Final Order in settlement of a CAA enforcement action brought against Eastman Kodak Company. In the complaint, EPA alleged that Kodak had violated CAA Section 608 and the emissions standards for the servicing and disposal of air conditioning or refrigeration equipment containing ozone-depleting refrigerants, at its facility in Rochester, New York. Under the settlement, Kodak will pay a civil penalty of $63,792.

On September 23, 2009, the U.S. District Court for the District of Columbia upheld the Environmental Appeals Board's (EAB) Final Decision in an EPA RCRA enforcement action against Howmet. By way of background, Regions 2 and 6 issued administrative complaints alleging that Howmet failed to manage used potassium hydroxide (KOH) generated at its facilities as a hazardous waste. Litigation ensued regarding the definition of "spent material." The Administrative Law Judge and the EAB upheld EPA's interpretation of the definition of spent material and found that the Respondent had fair notice of this interpretation. Howmet appealed the EAB's decision in the D.C. District Court. The United States argued that the EAB's decision was entitled to deference and should be upheld. The court agreed, and affirmed the EAB's decision, finding that EPA's interpretation was not arbitrary, capricious, or an abuse of discretion. In addition, the court found that EPA provided fair notice of its interpretation, and imposed a $309,091 penalty.

On September 25, 2009, EPA Region 2 issued an administrative complaint against Welch Foods, Inc. alleging that Welch had violated CERCLA section 103 and Emergency Planning and Community Right to Know Act (EPCRA) section 304 by failing to notify the appropriate authorities of a release of a hazardous substance, and failing to provide a written follow-up report. Welch owns and operates a grape juice processing and manufacturing facility at 100 North Portage Street, Westfield, New York. It is further alleged that on November 10, 2008, there was a release of 2,405 pounds of ammonia (anhydrous) gas at the facility—more than twenty-four times the reportable quantity of 100 pounds. The complaint proposes a civil penalty of $120,000.

Also on September 25, 2009, EPA Region 2 issued an administrative complaint against Eastman Kodak Company, alleging that it violated the Facility Response Plan ("FRP") regulations implementing Clean Water Act Section 311(j), by failing to have drill/exercise logs and/or training session logs, failing to develop and implement a facility response training program and a drill/exercise program, and failing the one-hour containment boom deployment test during a government-initiated unannounced exercise. The complaint proposes a civil penalty of $157,100.

On September 30, 2009, Region 2 issued an administrative complaint to the City of New York, as the owner, and The New York City Economic Development Corporation, (EDC), as the operator, of the facility located at the Arthur Kill Railroad Lift Bridge between Elizabeth, New Jersey and Staten Island, New York alleging failure to register a PCB transformer located at the facility by December 28, 1998—after which, the continued use of such

transformer constituted an unauthorized use of a PCB Transformer—and alleging failure to properly dispose of PCB liquids. The complaint proposes a civil penalty of $105,742.

On September 30, 2009, the United States commenced a civil action against 110 Sand Company and Broad Hollow Estates Inc. for violations of the CAA in connection with the construction and operation of a landfill located at 136 Bethpage-Spagnoli Road in Melville, New York. 110 Sand Company is the owner and operator of the landfill, and Broad Hollow Estates is the owner of the property. The complaint alleges that sulfur dioxide (SO2) emissions from the landfill alone, without including any other external source, caused exceedances of the National Ambient Air Quality Standards and the Prevention of Significant Deterioration (PSD) increments for SO2. In addition, the complaint alleges that the defendants: (1) failed to comply with the PSD requirements for both SO2 and hydrogen sulfide (H2S), and (2) violated the CAA by operating the landfill without first obtaining appropriate permits and without installing and operating the Best Available Control Technology to control emissions of H2S and SO2.

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

On December 22, 2009, EPA Region 2 issued an administrative complaint to Tecumseh Redevelopment, Inc. pursuant to Section 3008 of RCRA. The complaint alleged that the Respondent failed to timely update its financial test and corporate guarantee to the New York State Department of Environmental Conservation for the fiscal year ending December 31, 2007, as required by New York's authorized RCRA program. The complaint proposed a civil penalty of $32,499.

On December 29, 2009, EPA Region 2 issued a Consent Agreement and Final Order for TSCA PCB violations at a facility owned and operated by Quebecor World Buffalo, Inc. (Quebecor) in Depew, New York. The violations occurred post-petition in the bankruptcy of Quebecor World (USA), Inc., and its affiliates, which filing on January 21, 2008 included Quebecor. EPA and Quebecor agreed to settle the matter before the filing of an administrative complaint, and Quebecor agreed to pay a civil penalty of $13,928 and perform a Supplemental Environmental Project at an estimated cost of $43,145.

E. Conclusion

With new leadership, new goals, and an ambitious agenda, EPA is taking a variety of bold and unprecedented steps to protect human health and the environment. For more information on what's new at EPA, Region 2, to report environmental violations, or to sign up to follow the Region on Twitter or Facebook, visit EPA's Web site at http://www.epa.gov/region2/.

Endnotes

1. Any opinions expressed herein are the authors' own, and do not necessarily reflect the views of the U.S. Environmental Protection Agency.
2. Memorandum from Lisa P. Jackson, Administrator to All EPA Employees (Jan. 12, 2010), *available at* http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/bb39e443097b5df5852576a9006a5a86!OpenDocument [hereinafter Jackson Memorandum].
3. *See* Biography of Judith A. Enck, http://www.epa.gov/Region2/enck_bio.htm (last visited Mar 22, 2010).
4. Memorandum from Administrator Lisa P. Jackson To All EPA Employees on Next Steps—Environmental Justice and Civil Rights (Nov. 12, 2009) , *available at* http://blog.epa.gov/administrator/2009/11/12/memo-to-employees-next-steps-environmental-justice-and-civil-rights/.
5. Jackson Memorandum, *supra* note 2.
6. *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases under the Clean Air Act, http://www.epa.gov/climatechange/endangerment.html.
7. *See id.*
8. Administrator Lisa P. Jackson, Remarks to the United Nations Climate Change Conference Copenhagen, Denmark, As Prepared (Dec. 9, 2009), *available at* http://yosemite.epa.gov/opa/admpress.nsf/8d49f7ad4bbcf4ef852573590040b7f6/2e2fc405206fb50d85257687005493c2!OpenDocument.
9. *Id.*
10. *Id.*
11. *See also* Fact Sheet—Proposed Rule: Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, http://www.epa.gov/nsr/fs20090930action.html.
12. U.S. Envtl Protection Agency, 2010 News Releases, EPA Strengthens Smog Standard/Proposed Standards, Strictest to Date, Will Protect the Health of All Americans, Especially Children (Jan. 7, 2010), http://yosemite.epa.gov/opa/admpress.nsf/e77fdd4f5afd88a3852576b3005a604f/d70b9c433c46faa3852576a40058b1d4!OpenDocument.
13. *Id.*
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15. U.S. Envtl Protection Agency, News Releases from Region 2, EPA Submits Final Report on First Phase of Hudson River Dredging For Independent Scientific Review; 45-Day Public Comment Period Begins Today (Mar. 8, 2010), http://yosemite.epa.gov/opa/admpress.nsf/d10ed0d99d826b068525735900400c2a/6c4ccd8ea504fb76852576e00073db45!OpenDocument.

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20. For EPA information related to the American Recovery and Reinvestment Act of 2009, *see* http://www.epa.gov/recovery/.

21. American Bankruptcy Institute website, News Release, Total Bankruptcy Filings Increase 32 Percent In 2009, Approach Pre-BAPCPA Levels (Mar. 2, 2010), http://www.abiworld.org/e-news/PRESSRELEASE4Q2010stats.pdf. The 89,402 business bankruptcies filed in 2009 represented a 38 percent increase over the 64,584 filed in 2008. Eric Morath, *Crisis Sends 2009 Business-Bankruptcy Filings Up 38%,* Wall St. J., Jan. 6, 2010, *available at* https://www.fis.dowjones.com/WebBlogs.aspx?aid=DJFDBR0020100106e6160005n&ProductIDFromApplication=&r=wsjblog&s=djfdbr.

22. ASARCO filed for protection under Chapter 11 of the United States Bankruptcy Code on August 9, 2005 (Case No. 05-21207, Southern District of Texas, Corpus Christi Division). For further information on the bankruptcy, *see* https://www.asarcoreorg.com/.

23. *See In re* W. R. Grace & Co., No. 01-01139, 403 B.R. 317 (Bankr. D.Del.2009).

24. *See In re* Tronox Incorporated, No. 09-10156, 2010 WL 502836 (Bankr. S.D.N.Y. 2010). On January 12, 2009, Tronox and certain of its subsidiaries filed voluntary petitions to restructure under Chapter 11 of the U.S. Bankruptcy code with the U.S. Bankruptcy Court for the Southern District of New York. For further information on its filings, *see* http://www.tronox.com/reorganization/index.htm.

25. *In re* Old Carco LLC, No. 09-50002, 2010 WL 22426 (Bankr. S.D.N.Y. 2010). For further information on the matter, *see* http://www.chryslerrestructuring.com/.

26. *In re* General Motors Corp., No. 09-50026, 409 B.R. 24 (Bankr. S.D.N.Y. 2009). For further information on the case, *see* https://www.motorsliquidation.com/.

27. For more information on the Libby Montana Superfund Site and the progress of the cleanup, *see* http://www.epa.gov/region8/superfund/libby/index.html.

28. U.S. Envtl Protection Agency, Office of Enforcement and Compliance Assurance, FY 2008 OECA Accomplishments Report:Protecting Public Health and the Environment (2009), *available at* http://www.epa.gov/compliance/resources/reports/accomplishments/oeca/fy08accomplishment.pdf#page=36 .

29. U.S. Envtl Protection Agency, 2009 News Release, Largest Environmental Bankruptcy in U.S. History Will Result in Payment of $1.79 Billion towards Environmental Cleanup & Restoration/Largest Recovery of Money for Hazardous Waste Clean Up Ever (Dec. 10, 2009), http://yosemite.epa.gov/opa/admpress.nsf/d985312f6895893b852574ac005f1e40/c40dd49b8eebe5ff85257688006c9c7f!OpenDocument.

30. Those states are Arizona, Alabama, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Kansas, Missouri, Montana, Nebraska, New Jersey, New Mexico, Ohio, Oklahoma, Texas, Utah, and Washington. *Id.*

31. *Id.*

32. The Bunker Hill Mining and Metallurgical Complex Superfund Site is located in Northern Idaho's Coeur d'Alene River Basin. The Coeur d'Alene Basin is one of the largest areas of historic mining in the world. Since the late 1880s, mining activities in the Upper Coeur d'Alene Basin contributed an estimated 100 million tons of mine waste to the river system. Many of the Basin communities were built on mine wastes. Until as late as 1968, tailings were deposited directly into the river. Over time, these wastes have been distributed throughout more than 160 miles of the Coeur d'Alene and Spokane Rivers, lakes, and floodplains. For further information, *see* htttp://yosemite.epa.gov/R10/CLEANUP.NSF/bh/Cleanup+Work.

33. *In re* Chrysler LLC, 405 B.R. 84, 113 (Bankr. S.D.N.Y. 2009); for further information, *see* http://www.chryslerrestructuring.com/.

34. Section 363 refers to the section of the U.S. Bankruptcy Code that allows a company to enter a court-supervised process to sell assets quickly as the best means to protect value for the benefit of all stakeholders. Unlike a typical bankruptcy proceeding, which can often take a few years to resolve, the advantage of a 363 bankruptcy is speed. Through the 363 process, a company is often able to emerge from bankruptcy in approximately 30 to 60 days. *See* Chapter 11: Fact Sheet, http://www.chryslerrestructuring.com/.

35. On June 5, 2009, an order was entered in the bankruptcy court approving the sale of substantially all of GM's assets to MLC; the sale closed on July 10, 2009. As per the Master Sale and Purchase Agreement, the sale included 115 properties (99 non-manufacturing properties and 16 manufacturing properties).

36. *Ramifications of Auto Industry Bankruptcies, Part II* Before the House Judiciary Commercial and Administrative Law Subcommittee, 11th Cong. (2009) (statement of Ron Bloom, Senior Advisor, U.S. Department of Treasury), *available at* http://www.treas.gov/press/releases/tg222.htm. *See also*, Jim Rutenberg & Bill Vlasic, *Chrysler Files to Seek Bankruptcy Protection*, NY Times, Apr. 30, 2009, *available at* http://www.nytimes.com/2009/05/01/business/01auto.html.

37. *See* Motors Liquidation Company, http://www.motorsliquidationdocket.com/.

38. *Id.*

39. Auto Site Cleanup Liability May Boost Push For Reinstating Superfund Tax, Inside EPA (Inside Washington Publishers), December 4, 2009. For additional news on all the big automakers, *see* the Detroit Free Press, Autos Section, http://www.freep.com/section/business01.

40. U.S. Envtl Protection Agency, 2009 Press Releases, EPA Identifies Three Industries for Financial Obligations in Cleanup of Environmental Releases; Action Is a First Step to Ensure Owners of These Facilities, Not Taxpayers, Foot Bill For the Cleanup of Environmental Releases (Dec. 30, 2009), http://yosemite.epa.gov/opa/admpress.nsf/d985312f6895893b852574ac005f1e40/a8c0942a295468338525769c00689c70!OpenDocument.

Marla E. Wieder is an Assistant Regional Counsel with the New York/Caribbean Superfund Program, and Chris Saporita is Assistant Regional Counsel with the Water and General Law Branch of the United States Environmental Protection Agency, Region 2, in New York City.

DEC Update

By John Louis Parker

DEC Today: Fiscal Challenge/Fiscal Reality FY 10/11

Readers of recent columns may see this item as a recurring theme. The Department of Environmental Conservation continues to deal with the challenges of the extreme fiscal situation confronting New York State caused by the current financial and economic problems facing the country. The fiscal crisis continues to impact the agency and the proposed budget for FY 2010/11 reflects this reality. Commissioner Pete Grannis presented the Executive Budget Recommendations from the agency to the Legislature on January 26, 2010. The proposed Executive Budget and related Article VII legislative proposals affect many aspects of the Department, including staffing levels, the elimination of boards and commissions, new environmental efficiency and modernization initiatives and the Environmental Protection Fund. Please visit the DEC's Web site at www.dec.ny.gov/about/50620.html to view the Executive Budget Recommendations.

Despite the far-reaching impacts of the proposed Budget, the Commissioner assured the Legislature that Department staff remains committed to delivering a high level of service, despite these fiscal constraints. The proposed Budget contemplates the loss of 54 staff members through attrition, bringing the total staff to approximately 3,300. The proposed Budget supports the hiring of 29 staff across multiple divisions of the agency for regulatory oversight and enforcement related to Marcellus Shale, yet would result in the lowest DEC staff levels since the early 1980s. Nonetheless, DEC continues to advance important and significant initiatives and projects in every DEC region of the State of New York. Here is a brief update of some of the highlights of DEC staff work on these initiatives.

A Year of Historic Milestones

The year 2010 is one involving many significant anniversaries for the environment and environmental law. The first Earth Day celebration was held in 1970 to address the many environmental problems that plagued our landscape and our country. On that day, 40 years ago, Pete Grannis joined thousands of marchers in New York City and millions more in small towns and cities across the United States. On its 40th anniversary this year, that initiative has spread throughout the world and bears witness to the seminal environmental laws and environmental agencies that involve the practice of the members of our Section. The grassroots nature of this event is evident in the pre-eminent issue of our day—climate change—and the grassroots and community-based efforts that have continued despite the lack of a decisive international accord. In New York, such activities are recognized in the Department's Climate Smart Communities Pledge. Please visit the DEC's Web site at www.dec.ny.gov/energy/50845.html to view the Climate Smart Communities information.

This year also marks the 40th anniversary of the Department of Environmental Conservation. Starting with Commissioner Henry Diamond through to Commissioner Pete Grannis today, the agency has had thirteen chief executives over four decades. The past decades of the agency have been marked by expanding authority and responsibility. The result of the Department's efforts can be seen in their impact on the decision making of companies and government throughout the State. The agency also serves as the steward for millions of acres of State lands in the Adirondacks and Catskills and beyond. The origins of the modern DEC date back to 1868, when there were three employees at the Fisheries Commission. Later, in 1911, that Commission would grow into the Conservation Department. Today, there are over 3,300 men and women who carry out the mission of the Department. Looking back through the annals of this history, it is plain to see the many similarities in the mission and purpose of the agency, if not in its breadth and scope. As the Department enters its fifth decade, it will no doubt continue to evolve and change to meet tomorrow's challenges.

This year also marks the 30th anniversary of the New York State Bar Association Environmental Law Section, established in 1980. This summer, to commemorate this anniversary and the anniversary of the DEC, the Section will be sponsoring programs in each of the nine DEC Regions. Incoming Chair Barry Kogut will serve as the Section coordinator for these events. The Section has benefited from the service of many distinguished leaders, starting with Arthur Savage who convened the initial meeting of the Executive Committee in 1981. There have been many overviews of the history of the Section, with recent publications provided by former Chair Louis Alexander in the Summer 2008 edition of *The New York Environmental Lawyer* (Vol. 28 at 19-20), and by former Chair Gail Port in the Spring/Summer 2000 edition of *The New York Environmental Lawyer* (Vol. 20 at 1-2). The accomplishments, dedication and hard work of the members of the Section speak for themselves.

Draft Hudson River Estuary Action Plan Released

The draft Hudson River Estuary Action Agenda 2010-2014 was released for public comment on January 25, 2010. The Action Agenda is the program's "blueprint" for the next five years. The Hudson River is an important resource for millions of New Yorkers and provides unique habitat for aquatic and terrestrial species that are threat-

ened or endangered, or are of significant recreational and commercial value. The Draft Action Agenda was updated in response to comments from community groups, local officials, businesses, and citizens received at the Hudson River Summit held at West Point in June 2009. They focused on the future of the River and partnerships that can be expanded to achieve common goals. New areas added to the Draft Action Agenda include promoting adoption of the Climate Smart Communities Pledge for Hudson Valley communities including addressing sea level rise for waterfront towns, a pilot project to improve coordination of management of existing state-owned property along the Hudson River, and incorporating urban-greening, green infrastructure, and smart-growth principles in local waterfront revitalization programs.

The Hudson River Estuary Program protects and improves the Hudson River watershed. The program was created in 1987, and extends from the Troy Dam to the Verrazano Narrows. The expansive mission of the Program includes ensuring clean water, protecting and restoring fish and wildlife habitats and biodiversity, providing recreation in and on the water, adapting to climate change, and conserving the scenic landscape. Please visit the DEC's Web site at www.dec.ny.gov/lands/5104.html to view the Draft Action Agenda.

Revised Environmental Benefit Policy Adopted

On January 29, 2010, the Department's revised Environmental Benefit Policy (CP-37) became effective. The revised policy provides guidance to Department staff on the use of Environmental Benefit Projects (EBPs) in the settlement of administrative enforcement actions. EBPs, which affect the penalty component of an environmental enforcement settlement, allow payment of monies to benefit the communities impacted by the underlying violation of environmental law. Department staff may consider an EBP in evaluating whether to suspend payment of a portion of the assessed penalty, and instead have that corresponding payment directly fund the EBP. The policy requires that a reduction of the assessed penalty not detract significantly from the general deterrent effect of the settlement. CP-37 is implemented in conjunction with the Department's Civil Penalty and Order on Consent Enforcement Policies.

The changes implemented in the revised CP-37 noted in the Environmental Notice Bulletin indicate that the revised policy:

> (1) recognizes NYS DEC discretion to have a respondent make a payment to a designated entity or fund for implementation of an approved project; (2) states a preference, instead of a mandate, for a project to have a geographic nexus to the violation(s); (3) states a preference for projects that have a pollution prevention component; (4) eliminates or eases certain limitations on EBPs (i.e., elimination of the requirement for a payable penalty of at least 20% of the calculated penalty in favor of a more flexible standard of a "material payable penalty," and elimination of the prohibition of claiming a tax benefit from an EBP); (5) allows consideration of projects that achieve significantly early compliance or significantly exceed minimum compliance; (6) states a preference for specified EBPs over unspecified EBPs; (7) where a respondent agrees to an unspecified EBP, requires an approvable specified EBP be proposed within a year; (8) broadens the financial assurance mechanisms available for use; and (9) allows for the reimbursement of extraordinary expenses incurred by the Department in overseeing implementation of an EBP.

Please visit the DEC's Web site at www.dec.ny.gov/regulations/57988.html to view the revised EBP policy.

Marcellus Shale Draft Supplemental Generic EIS

DEC has been involved in the SEQRA process to analyze potential natural gas drilling activities in the Marcellus Shale formation, including horizontal drilling and high-volume hydraulic fracturing techniques used to extract natural gas from these and other low permeability gas reservoirs across the Southern Tier and into the Catskills. On December 31, 2009, the submission period closed for written comments on the draft of the Supplemental Generic Environmental Impact Statement (Supplemental Generic EIS). The Supplemental Generic EIS expands on the 1992 Generic EIS, which addressed requirements for oil and gas drilling in New York State. Please visit the DEC's Web site at http://www.dec.ny.gov/energy/46288.html for additional information. Department staff are reviewing the over 13,000 comments received on the Supplemental Generic EIS.

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

The DEC Update was compiled by John Parker solely in his individual capacity. The 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.

Member Profiles

Long-Time Member: Constantine Sidamon-Eristoff

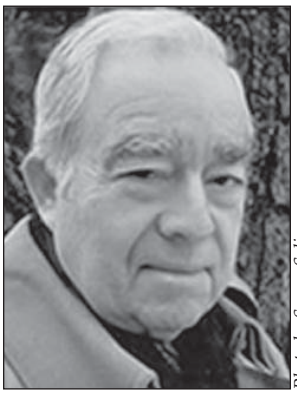

Photo by Susan Salinger

Constantine Sidamon-Eristoff

For this issue, we focus on the inspiring life and accomplishments of Constantine Sidamon-Eristoff, or as his friends call him, "Connie." Mr. Sidamon-Eristoff is a long-time member of NYSBA's Environmental Law Section, and serves on its Executive Committee and as Co-Chair of its International Environmental Law Committee. Connie's career can be summed up in one word: "wow." Connie has had a profound and direct impact on so many New Yorkers, from protecting New York City's drinking water to promoting sustainable transportation practices. We all have reason to thank him.

Mr. Sidamon-Eristoff began his career in urban transportation at the New York City Department of Highways, and then went on to become Administrator of the New York City Transportation Administration under then-Mayor John V. Lindsay. He found his home of fifteen years, however, as a Board Member and Commissioner of the New York Metropolitan Transit Authority (MTA). Following his 1974 appointment by Governor Malcolm Wilson and his confirmation by the New York State Senate, Connie was reappointed by Governor Hugh Carey and again by Governor Mario Cuomo for a third term. During his tenure he chaired and served on many key MTA Board committees. In describing his move from the MTA to the United States Environmental Protection Agency (EPA), Connie noted, "It is natural to go from urban transportation to addressing air pollution and sprawl."

From 1989 to 1993, Connie served as Regional Administrator for Region II of the EPA. He always maintained his position of responsible stewardship and launched the reassessment of EPA's "no action" decision that avoided a reduction of polychlorinated biphenyls (PCBs) in the Hudson River. Further, his role in the decision concerning the filtration of NYC's drinking water illustrates his refusal to compromise on critical matters. He convinced the EPA Administrator to approve his decision to grant the very first waiver of the requirement that its water be filtered. As a result, the City saved an enormous amount of its investment, but was meanwhile required to acquire and protect sensitive lands for both their sensitive hydrological features and influence on the purity of its drinking water. The effect of this decision cannot be underestimated; thanks largely in part to Connie's efforts, New York City has access to clean water that does not require filtration to make it potable.

A monument to public service, stewardship, and sustainable practices, Connie's Hudson Valley roots primed his tendencies as both a dedicated conservationist and a humanitarian. Mr. Sidamon-Eristoff is an active member of the Board of Trustees of Phipps Houses, a New York City non-profit created to manage and build low- and middle-income housing. He also serves as Chairman Emeritus of the Board of Directors of the Tolstoy Foundation, Inc., an international refugee resettlement and welfare agency focusing on Russia and the Commonwealth of Independent States. In discussing his Georgian ancestry, Connie claims to have "grown up in two worlds." His father, a member of the Imperial Russian and then Georgian military, sought asylum in the United States after World War I. It was with this sense of history and compassion that Connie founded American Friends of Georgia, Inc. to provide humanitarian aid to the people of Georgia, which he chairs. You can learn about its work from its Web site afgeorgia.org. Whether near or far, the presence of Constantine Sidamon-Eristoff can be felt.

Given Connie's accomplishments, it should not be surprising that Connie's efforts are recognized beyond the legal community. Recently, Audubon New York honored him with the 2009 Thomas W. Keesee Jr. Conservation Award. A man of many hats, he is also a Member of the Orange County, New York Planning Board, and is on the Board of the Tristate Transportation Campaign. In addition, he is extremely active with the New York League of Conservation Voters Education Fund, Inc., where he sits as Secretary and Director.

Connie currently serves as Chairman of the New York Deep-Water Port Corporation and of NYPort Terminal Development Company, LLC, which proposes to design and construct a deepwater marine terminal in Brooklyn, which would greatly benefit the City and Port by providing access for the new generation of huge container ships now coming in service.

When asked what the future holds, Connie notes that it is "still full steam ahead." Connie remains of counsel in his practice with Lacher & Lovell-Taylor. He also continues as Managing Director of the East of Hudson Rail Freight Task Force. He believes "more rails, less trucks" would decrease the freight load on our highways, reduce air pollution markedly, and would relieve the congestion as well as the costs of doing business in our region. With so much experience in the field, it is hard to find an opinion from someone more knowledgeable. According to Carol Ash, New York State Parks Commissioner, Connie is "a living landmark" with rich policy experience and a broad vision of sustainability for New York.

The accomplishments of Constantine Sidamon-Eristoff are literally part of New York City's history, and it is regrettable that only a portion of them can be mentioned here. His efforts will continue to impact the lives of New Yorkers and the global community alike for years to come. Luckily for us, Connie shows no sign of slowing down anytime soon.

By Justin Birzon

New Member: Yvonne Hennessey

Yvonne Hennessey

The Environmental Law Section is proud to showcase Yvonne E. Hennessey as one of its brightest young members. Yvonne is an environmental attorney with The West Firm in Albany, NY, where she also sits as the Chair of the Firm's Litigation Practice. She has represented municipalities, corporations, and industrial organizations on a wide range of matters involving permitting, compliance, civil and administrative enforcement, government relations, and litigation. Although she has handled matters ranging from brownfield redevelopment to airborne particulate matter, she has developed a specialty in natural resources and energy law which allows her to focus on a wide spectrum of environmental issues.

Yvonne is making a name for herself in the battle over the natural gas present in the Marcellus Shale formation. Located around the Appalachian plateau in southern New York, Pennsylvania, Ohio and West Virginia, the shale play has the ability to significantly reshape New York's energy regime. By all means an expert on the matter, Yvonne has lectured to the Bar Association, a national conference of natural gas pipeline companies, and the Eastern New York Chapter of the Air & Waste Management Association about the issues facing the Marcellus Shale formation.

Although Yvonne has tried matters before New York and Massachusetts state courts, she is most at home in federal court. Her heart lies with the United States District Court for the Northern District of New York, where she clerked early in her career. In recognizing all of her hard work and dedication, the Northern District of New York Federal Court Bar Association (NDNY-FCBA) has elected Yvonne Vice President for the Capital District Region.

In addition to serving on the Environmental Law Section's Executive Committee, Yvonne co-chairs its Task Force on Legal Ethics and even co-hosted a webinar about the new rules for professional responsibility. Her accomplishments do not stop there; she has co-authored published works on environmental justice, commercial law, and adoption. Her interests truly are varied and diverse, as are the community activities with which she is involved. As a volunteer Judge, Yvonne has helped cultivate young legal minds in the Albany County High School Mock Trial Competition.

Yvonne is a shining example of the professionalism, dedication, and community involvement for which every attorney should strive. If these past few years have been any indication of what is to come, we can expect a long career of extraordinary accomplishments from Yvonne.

By Justin Birzon

Member News

Howard Tollin, Co-chair of the Section's Membership Committee, and Managing Director at Aon Risk Services, was elected to the Board of Directors of New Partners for Community Revitalization (NPCR), a non-profit organization which advances the renewal of contaminated neighborhoods. NPCR's co-founder, Mathy Stanislaus, resigned to accept President Obama's appointment as EPA's Assistant Administrator for Solid Waste and Emergency Response (OSWER). In addition, Howard was recently confirmed for a three-year term on the Advisory Board for Stony Brook University's Women in Science and Engineering (WISE) Program, on which he has served for 10 years. Howard was also honored as "2009 Power Broker" in the environmental field by *Risk & Insurance,* for his work with clients and outside lawyers on risk management insurance and surety solutions for corporate, real estate and construction matters. Congratulations, Howard!

Miriam E. Villani, Editor-in-Chief of *The New York Environmental Lawyer*, and partner at Sahn Ward & Baker, PLLC, and **Bruce Adler**, Senior EHS Counsel, General Electric Company, are pleased to announce their engagement. A June 2011 wedding is planned. Congratulations, Miriam and Bruce.

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

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

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Book Review

This Borrowed Earth

By Robert Emmet Hernan

Reviewed by Peter G. Ruppar

Let's have a show of hands. How many of you reading this review are familiar with the toxic dumping at Love Canal, NY, the explosion of the Union Carbide plant in Bhopal, India, or the near nuclear meltdown in Chernobyl, Ukraine? That's what I thought, almost everyone.

Let's have another show of hands. How many are familiar with the systematic pollution of Minamata Bay, Japan by wastewater discharges from a chemical plant; the dioxin-spewing chemical plant explosion in Seveso, Italy; or the heroic effort to save oil-soaked penguins after the sinking of a cargo vessel off the Dassen and Robben Islands of South Africa? It seems only the most environmentally astute.

Robert Emmet Hernan's new book, *This Borrowed Earth: Lessons from the 15 Worst Environmental Disasters Around the World,* Palgrave Macmillan, 229 pages, traces the environmental devastation and human suffering behind the Love Canal, Minamata, Seveso, and a dozen more of history's fifteen worst environmental disasters in a captivating series of vignettes, each about the length of a magazine article, that move along in a lively fashion through the root causes, human reactions and environmental consequences of each episode.

Many readers of *The New York Environmental Lawyer* already know Bob. For those who do not, let me introduce you. Until his recent retirement, Bob was a Senior Counsel in the New York State Department of Environmental Conservation. For many years prior to that, Bob served as a New York State Assistant Attorney General in the Environmental Protection Bureau of the Attorney General's Office, where he was one of the trial lawyers in the Love Canal case.

Because of his Love Canal experience, I was most interested in reading Bob's chapter on that historic environmental event. In it, he talks about the history of the canal, originally intended as a channel for water to supply the first hydroelectric plant, perched on the cliffs above the Lower Niagara River gorge. Never completed, the canal was used as a chemical dumping area by the Hooker Electrochemical Company, as it was then called, during and after World War II.

I was interested to learn that, after filling of the canal had been completed, one of the earliest indications of a problem came in 1969 when Little Leaguers practicing on the north end of the canal encountered "volcanoes," seeps of light grey fumes smelling of thionyl chloride, steaming up from the ground. I was also interested to learn that when the Little League team coach, a police officer named Peter Bulka, reported the incident to the local authorities, many of his neighbors were unhappy, concerned first with the effect of Bulka's discovery on their property values and second, on its reflection upon the local chemical industry, by whom many of them were employed.

The rest of Bob's Love Canal story is well documented but, nevertheless, a sobering reminder. Peter Bulka found that he had to replace the sump pump in his basement three times to keep a black oily substance from seeping inside; the *Niagara Gazette* picked up on the story resulting in a survey of area basements by the City of Niagara Falls; the formation of the Love Canal Homeowner's Association by housewife, Lois Gibbs; the intervention of the New York State Department of Health; the relocation of residents to local hotels and motels; the declaration by President Carter of the first environmental federal emergency in United States history; the delicate task of draining leachate from the canal and then capping it; the purchase and demolition of homes surrounding the canal; and the fifteen years of litigation that ensued thereafter.

One of the environmental stories about which I had never heard involved the 1976 explosion of a chemical plant outside of Sevaso, Italy. The plant produced hexachlorophene, which was widely used as a disinfectant in hospitals and consumer soap products. Originally heralded as another miracle gift from the chemical industry, hexachlorophene was later suspected of causing brain damage. It was implicated in the deaths of more than twenty French babies and ultimately was banned from use in the United States. A byproduct of the hexachlorophene manufacturing process was trichlorophenol (TCP) which, when subjected to extreme heat, released TCDD dioxin. When one of the reactors at the Sevaso plant overheated, the top blew off and a white cloud of boiling, dioxin-laden chemistry spewed into the air, then cooled and fell on the surrounding countryside. Local residents were accustomed to leaks at the plant and, although the noxious gas in the air caused their eyes to burn and their lungs to cough, in the days that followed the explosion, they generally went about their business.

For two weeks plant officials reassured the people, insisting there was no cause for alarm. It was only when confronted by a government health official who had independently determined that the explosive emissions likely contained dioxin that the company began to relent.

Evacuations were ordered in the immediate vicinity of the plant. The evacuated area was cordoned off in barbed wire. Rabbits, livestock, and pets left behind died within a short time. More than twenty cases of chloracne, mostly in children, were reported. Eventually, the plant was demolished. Not only were there boiling chemicals in the air, there was boiling blood in the veins of area residents. They laid blame for the explosion on public officials as well as on the operators of the plant. In the aftermath, a public official was shot and wounded by people seeking the release of government records related to the company, a company executive's house was bombed, and another company executive was murdered.

Other environmental episodes which Bob chronicles include coal tar emissions from residential chimneys in London, England; a release of radioactivity from a fire at a plutonium plant in Windscale, England; the near nuclear meltdown at Three Mile Island, Pennsylvania; the decimation of Times Beach, Missouri from a contaminated dust suppressant; the pollution of the Rhine River with mercury following a warehouse fire in Basel, Switzerland; the Exxon-Valdez oil spill in Prince William Sound, Alaska; the deliberately set fires in the Kuwait oil fields by the retreating Iraqi Army at the end of the first Gulf war; the destruction of the Brazilian rainforest; and the onset of global warming.

By the way, do you know that what remains of Times Beach, Missouri, "houses, mobile homes and businesses, including the Easy Living Laundromat, the Western Lounge bar, the city hall and the Full Gospel Tabernacle Church," are buried under a grassy mound next to a picnic area in Route 66 State Park on the Meramec River, twenty miles southwest of St. Louis?

Many of the incidents upon which Bob reports reflect a parallel pattern: first the incident itself; then the initial, sometimes hesitant, complaints by those directly affected; then the denials by the responsible parties and, often, by governmental agencies; then the public outcry; then response actions (although not necessarily admissions) by those previously in denial; and finally the reality of dealing with the incident's long-term effects.

When I undertook the task of reviewing this book, the Editor-in-Chief of this publication charged me with producing an unbiased, honest piece of work, free of any hype for the benefit of the author. I pledged to do just that. Thus, my unbiased, honest opinion is that this is a very good book. It is well written, fast paced, and holds the reader's attention. Did I say captivating? Well, it is. Each of the fifteen chapters teaches a separate lesson about the human and environmental consequences of our industrial society from the standpoint of those most directly affected. In doing so, it touches upon the populist roots of environmental activism through the stories of people the world over whose lives have been forever altered by exposure to toxic chemicals and the effect that exposure has had on the wildlife species with which we share *This Borrowed Earth*.

2010 Environmental Law Section

ANNUAL MEETING

Friday, January 29, 2010 • New York Hilton

USEPA Regional Administrator Judith Enck

Peter Casper

Then-Section Chair Alan Knauf and James Periconi present Professor Philip Weinberg with Award

Then-Section Chair Alan Knauf presents former Section Chair Joan Leary Matthews with Award

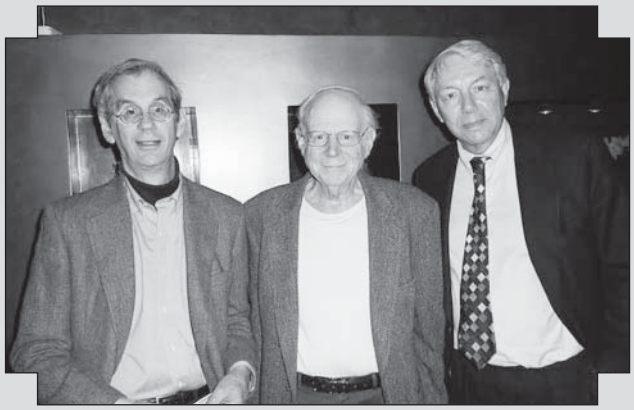
Peter Casper with Minority Fellows

USEPA Regional Administrator Judith Enck, Walter Mugdan, Lou Alexander, Peter Casper, and Alan Knauf with Minority Fellows

Professor Philip Weinberg's Retirement Party

March 3, 2010

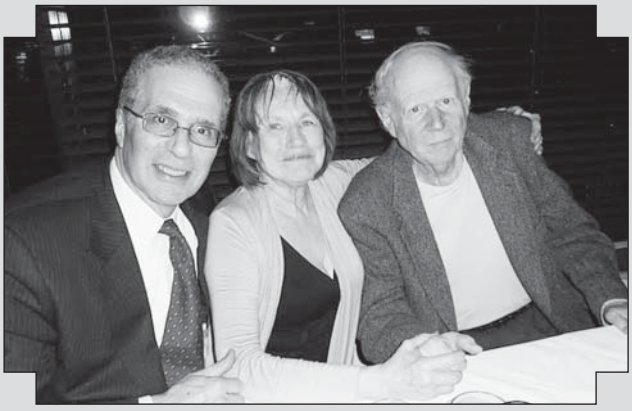
Vernon Rail and Andrew Simons



Al Butzel, Phil Weinberg, and Marty Baker

Walter Mugdan, Tom Harrison, and Joe Zedrosser

Connie Sidamon-Eristoff, Carole Bailey, and John French III



Jim Periconi, Alice McCarthy, and Phil Weinberg

Joel Sachs, Roslyn Sachs, Gail Port, Miriam Villani, and Bruce Adler

Wind Energy Development: Municipal Perspective Ensuring That a Municipality Does Not Get Caught in the Crosswinds

By Julia Green Sewruk

Wind farm development in New York State is a hot topic these days, but municipalities have specific concerns about such developments. In brief, the classification of wind energy projects as public utilities is by no means a settled matter. Treatment of a wind energy project as a public utility has significant—but not paralyzing—consequences for municipal zoning authority. Even if a particular wind energy project qualifies as a public utility, a local zoning agency still has authority to review the project and impose legitimate restrictions aimed at minimizing impacts on the community and the environment. Municipalities also may negotiate with the wind energy developer to secure additional mitigation measures in the form of financial or other benefits, provided those benefits are tailored to offset the impacts of the project, advance accepted zoning objectives, and are not conferred in exchange for preferential treatment.

It Is Not a Foregone Conclusion That Wind Energy Projects Are Public Utilities

Many wind farm developers take the position that their projects qualify as public utilities. Classification as a public utility is beneficial because the Court of Appeals has determined that public utilities are subject to a relaxed zoning standard.

In *Consolidated Edison Company of New York v. Hoffman*, Con Ed was seeking a variance to modify its existing nuclear generating plant by adding a cooling tower.[1] Based on the principle that a municipality "may not exclude a public utility from its community where the utility has shown a need for its facilities[,]" the Court of Appeals held that the traditional unnecessary hardship standard should not be applied to a public utility seeking a variance.[2] Instead, the Court concluded that Con Edison need only

> show that modification is a public necessity in that it is required to render safe and adequate service, and that there are compelling reasons, economic or otherwise, which make it more feasible to modify the plant than to use alternative sources of power such as may be provided by other facilities.[3]

The Court also held that the standard for a variance should be lowered further "where the intrusion or burden on the community is minimal[.]"[4]

Significantly, in *Consolidated Edison* there was no question that the nuclear generating plant at issue qualified as a public utility.[5] The status of wind energy projects is not so clear. While federal and state governments have expressed support for alternative energy development, there is no mandate that wind energy projects qualify or be treated as public utilities. In the absence of such a mandate, to qualify as a public utility a wind energy project must satisfy a three-part test adopted by the Court of Appeals in *Cellular Telephone Company, Doing Business as Cellular One v. Rosenberg*.[6]

In *Rosenberg*, the Court of Appeals endorsed the following definition of public utility: "a private business, often a monopoly, which provides services so essential to the public interest as to enjoy certain privileges such as eminent domain and be subject to such governmental regulation as fixing of rates, and standards of service."[7] Under the three-part *Rosenberg* test, a public utility is characterized by:

> (1) the essential nature of the services offered[,] which must be taken into account when regulations seek to limit expansion of facilities which provide the services, (2) "operat[ion] under a franchise, subject to some measure of public regulation," and (3) logistic problems, such as the fact that "[t]he product of the utility must be piped, wired, or otherwise served to each user…[,] the supply must be maintained at a constant level to meet minute-by-minute need[, and] [t]he user has no alternative source [and] the supplier commonly has no alternative means of delivery.[8]

The *Rosenberg* Court further held that the principle of preferential treatment established in *Consolidated Edison* applies to all public utilities, whether the zoning proposal is related to siting of entirely new facilities or modification of existing facilities.[9]

As discussed in detail below, wind energy projects do not satisfy this test in a manner to automatically qualify as public utilities.

Wind Energy Projects Do Not Qualify as Public Utilities Under the *Rosenberg* Test

Arguably, application of the criteria established in *Rosenberg* leads to a conclusion that wind energy projects are likely not public utilities.[10] First, some have argued that the power that wind energy projects produce is not essential as there are existing energy sources. Further, the electricity generated by wind turbines may not be sold on any given day if cheaper electricity is available.[11] Second, wind energy projects are owned by private developers and run as commercial enterprises. They are not operated pursuant to a franchise from a public entity. The New York State Public Service Commission (PSC) has stated that "virtually all [electric] generation units … are 'non-utility' owned."[12] Third, the electricity generated by wind turbines is allocated by the New York Independent System Operator on behalf of end-use customers.[13] These are significant distinctions from the purposes and functions of traditional public utilities.

Moreover, the New York Public Service Law (PSL) does not uniformly apply to wind energy projects. Section 2(13) of the PSL defines an "electric corporation" subject to regulation under the PSL to include

> [e]very…company…owning, operating or managing any electric plant…except where electricity is generated by the producer solely from one or more…alternate energy production facilities or distributed solely from one or more of such facilities to users located at or near the project site.

Likewise, PSL § 2(4) excludes entities "generating electricity…from one or more alternate energy production facilities or distributing electricity…from…such facilities to users located at or near a project site" from the definition of persons subject to regulation under the PSL.

Pursuant to the PSL, an "'alternate energy production facility'…includes any wind turbine…facility, together with any related facilities located at the same project site, with an electric generating capacity of up to eighty megawatts."[14] "Related facilities" are

> any land, work, system, building, improvement, instrumentality or thing necessary or convenient to the construction, completion or operation of any… alternate energy production…facility and include also such transmission or distribution facilities as may be necessary to conduct electricity…to users located at or near a project site.[15]

Thus, whether a particular wind project qualifies as an electric corporation subject to regulation under the PSL requires a case-by-case analysis of the megawatt (mW) capacity of the project, as well as analysis of the physical proximity of the project's facilities to one another and to end users. The PSC issues a certificate of authority based on a finding of public convenience and necessity to entities that are electric corporations within the meaning of the PSL and subject to PSC jurisdiction.[16]

A wind energy project is not automatically entitled to such a certificate. For example, in Case No. 07-E-0674, *Petition of Advocates for Prattsburgh, Cohocton Wind Watch and Concerned Citizens of Italy for a Declaratory Ruling on Windfarm Prattsburgh*, the PSC determined that it did not have jurisdiction over the Windfarm Prattsburgh, LLC project (WFP project) proposed for construction in the towns of Prattsburgh and Italy. [17] The PSC held that the WFP project was not an electric corporation within the meaning of the PSL because it had a 66 mW nameplate capacity, which is below the 80 mW threshold established in PSL § 2(2-b).[18] The PSC declined to aggregate the output capacity of nearby affiliated wind energy projects because those projects would not be interconnected with the WFP project.[19] The PSC also concluded that the WFP project was located on the same site despite the fact that the related facilities would be constructed on a variety of parcels (some as far as 5.1 miles away) in which the developer had acquired a variety of property interests.[20] The critical factor was that the developer would have site control of the various parcels.[21] Accordingly, the proposed wind development project was not an electric corporation subject to PSC jurisdiction under the PSL.[22]

Given the above, there remains uncertainty over whether to classify all wind energy projects as public utilities.

Wind Energy Projects May Not Satisfy the Definition of "Public Utility" in Many Municipal Zoning Codes

It is also important to consider the relevant provisions of the local zoning code when analyzing whether a wind energy project qualifies as a public utility. Some municipalities may have adopted zoning codes that define public utilities to include alternative energy developments such as wind farms. Even in the absence of an explicit definition of public utility in the local code, it is within the authority of a local zoning board to interpret and apply the relevant provisions to determine whether a wind energy project qualifies as a public utility under the code.[23] As part of its analysis, the local agency should consider the factors established in *Rosenberg*.[24]

For example, the Appellate Division, Third Department recently declined to disturb the Beekmantown Zoning Board of Appeals' determination that a wind energy project was a public utility entitled to a conditional use permit because it would provide essential services.[25] Although "essential services" was defined in the local zoning code, "public utility" was not.[26] The Court held that it

was not unreasonable for the local zoning board to determine that generation of energy by wind power was an essential service, thus qualifying the project as a public utility under the code.[27] In its decision, the Third Department cited the great deference afforded to interpretation and application of a zoning code by a local zoning board.[28] Importantly, the court did not hold that all wind projects qualify as public utilities under New York law.

For all of these reasons, there can be no presumption that a wind energy project is entitled to treatment as a public utility.[29] Indeed, many wind energy projects will not qualify as a public utility under the *Rosenberg* test, the plain language of the PSL, or the relevant local zoning code.

Classification as a Public Utility Does Not Equal Total Freedom from Local Regulation

The "relaxed" zoning standard applicable to public utilities does not translate into absolute freedom from local regulation. As the Court of Appeals established in *Consolidated Edison*, the principle that a municipality may not exclude a utility from its community "has never meant that a utility may place a facility wherever it chooses within the community."[30]

Thus, even if a wind energy project qualifies as a public utility, in order to obtain a variance or special use permit it would still need to show that

> (1) its new construction "is a public necessity" in that it is required to render safe and adequate service"; and (2) "there are compelling reasons, economic or otherwise, which make it more feasible" to build a new facility than to use "alternative sources of power such as may be provided by other facilities."[31]

If no such necessity is shown, the local zoning agency retains its regulatory authority over an application for a variance or special use permit.[32]

A Municipality May Exercise Its Traditional Zoning and Police Powers Whether or Not Wind Energy Projects Are Treated as Public Utilities

In the absence of a mandate preempting local regulation of wind energy projects, municipalities are not stripped of their traditional zoning and police powers related to such projects.[33]

If a wind energy project does not qualify as a public utility under the local zoning code or the PSL, and if such development is not a permitted use, the traditional unnecessary hardship standard would apply to any use variance application.[34] Moreover, when reviewing an application for approval of a specific wind energy project or considering amendments to the local zoning law to address such projects, a municipality must comply with Article 8 of the New York Environmental Conservation Law (New York State Environmental Quality Review Act [SEQRA]).[35] The familiar, relevant considerations include preservation of community character and aesthetic value, diminution of noise, traffic, and other environmental impacts, adherence to a comprehensive plan, and promotion of other general public health and safety concerns.[36]

A municipality also may exercise its police power to adopt a moratorium to maintain the status quo and allow sufficient time to develop comprehensive zoning provisions addressing wind energy projects, rather than regulating such facilities piecemeal.[37] A moratorium "must be for a valid and reasonable purpose and 'the life of such legislation may not exceed a reasonable period of time.'"[38] A moratorium not based on legitimate grounds or that remains in effect for an extended period of time is subject to constitutional challenge.

For example, in *Village of Tarrytown*, the Second Department affirmed the Supreme Court's invalidation of a moratorium that was purportedly enacted to allow for further study of public health and safety concerns related to installation of cellular telephone panel antennas in the community.[39] Reviewing the evidence presented to the lower court, the Second Department concluded that the alleged public health and safety concerns were a pretext for general community opposition.[40] In fact, the applicant had submitted medical and scientific evidence establishing that there was no associated public health risk, which evidence the municipality did not dispute.[41] The moratorium was thus invalidated as unconstitutional.[42]

Significantly, in *Village of Tarrytown*, the Second Department did not rely on the applicant's status as a public utility as a basis for invalidation of the moratorium.[43] Therefore, a moratorium may be applicable even to a wind energy project that satisfies the *Rosenberg* test. It is also noteworthy that aesthetics can be a valid ground for adoption of a moratorium.[44]

While no precise time limits have been established for moratoria, the Appellate Division, Second Department has held that five years was too long for a moratorium to remain in effect where the municipality failed to offer any satisfactory reason for the delay in enacting its zoning ordinance.[45] The length of pendency of a moratorium may be counterbalanced by inclusion of a hardship exception in its enactment.

In sum, a local municipal agency is well within its discretion to exercise its traditional zoning and police powers to regulate proposed wind energy development within its community, even if the project qualifies as a public utility.

Useful Tools to Mitigate and Offset Impacts of Wind Energy Projects

In the event that a wind energy project has been approved and will be constructed, the affected municipality should be aware of potential tax and other benefits, as well as creative ways to mitigate and offset the impacts of the project on its community.

Host Community Agreements Can Be Used to Mitigate Current Impacts and Secure Protection from Future Impacts

Historically, municipalities have entered into host community agreements (HCAs) as a land-use tool aimed at mitigating the impact of a proposed development on the community.[46] The rationale is that a development can affect the community as much if not more than it impacts the particular private property owners involved in the project.[47] Wind energy development is no exception.

In the wind energy context, HCAs generally include a schedule of fixed payments based on the total megawatt capacity (sometimes referred to as nameplate capacity) of the project to be made to the municipality over time.[48] Some HCAs include provisions for ongoing operation concerns, such as complaint resolution procedures and specific protocols and funding for noise compliance testing.[49]

HCAs also may include provisions addressing damage to town and county roadways from the impact of transporting the large, heavy sections of the towers and other materials needed for construction.[50] The agreements typically require the developer to (a) pay for a road expert/consultant for the municipality, (b) repair or modify the roads as needed to allow for their use during construction, (c) post a bond representing the estimated cost to restore the road at project conclusion, (d) maintain the road as needed during construction, and (e) improve or restore the roads at the end of construction.[51] Sometimes these impacts are addressed in a separate Road Use Agreement.

A final issue commonly addressed in HCAs is the decommissioning of wind turbines at the termination of the project.[52] In other words, HCAs can be used to look ahead to the end of the useful lives of the facilities and consider the work, funding, and enforcement mechanisms needed to ensure that those facilities are removed rather than simply abandoned.

There are various sources of authority for such agreements. The language of New York Real Property Tax Law § 487 contemplates that a municipality would negotiate a type of benefit agreement with a wind farm developer.[53] Pursuant to RPTL § 487(2), wind facilities are exempt from property taxation for 15 years.[54] However, § 487 further provides that a local taxing jurisdiction may "opt out" of this tax exemption by resolution, and if it does not, may enter into a payment in lieu of tax (PILOT) agreement with the developer.[55] Thus, under the plain language of section 487, it appears permissible for a municipality to agree not to "opt out" from the RPTL § 487 exemption in exchange for the developer's commitment to make payments to the municipality pursuant to an HCA.[56]

This strategy becomes risky, however, when considering the likelihood that the wind energy developer will seek the county industrial development authority's (IDA) assistance with the project pursuant to New York General Municipal Law § 874(1). Such a relationship confers additional tax exemptions on the developer. In that event, the developer and the IDA likely would enter into a PILOT agreement pursuant to GML § 858(15) for the purpose of compensating affected tax jurisdictions for lost real property tax revenue.

When an IDA elects to enter into a PILOT agreement with a developer, GML § 858(15) mandates that the PILOT paid by the developer be allocated proportionally to affected tax jurisdictions:

> *…Unless otherwise agreed by the affected tax jurisdictions*, any such agreement shall provide that payments in lieu of taxes shall be allocated among affected tax jurisdictions *in proportion to the amount of real property tax and other taxes which would have been received by* each affected tax jurisdiction had the project not been tax exempt due to the status of the agency involved in the project.

(emphasis supplied). Affected tax jurisdictions include all municipalities and school districts in whose taxing jurisdiction the project will be built and operated.[57]

General Municipal Law § 854(17) defines payments in lieu of taxes as

> *any payment made to an agency, or affected tax jurisdiction* equal to the amount, or a portion of, real property taxes, or other taxes, which would have been levied by or on behalf of an affected tax jurisdiction if the project was not tax exempt by reason of agency involvement.

(emphasis supplied). Based on the plain language of the statute, there is an argument that the payments to a municipality under an HCA should be considered PILOT payments for purposes of an IDA-negotiated PILOT agreement, and allocated accordingly.

But as discussed above, municipalities can use HCAs to carry out other important and legitimate zoning objectives, such as protection of the public health, safety, and welfare and the environment. Therefore, there is a strong

argument that HCAs are authorized pursuant to the Town Law provisions delineating the scope and purposes of a municipality's general zoning power.[58] Municipalities are also authorized under SEQRA to take measures to ensure mitigation of environmental impacts accompanying development as "SEQRA provides authority to regulate conduct after approvals."[59] A condition or other future event necessitated by SEQRA concerns thus could be enforced through an HCA.[60] Further, Article IX of the New York State Constitution affords municipalities certain home rule powers, such as control over municipal roadways.[61] Accordingly, the municipality has inherent authority to enter into a contract, such as an HCA, aimed at mitigation of the impact of a project on municipal roads.[62]

Finally, municipalities should use caution when negotiating the language of an HCA. HCAs should not include any provision that appears to (or actually does) bind the municipality to provide preferential or expedited treatment to the application of the wind developer in exchange for payment.[63] This type of agreement could be considered contract zoning and in violation of public policy: "a Legislature cannot bargain away or sell its powers."[64] HCAs also cannot grant an applicant vested rights to develop a project over an extended period of time, because doing so could constitute an *ultra vires* limitation on future use of legislative power.[65]

Incentive Zoning Is Also an Appropriate Tool to Offset Community Impacts

The Yates County Supreme Court recently upheld the Town of Italy's adoption of incentive zoning regulations applicable to wind energy development within its borders.[66] In that case, the Town of Italy had adopted a local law rezoning two areas in the southern part of town as Wind Energy Incentive Zones.[67] The local law also included noise mitigation standards and minimum setback requirements.[68] The petitioner citizens group challenged the local law on several grounds, including that it did not sufficiently mitigate environmental impacts.[69] Among other things, the petitioner argued that SEQRA does not allow the use of "incentives" to offset impacts.[70]

Noting that there was no precedent on point, the Court held that the Town's use of incentive zoning in conjunction with mitigation measures pursuant to SEQRA was acceptable.[71] The Court further concluded that the Town had satisfied its obligations under SEQRA because it had conducted a thorough review, during which it "educated itself on the ramifications of the proposed legislation; considered different courses of action; and chose the course of action which it determined balanced the existing and potential social, economic and environmental factors."[72] Accordingly, the Court found no basis to disturb the local law.

This is a novel use of incentive zoning and one that—at least for now—appears viable.

Conclusion

The issues surrounding the classification and regulation of wind generation facilities are of central importance to municipalities facing potential wind energy development in their communities. The legal and business aspects of such development are changing every day. The most important objective for a municipality involved in or faced with wind farm development must be to take actions and make decisions consistent with its zoning powers and obligations for the benefit of its community.

Endnotes

1. *Consolidated Edison Co. of New York v. Hoffman*, 43 N.Y.2d 598, 603, 403 N.Y.S.2d 193, 195 (1978).
2. *Id*. at 607.
3. *Id*. at 611.
4. *Id*.
5. *Id*. at 607.
6. *Cellular Telephone Company, Doing Business as Cellular One v. Rosenberg*, 82 N.Y.2d 364, 604 N.Y.S.2d 895 (1993).
7. *Id.* at 371 (citing 2 American Law of Zoning § 12.32 at 568–69 (Robert M. Anderson ed., 3d ed.)).
8. *Id*. (citing 2 American Law of Zoning § 12.32 at 569 (Robert M. Anderson ed., 3d ed.)).
9. *Id*.
10. *See generally*, Wind turbines are not a special use within the meaning of the Richmondville Zoning Ordinance, Op. Peter Henner, Esq. (Oct. 15, 2007), *available at* http://www.schoharievalleywatch.org/opinions.php.
11. *Id.*
12. Letter from Howard Tarler, Chief, Bulk Transmission Systems, New York State Department of Public Service, to Jo Eto and Alison Silverstein, U.S. Department of Energy (Sept. 21, 2005) (on file with the author).
13. Letter from Ted J. Murphy, counsel to New York Independent System Operator, Inc., to David H. Meyer, Acting Deputy Director, Office of Electricity Delivery and Energy Reliability, U.S. Department of Energy (Sept. 21, 2005), *available at* http://www.nyiso.com/public/webdocs/documents/regulatory/filings/2005/09/nyiso_rspns_qstns_stkhldrs_9_21_05.pdf.
14. Public Service Law § 2(2-b) (PSL).
15. § 2(2-d).
16. § 68.
17. Case No. 07-E-0674, *Petition of Advocates for Prattsburgh, Cohocton Wind Watch and Concerned Citizens of Italy for a Declaratory Ruling on Windfarm Prattsburgh*, Declaratory Ruling on Electric Corporation Jurisdiction (Aug. 24, 2007).
18. *Id*. at 6.
19. *Id*.
20. *Id*. at 7.
21. *Id*. at 7–8.
22. *Id*. at 8.
23. Town Law § 267-b; *Wind Power Ethics Group v. Zoning Board of Appeals of Town of Cape Vincent*, 60 A.D.3d 1282, 1283, 875 N.Y.S.2d 359, 361 (4th Dep't 2009).
24. *See West Beekmantown Neighborhood Association, Inc. v. Zoning Board of Appeals of the Town of Beekmantown*, 53 A.D.3d 954, 956, 861 N.Y.S.2d 864, 866 (3d Dep't 2008).

25. *Id*.
26. *Id*.
27. The Third Department also noted that it was undisputed that the proposed project would be subject to regulation by the New York State Public Service Commission. *West Beekmantown*, 53 A.D.3d at 956. For the reasons discussed above, this is not the case for all wind energy projects.
28. *Id*. (citations omitted).
29. For a contrary view, *see* Patricia E. Salkin and Robert Burgdorf, *Siting Wind Farms in New York: Applicability of the Relaxed Public Utility Standard*, 7 New York Zoning Law and Practice Report 1 (2006).
30. 43 N.Y.2d at 610, 403 N.Y.S.2d at 199 (citations omitted).
31. *Omnipoint Communications, Inc. v. City of White Plains*, 430 F.3d 529 (2d Cir. 2005) (holding that, despite undisputed gap in service, cellular telephone company had not shown sufficient need to construct new tower rather than co-locate on existing tower) (quoting *Rosenberg*, 82 N.Y.2d at 372, 604 N.Y.S.2d at 899); *see also Consolidated Edison*, 43 N.Y.2d at 611, 403 N.Y.S.2d at 200.
32. *Omnipoint*, 430 F.3d at 536.
33. *Cf. Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 683, 642 N.Y.2d 164, 173 (1996).
34. Town Law § 267-b.
35. *Centerville's Concerned Citizens v. Town Board of Town of Centerville*, 6 A.D.3d 1129, 867 N.Y.S.2d 626 (4th Dep't 2008); *Trude v. Town Board of Town of Cohocton*, 17 Misc. 3d 1104A, 851 N.Y.S.2d 61 (Sup. Ct., Steuben Co. 2007).
36. Town Law §§ 261, 263, 267-b; *see also Friedhaber v. Town Board of Town of Sheldon*, 16 Misc. 3d 1140A, 851 N.Y.S.2d 58 (1st Dep't App. Term 2007), *aff'd,* 59 A.D.3d 1006, 872 N.Y.S.2d 361 (4th Dep't 2009).
37. *Ecogen, LLC v. Town of Italy*, 438 F. Supp. 2d 149 (W.D.N.Y. 2006) (upholding moratorium on construction of wind turbine towers, relay stations, and other support facilities); *see also Cellular One v. Village of Tarrytown*, 209 A.D.2d 57, 66, 624 N.Y.S.2d 170, 176 (2d Dep't 1995); *Mitchell v. Kemp*, 176 A.D.2d 859, 575 N.Y.S.2d 337 (2d Dep't 1991).
38. *Village of Tarrytown*, 209 A.D.2d at 66 (citations omitted).
39. *Id.* at 66.
40. *Id*.
41. *Id*.
42. *Id*.
43. *Id*. at 64.
44. *Omnipoint Communications, Inc. v. City of White Plains*, 430 F.3d 529, 533 (2d Cir. 2005) (citations omitted).
45. *Mitchell v. Kemp*, 176 A.D.2d 859, 575 N.Y.S.2d 337 (2d Dep't 1991); *see also Lakeview Apartments of Hunns Lake, Inc. v. Town of Stanford*, 108 A.D.2d 914, 485 N.Y.S.2d 801 (2d Dep't 1985).
46. Daniel A. Spitzer, Patricia E. Salkin, & Michael Bookser, *Host Community Agreements for Wind Farm Development*, 9 New York Zoning Law and Practice Report 1 (2009).
47. *Id*. at 2.
48. *Id*.
49. *Id*.
50. *Id*. at 2–3.
51. *Id*. at 3.
52. *Id*.
53. *Id*. at 4–5.
54. N.Y. Real Property Law § 487(2).
55. §§ 487(8), (9).
56. Spitzer, et al., 9 No. 5 N.Y. Zoning Law and Prac. Rep. at 5.
57. GML § 854(16).
58. Spitzer, et al., 9 No. 5 N.Y. Zoning Law and Prac. Rep. 5.
59. *Id.*; *see also Gordon v. Rush*, 100 N.Y.2d 236, 244-45, 762 N.Y.S.2d 18, 23-24 (2003).
60. *Id*. at 5–6.
61. *Id*. at 6; *see also* N.Y. Municipal Home Rule Law § 10.
62. *Id*.
63. *Id*. at 3–4.
64. *Id*. at 3; *see also Church v. Town of Islip*, 8 N.Y.2d 254, 259, 203 N.Y.S.2d 866, 869 (1960).
65. *Id*. at 4.
66. *Finger Lakes Preservation Association v. Town Board, Town of Italy, et al.,* Yates County Supreme Court Index No. 2009-237 (Oct. 8, 2009) (Falvey, Acting J.S.C.).
67. *Id*. at 1.
68. *Id*. at 9.
69. *Id*. at 7–8.
70. *Id*. at 8.
71. *Id.* at 7–10.
72. *Id*. at 9.

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Protecting the Environment? EPA's Dubious Reasoning for Denying a California Emissions Waiver Application

By Scott K. Maxwell

> Don't we really risk our own damnation every day by destroying the air that gives us life?
>
> **Lyndon Johnson,**
> **upon signing the Air Quality Act of 1967,**
> **November 21, 1967[1]**

Introduction

In December 2007 and January 2008, the United States Environmental Protection Agency ("EPA") surprised the State of California when it denied the state's request to regulate greenhouse gas emissions from automobiles. Subject to several important limitations, California has generally been granted the authority to set its own emissions standards, provided they are more stringent than the applicable federal standards. Part I of this Note briefly discusses background on global warming and domestic and international global warming law. Part II of this Note discusses the controversy between California and the United States and the current states of the lawsuits filed by California and other interested parties as a result of EPA's denial of California's Waiver Application[2] under Section 209 of the Clean Air Act.[3] Part III of this Note discusses different approaches to interpreting Clean Air Act Section 209 and concludes that the Administrator Stephen L. Johnson misinterpreted and misapplied Section 209. In deciding whether California could be permitted to regulate greenhouse gas automobile emissions, Administrator Johnson misconstrued the plain meaning of Section 209, mischaracterized the legislative intent of Section 209, departed without valid reason from prior agency precedent and interpretation, failed to rebut California's findings that there are compelling and extraordinary conditions for emissions standards more stringent than the federal standards, and may have been improperly influenced by Bush Administration officials. Part IV of this Note discusses the current state of the California Waiver Application and discusses the Obama Administration's shift in agency priorities. Under new EPA Administrator Lisa P. Jackson, EPA re-opened the Waiver Application docket for new public comment and reconsideration of the Waiver Application, which in July 2009 resulted in a reversal of Administrator Johnson's denial of the Waiver Application. Part V of this Note concludes that Administrator Johnson's denial of the Waiver Application was incorrect, but that his decision was reversed by Administrator Jackson; California is permitted to regulate greenhouse gas emissions for future automobile model years.

I. Background

Global warming is a worldwide problem; inaction likely will lead to disastrous results.[4] There is a scientific consensus that global warming is due to man-made carbon dioxide emissions.[5] Despite scientific consensus, the United States, under the recent Administration of President George W. Bush, refused to take significant steps to reduce carbon dioxide emissions. For example, in February 2001, President Bush announced that the United States unilaterally was withdrawing[6] from the Kyoto Protocol,[7] an international treaty to which the United States had agreed to reduce carbon dioxide emissions by seven percent by the year 2012.[8] Worldwide, automobile emissions constitute a major source of man-made greenhouse gas emissions.[9] The United States is the largest emitter of fossil-fuel-related greenhouse gas emissions.[10] Under the Clean Air Act,[11] California is allowed, by applying for a waiver to the Environmental Protection Agency ("EPA"), to regulate automobile emissions at stricter levels than the federal levels.

In *Massachusetts v. EPA*, a landmark global warming case decided on April 2, 2007, the Supreme Court held, *inter alia*, that greenhouse gases are pollutants as defined by the Clean Air Act and that the EPA has the authority to regulate greenhouse gases in new motor automobiles.[12]

> Under the Act's clear terms, EPA can avoid promulgating regulations only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. It has refused to do so, offering instead a laundry list of reasons not to regulate, including the existence of voluntary Executive Branch programs providing a response to global warming and impairment of the President's ability to negotiate with developing nations to reduce emissions. These policy judgments have nothing to do with whether greenhouse gas emissions contribute to climate change and do not amount to a reasoned justification for declining to form a scientific judgment.[13]

On remand, the Court ordered EPA to determine whether the greenhouse gas pollutants cause, or contribute to, air pollution in a manner or amount that may reasonably be anticipated to endanger public health or welfare.[14]

EPA opened a notice and comment period seeking public input as to whether the EPA should find that it should regulate greenhouse gases.[15]

II. The Controversy

This Section traces the immediate history of California's Waiver Application, the EPA's subsequent denial, and the resulting litigation. In its most recent Waiver Application, California sought for the first time to regulate greenhouse gas emissions from new automobiles.[16] After a notice and comment period, the EPA, by and through Administrator Johnson, denied California's Waiver Application to regulate greenhouse gas automobile emissions. The decision was widely criticized, particularly by Congress, which opened an investigation into the propriety of Administrator Johnson's decision.[17] This Note examines the relevant provisions of the Clean Air Act and suggests that Administrator Johnson's interpretation of Section 209 is incorrect and that California's waiver request was unjustifiably denied.

Under the Clean Air Act, the federal government preempts the field of automobile emissions.[18] California has since the 1960s been at the forefront of the regulation of automobile emissions,[19] and due to particularized pollution problems then existing in the state, has therefore generally been given permission under the Clean Air Act to regulate automobile emissions at a stricter level than the federal standard.[20]

On July 22, 2002, California Governor Gray Davis signed into law legislation that made the State of California the first American governmental entity to regulate greenhouse gas emissions from new automobiles.[21] As required by Section 209, on December 21, 2005 the California Air Resources Board ("CARB") filed with the EPA a "Request for Waiver of Preemption Under Clean Air Act Section 209(b) for Greenhouse Gas Emissions"[22] with supporting documentation. Although the EPA received the waiver request on December 21, 2005, it was not docketed until April 26, 2007. One of California's complaints against the EPA's conduct throughout this matter has been the lapse of sixteen months between the receipt of and the docketing of the Waiver Application. California and others have viewed the EPA's failure to act as simply a delay tactic. In its Request, California sought for the first time in United States history to regulate greenhouse gases. Specifically, the pollutants sought to be regulated are carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), and hydrofluorocarbons (HFCs), in automobile emissions beginning with the 2009 model year.[23] Acting Administrator William L. Wehrum informed CARB that the EPA was delaying its decision on the Waiver Application until *Massachusetts v. EPA*[24] was decided by the Supreme Court.[25]

Following the *Massachusetts v. EPA* decision,[26] from April 25, 2007 to June 15, 2007, the EPA conducted a notice and comment period[27] on California's Waiver Application.[28] A public hearing was held on May 22, 2007 in Washington, D.C.[29] After the notice and comment period ended, California became increasingly frustrated that Administrator Johnson had not made a decision on its Waiver Application and filed several actions seeking to compel the agency to render a decision.[30] On December 19, 2007, Administrator Johnson sent to Arnold Schwarzenegger, Governor of California, a letter declaring his intent to deny California's Request.[31] The letter was presumably sent because the EPA had promised California a decision by the end of 2007.[32] Many interpreted this letter as the EPA's final decision.[33] Perhaps the confusion was heightened because the December 19 letter was not accompanied by a published notice. California, too, interpreted the letter as final agency action and, pursuant to the reviewability provisions of the Clean Air Act,[34] filed suits in the Ninth and District of Columbia Circuit Courts challenging the denial of its Waiver Application.[35] On July 25, 2008, the Ninth Circuit dismissed the action for lack of jurisdiction because the December 19 letter was not final agency action.[36] Subsequently, on October 8, 2008 the United States Court of Appeals for the District of Columbia dismissed California's suit, holding that whether the December 19 letter was final agency action was a nonjusticiable issue because the Ninth Circuit had already ruled on the issue and given it preclusive effect.[37] California, together with other states, then sued based on the EPA's March 6, 2008 Notice of Denial.[38]

III. Analysis

A. Introduction

This Section analyzes Administrator Johnson's decision to deny California's Waiver Application, and concludes that such denial rested on an incorrect interpretation of the Clean Air Act. Section B discusses the plain meaning of the statute, and concludes that the text of the statute does not support Administrator Johnson's interpretation. Specifically, a plain reading of the statute does not require California to prove "compelling and extraordinary" conditions in order to satisfy the waiver requirements. Even if the statutory text does support a requirement that California prove "compelling and extraordinary" conditions, California has satisfied these requirements. Section C discusses the legislative history of the Clean Air Act, and Section 209 in particular, and concludes that Administrator Johnson misinterpreted the legislative history. Section D discusses prior EPA interpretations of Section 209 and suggests that the denial of California's Waiver Application is an unreasoned significant departure from prior EPA interpretation of Section 209. Section E argues that even if the court accepted EPA's interpretation of Section 209, California does meet EPA's "compelling and extraordinary conditions" standard; moreover, Administrator Johnson did not carry the burden of proof to rebut California's factual findings that California has compelling and extraordinary conditions. Section F discusses the allegations by members of Con-

gress that Administrator Johnson's decision was tainted by impermissible interference from Bush Administration officials. This Note concludes that the EPA Administrator's decision was incorrect and that the California waiver should have been granted.

B. Plain Meaning of Section 209

A plain textual reading of Section 209 lends itself to a different meaning than the one given by Administrator Johnson. Plain reading of the statute is the first step in interpreting any statute.[39] If a plain meaning can be discovered without ambiguity, the inquiry into the statute's meaning must end unless the plain meaning leads to an absurd result or suggests a scrivener's error.[40] Administrator Johnson has interpreted the statute, in essence, to mean that California must first demonstrate compelling and extraordinary conditions necessitating stricter emissions standards than the federal standards.[41] A plain reading of the statute, however, reveals that implicit in the statute is that compelling and extraordinary conditions already exist in California, and that the Administrator may not grant an application for waiver if he finds that the proposed standards are not logically related to combating such compelling and extraordinary conditions. California's Waiver Application was logically related to combating compelling and extraordinary conditions, and thus Administrator Johnson had no cause to deny the Waiver Application.

1. Emission Standards Defined

The Clean Air Act prohibits any state or subdivision thereof from adopting emissions standards for motor vehicles.[42] In this manner, the federal government preempts the field of automobile emissions.[43] However, the Clean Air Act gives California an express statutory exemption from this provision, and permits California to regulate emissions at a stricter standard than the federal standard: "The Administrator shall…waive application of this section to any State which has adopted standards… for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966…."[44] California is the only state to have adopted standards for the control of emissions from new motor vehicles prior to March 30, 1966.[45]

As a threshold matter, it must be determined whether the proposed California greenhouse gas regulations are "emission standard[s]" under the purview of the statute because if greenhouse gases are not emissions standards *per se*, then they do not fall under the ambit of Section 209 and the Clean Air Act will not pre-empt California greenhouse emissions standards. The best place to find the definition of "emissions" is the statute itself. Definitional sections for subparts of the Clean Air Act are often included in the subparts themselves, and include definitions specific to each respective subpart.[46] Section 209 is located within Clean Air Act Title II[47] (known as the National Emission Standards Act),[48] Part A, "Motor Vehicle Emissions and Fuel Standards."[49] In the definitional section for Part A, there is no definition for "emission" or "emission standard."[50] In the opening of Part A, however, the Administrator is given the instruction to "by regulation prescribe…standards applicable to the emission of any air pollutant from any [new motor vehicles], which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[51] Emissions standards therefore apply to air pollutants that, in the Administrator's judgment, "cause, or contribute, to air pollution which may reasonably be anticipated to endanger public health or welfare."[52]

Although Administrator Johnson fought the notion that greenhouse gases are air pollutants under the Clean Air Act, the Supreme Court held in *Massachusetts v. EPA* that the EPA has the authority to regulate greenhouse gas emissions because greenhouse gases fit the broad definition of a "pollutant" within the meaning of the Clean Air Act.[53] Title III of the Clean Air Act contains provisions of general applicability to the entire Clean Air Act.[54] Section 302, within Title III, contains definitions of general applicability.[55] In it, "emission standard" is defined as:

> [A] requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter.[56]

"Emission" is not defined specifically anywhere in the Clean Air Act, so a dictionary is the best source to determine what the term means.[57] Emission means, "the act of emitting."[58] To emit, in turn, means, "to release or send forth."[59] Putting these definitions together, it is evident that greenhouse gases released from automobiles are air pollutants that fall within the purview of Clean Air Act Title II and therefore, under Section 209, the Administrator is charged with prescribing emission standards therefor, *if* the Administrator makes a finding that greenhouse gases "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[60] If the Administrator makes a finding that greenhouse gases do not cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare, then it is only logical that California's proposed regulations are stricter as respects greenhouse gases than are the non-existent federal regulations.

2. Plain Meaning Analysis of Section 209

The plain language of Section 209 places no affirmative duty on the Administrator to conduct an inquiry into whether the requested Waiver Application should be de-

nied. The statute reads, in relevant part, "No such waiver shall be granted *if* the Administrator finds that…such State does not need such State standards to meet compelling and extraordinary conditions…."[61] The use of the conditional word "if" is not a command that the Administrator conduct an inquiry, but rather a permissive option for the Administrator, similar to the common statutory term "may."[62] For example, the statute does not read, "The Administrator *shall* conduct an investigation into whether such State needs such State standards to meet compelling and extraordinary conditions, and shall waive application of this section unless he finds that such State does not need such State standards to meet compelling and extraordinary conditions." Hence, the Administrator need not perform any investigation into whether a waiver should be denied based on Section 209(b)(1)(B) because such an investigation is permissive but not mandatory.

Administrator Johnson, however, believed that the EPA was required to conduct this investigation: "Applying this interpretation to this waiver application *calls for EPA to exercise its own judgment* to determine whether the air pollution problem at issue—elevated concentrations of greenhouse gases—is within the confines of state air pollution programs covered by section 209(b)(1)(B)."[63] Administrator Johnson is wrong based on a plain reading of the statute; the statute "calls for" the Administrator to do nothing.[64] He has thus embarked on an inquiry that he believed he was compelled to do, whereas under a plain reading of the statute, he was under no such obligation. California's Waiver Application could have been granted based on no investigation whatsoever by the EPA. That the EPA did conduct an inquiry, however, is within its statutory authority. Administrator Johnson erred in his reasoning as to why he conducted the investigation, but such investigation was still within his statutory authority.

A plain reading of the statute reveals that neither California nor the EPA Administrator are required to prove or disprove the existence of "compelling and extraordinary conditions" in California in order to invoke the waiver. Section 209 requires the Administrator to grant the Waiver Application "if *the State* determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards."[65] However, if an exception to the waiver provision applies, then the waiver shall not be granted.[66] The exception to the waiver provision provides,

> No such waiver shall be granted if the Administrator finds that—(A) the determination of the State is arbitrary and capricious, (B) such State does not need such standards to meet compelling and extraordinary conditions, or (C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title.[67]

This part of the statute is a proviso that cuts back on the general rule stated in the rest of the statute, and therefore should be narrowly construed.[68] Administrator Johnson relied on Section 209(b)(1)(B) to deny California's Waiver Application.

Under a plain reading of the phrase, "No such waiver shall be granted if the Administrator finds that…such State does not need such State standards to meet compelling and extraordinary conditions,"[69] the role of the Administrator is not to prove or disprove the existence of compelling and extraordinary conditions, but rather to prove or disprove whether the standards are needed to meet such compelling and extraordinary conditions, because implicit in the statute is the understanding that compelling and extraordinary conditions already exist in California, and that the Administrator may not grant an application for waiver if he finds that the proposed standards do not meet such compelling and extraordinary conditions. Otherwise stated, the statute can be broken down into three separate, distinct clauses: (1) No such waiver shall be granted if the Administrator finds that such State; (2) does not need such State standards to meet; and (3) compelling and extraordinary conditions.[70] Administrator Johnson's reading of Section 209 effectively dropped clause (2) completely out, so that his reading became, "No such waiver shall be granted if the Administrator finds that such State does not have compelling and extraordinary conditions." There is, however, a necessary logical connection between clauses (2) and (3): whether the State "does not need such State standards to meet/ compelling and extraordinary conditions."

This inquiry into whether the standards are needed to meet the compelling and extraordinary conditions is the essence of Section 209(b)(1)(B). As used here, "to meet" should be understood to mean, "to cope or contend effectively with," in accordance with its dictionary definition.[71] So, the proposed standards must be needed to effectively cope or contend with, or combat, the compelling and extraordinary conditions. It is only when the proposed standards do not effectively cope or contend with, or combat, the compelling and extraordinary conditions that the Administrator must deny a waiver request. In other words, if the proposed standards do not cope or contend with the compelling and extraordinary conditions that exist in the state, then the waiver request must be denied. Administrator Johnson's view ignores clause (2) and ignores the necessity of the logical connection between clauses (2) and (3) and instead jumps from clause (1) straight to clause (3).

The emissions standards California sought to promulgate were designed to cope or contend with the compelling and extraordinary conditions existing in California, and thus Administrator Johnson had no cause for denial of the Waiver Application. Administrator Johnson, however, focused his entire inquiry on whether compelling

and extraordinary conditions in fact existed.[72] Administrator Johnson effectively read out of existence the text of Section 209(b)(1)(B) and engaged in an inquiry that was not delegated to his authority. Of course, to read out certain words in a statute clearly is inconsistent with the plain meaning rule of statutory interpretation.

Similarly inconsistent with Section 209's plain meaning is Administrator Johnson's call for the exercise of independent judgment to determine whether the greenhouse gas portions of the Waiver Application should be granted. Administrator Johnson attempts to circumvent the argument that his interpretation is inconsistent with prior EPA practice[73] by calling for an independent evaluation of those portions of the Waiver Application that deal with greenhouse gas emissions standards on the ground that greenhouse gases had never before been part of a Waiver Application.[74] This interpretation, however, flies in the face of the plain language of the statute, which states that the waiver must be granted "if the State determines that the State standards will be, *in the aggregate*, at least as protective of public health and welfare as applicable Federal standards. No such *waiver* shall be granted if the Administrator finds that…such State does not need such State standards to meet compelling and extraordinary conditions."[75] Due to the use of the phrase "in the aggregate,"[76] the first sentence indicates that the Waiver Application is to be treated as a whole, not in distinct parts. The proposed California standards, in their entirety, are clearly more protective of public health and welfare as the applicable federal standards. The second sentence does not explicitly state whether, in evaluating whether the standards are needed to meet compelling and extraordinary conditions, the standards must be considered in their entirety. However, the second sentence uses the term "waiver" in the singular, and the phrase "*such* State standards"[77] indicates that the second sentence relates back to the first sentence. Thus, the second sentence might have been written, "No such waiver shall be granted if the Administrator finds that such State does not need such State standards, *in the aggregate*, to meet compelling and extraordinary conditions." Administrator Johnson was incorrect to break the Waiver Application down into separate parts and consider them independently of each other. Administrator Johnson's construction of the statute, as respects his independent evaluation standard, is untenable.

C. EPA Administrator Relies on and Misinterprets Legislative History of Section 209

In his Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, Administrator Johnson stated, "I do not believe section 209(b)(1)(B) was intended to allow California to promulgate state standards for emissions from new motor vehicles designed to address global climate change problems."[78] In using the word "intended," Administrator Johnson presumably was speaking of Congress's intent when it enacted Section 209. In the fourteen-page Notice of Denial, Administrator Johnson cited four different pieces of legislative history in support of his position. Subsection (i) of this Section discusses the legislative history prior to the enactment of Section 209 including the evolution of the waiver provision that resulted in the current version of Section 209. Subsection (ii) of this Section discusses Administrator Johnson's selective use and misinterpretation of legislative history.

i. Legislative History of Section 209 of the Air Quality Act of 1967 and Subsequent Amendment[79]

The Air Quality Act of 1967 ("Air Quality Act")[80] was the first federal legislation to federally pre-empt automobile emissions standards. California had experienced considerable pollution problems as its population grew throughout the 1950s and 1960s and, by the time the Air Quality Act was being considered in Congress, had already enacted its own automobile emissions standards. In 1947 the California legislature provided for creation of an air pollution control district in each county of the State to be activated upon action of the Board of Supervisors.[81] The Los Angeles County Air Pollution Control District was activated on October 14, 1947.[82] "In 1959, the [California] State Legislature directed the State Department of Public Health to establish standards for the air and created a Motor Vehicle Pollution Control Board to test and, if necessary, require control devices; devices which in fact are today required of all cars sold in California."[83] Congress, therefore, recognized that California was in a peculiar situation; it had already adopted emissions standards more stringent than the proposed federal standards.

Originally, the Air Quality Act proposed by President Lyndon Johnson had no waiver provision; the federal government simply pre-empted the entire field with national uniform standards.[84] However, Senator George Murphy of California successfully introduced an amendment containing the waiver provision. During a Senate hearing in 1966, Senator Murphy said:

> Last year…I raised the question of Federal pre-emption in connection with the Federal standards that are to be made applicable to 1968 vehicles. Since California has adopted more stringent standards which will become effective in 1970, I think it is most important that we make sure that the Federal Standards do not pre-empt the higher or more effective standards of California.[85]

The bill then faced a vociferous challenge in the House, led by Congressman John Dingell Jr. of Michigan.[86] Significantly, Congressman Dingell hailed from the nation's automobile manufacturing capital, which vigorously opposed both Senator Murphy's California waiver amendment in the 1960s and the proposed

greenhouse gas emissions standards currently at issue.[87] Congressman Dingell offered an amendment that would have placed the burden to prove the need for stricter regulation on California, whereas the Senate's version placed the burden of proof on the Secretary (now Administrator) to disprove the need for stricter regulation.[88] Congressman Dingell's amendment subsequently failed and the bill as signed into law read:

> The Secretary shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, unless he finds that such State does not require standards more stringent than applicable Federal standards to meet compelling and extraordinary conditions or that such State standards and extraordinary conditions or that such State standards and accompanying enforcement procedures are not consistent with section 202(a) of this title.[89]

As one commentator has said, "The legislative history of the 1967 waiver provision suggests two distinct rationales for its enactment: (1) providing California with the authority to address the pressing problem of smog within the state; and (2) the broader intention of enabling California to use its developing expertise in vehicle pollution to develop innovative regulatory programs."[90] The legislative history thus suggests that California should be given wide latitude to determine its own needs. The EPA Administrator's role is supposed to be narrow and deferential.

ii. Administrator Johnson's Reliance on Legislative History

In his Notice of Denial, Administrator Johnson attempted to use legislative history to demonstrate that the Ninetieth Congress gave California leave to enact strict emissions regulations because of California's particularized, inherently local pollution problems and early efforts to regulate emissions. In order to demonstrate that the waiver provision was intended to address only localized problems in California, Administrator Johnson cited a House Report from 1967 speaking of "[T]he unique problems faced in California as a result of its climate and topography."[91] This would tend to support his position, except the rest of the sentence he quotes gives a different meaning. In relevant part, the sentence reads:

> [I]n recognition of the unique problems facing California as a result of its climate and topography, the committee has provided that upon a showing by California that it requires more stringent standards than the nationwide standards otherwise applicable, the Secretary may prescribe standards with respect to such State more stringent than, or applicable to emissions or substances not covered by, the national standards.[92]

It is apparent from the legislative history that California was not required to show "compelling and extraordinary conditions" in order to invoke the waiver provision, but rather that Congress had already determined that California already had demonstrated compelling and extraordinary conditions. "[O]nly the State of California has demonstrated compelling and extraordinary circumstances sufficiently different from the Nation as a whole to justify standards on automobile emissions which may, from time to time, need be more stringent than national standards."[93] Thus, the textual analysis is supported by this analysis of the legislative history of Section 209.[94] The entire inquiry into the existence of compelling and extraordinary conditions that Administrator Johnson made in his waiver denial thus was improper.

D. Administrator Johnson's Decision Was a Significant, Unreasoned Departure from Prior Agency Interpretation and Practice

Section D discusses prior EPA interpretation of Section 209 and concludes that the denial of California's Waiver Application was a significant departure from prior agency interpretation of the agency's role in the waiver process and the level of deference given to California. Administrator Johnson did detail EPA's reason for its new, different standard in regulating greenhouse gas emissions, but the reason is nonsensical and contrary to the plain meaning and legislative intent of the statute. Accordingly, Administrator Johnson's change in course was a significant, unreasoned departure from prior agency interpretation and practice.

The important question raised in this Section is not whether Administrator Johnson's decision itself was arbitrary and capricious, but rather whether the level of deference given to California's fact-finding flies in the face of agency precedent. In the past, EPA had given California wide latitude in determining for itself whether there existed compelling and extraordinary conditions for which California needed stricter emissions standards than the federal standards. For example, in 1975 the Secretary (now Administrator), in granting a California Waiver Application, stated that "Congress meant to ensure by the language it adopted [in Section 209] that the Federal government would not second-guess the wisdom of state policy here."[95] This construction of the statute is supported by a plain textual analysis.[96] California better knows its own environmental conditions than does the federal government, so Congress wrote the statute to require deference to California's determination of the need for stricter emissions standards. So, if California believes

that it has compelling and extraordinary circumstances, then historically the EPA will not look into this judgment and pick it apart. Here, however, Administrator Johnson spent copious amounts of time arguing that damage from global warming is fundamentally global and California's injury would not be much greater than other parts of the country.[97] Administrator Johnson attempted to circumvent the argument that his interpretation is inconsistent with prior EPA practice, but his argument fails.

An agency's decision must not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[98] An agency generally must follow its own precedents, and must justify a departure from prior precedent or practice.[99] Additionally, in *Skidmore v. Swift & Co.*, the Supreme Court stated that:

> [T]he rulings, interpretations and opinions of the Administrator under [the Fair Labor Standards Act], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, **its consistency with earlier and later pronouncements**, and all those factors which give it power to persuade, if lacking power to control.[100]

A reviewing court will thus look to past agency interpretations of a statute as a factor in determining whether the challenged interpretation is correct.[101] In past practice, EPA treated California's findings of fact as to the existence of compelling and extraordinary circumstances as virtually conclusive. Here, however, Administrator Johnson sought to deny the waiver by questioning the existence of compelling and extraordinary circumstances in California. To do this, he had to find a way around the precedents set by prior agency practice.

Administrator Johnson attempted to circumvent the problem of prior EPA practice by calling for an independent evaluation of those portions of California's greenhouse gas emissions standards on the ground that global warming is a global problem and previous Waiver Applications had dealt with pollutants that had bearing only on localized problems for California.[102] EPA's regulations, codified in the Code of Federal Regulations, essentially mirrored Section 209 and provide no additional guidelines or criteria for granting or denying a Waiver Application.[103] EPA's own prior interpretations thus constitute the only available agency guidance as to how Section 209 should be interpreted. Administrator Johnson posited that, "EPA believes that in the context of reviewing California [greenhouse gas] standards designed to address global climate change, it is appropriate to apply the [Section 209(b)(1)(B)] separately."[104] This standard of independent judgment regarding the compelling need for greenhouse gas emissions regulations is a departure from prior agency precedent, as an independent judgment standard had never previously been applied to particular portions of California's Waiver Applications. In fact, the EPA Administrator rejected such a construction in 1984, finding that EPA is precluded from viewing proposed California vehicular particulate matter standards in isolation from other emission standards in the application.[105] Administrator Johnson sought to justify this departure from prior agency precedent, but his argument fails.

It does not necessarily follow that because global warming is global in nature, California's asserted need for greenhouse gas emissions regulation should be evaluated independently. The plain words of the statute indicate that the Waiver Application must be considered as a whole, not in separate and distinct parts.[106] Administrator Johnson's decision is voidable on the ground that it violates the plain meaning of the statute and therefore violates Administrative Procedure Act's mandate that an administrator's decisions not be violative of law.[107] Additionally, this new interpretation is afforded less deference by courts because it is a departure from longstanding agency interpretation. This departure from prior agency precedent allowed Administrator Johnson to evaluate the existence of compelling and extraordinary circumstances, a matter that had in all previous Waiver Applications been left to California to determine on its own.

E. Even Under the EPA's "Independent Judgment" Standard, California Has Demonstrated Compelling and Extraordinary Conditions, and Administrator Johnson Did Not Meet His Burden of Rebutting California's Findings of Fact

This Section considers whether Administrator Johnson successfully rebutted the presumption in favor of California's findings of fact and concludes that he did not. California made a determination of the existence of compelling and extraordinary circumstances. In a Waiver Application, California's determination that it complies with Section 209 is presumed to satisfy the waiver requirement, and the burden of proving otherwise is on the party seeking to attack the Waiver Application.[108]

In its Waiver Application, California submitted findings of fact demonstrating that there are compelling and extraordinary circumstances that necessitate the regulation of greenhouse gas emissions in California. A summary follows:

> [T]his rulemaking record does provide strong evidence for extraordinary and compelling conditions in California due solely to global warming from greenhouse gas emissions. In particular, while

> California's coastal resources are threatened like those in other states, California is particularly vulnerable to saltwater intrusion from sea-level rise, levee collapse, and flooding in the Bay-Delta area, which would severely tax California's increasingly fragile water-supply system. The predicted decrease in winter snow pack would exacerbate these impacts by reducing spring and summer snowmelt runoff critical for municipal and agricultural uses, a situation further strained by fish and wildlife considerations.… Also, of course, California's high ozone levels (clearly a condition Congress considered) will be exacerbated by higher temperatures from global warming. Even if we accepted the commenter's contention, then, California's circumstances are no less extraordinary and compelling than those it faced when Congress first recognized and provided for California's separate motor vehicle emission control program.[109]

Another commenter said:

> Intense weather patterns are—and will continue to impact Californians—heat, wildfire seasons are no longer seasons, they're year-round, they've never stopped the red-flag alert this year; and floods. Expensive adaptations are affecting our State budget, whether it's for the legal responsibility to take care of 1600 miles of levees or the local government impacts on fire services. Healthcare costs are rising. Sea-level rise is a real concern along our 1100-mile coastline in California.[110]

These statements exemplify the bulk of the evidence and are sufficient to shift the burden to the party seeking to attack the Waiver Application.

EPA's own publicly available documents detail particularized harm that California likely will suffer as a result of global warming:

> Based on projections given by the [IPCC] and results from the United Kingdom Hadley Centre's climate model…, by 2100 temperatures in California could increase by about 5°F…in the winter and summer and slightly less in the spring and fall. Appreciable increases in precipitation are projected: 20-30%…in spring and fall, with somewhat larger increases in winter.[111]

This same report notes, "One study estimates that a 3°F warming could almost double heat-related deaths in Los Angeles" and notes many other significant impacts that would affect California uniquely.[112]

By contrast, Administrator Johnson's statements claiming that California does not have compelling and extraordinary statements appear as conclusory statements that global warming is a global problem and thus California's situation is not compelling and extraordinary.[113] These conclusory statements are not grounded in fact and are therefore insufficient to rebut the presumption in favor of California's fact-finding determinations.

F. Administrator Johnson May Have Been Improperly Influenced by Bush Administration Officials[114]

Very quickly after Administrator Johnson sent his December 19, 2007 letter to Gov. Schwarzenegger, key members of Congress wrote letters to Administrator Johnson announcing their intent to open an investigation into the propriety of his decision.[115] On May 19, 2008 the House Oversight Committee released a memorandum (the "Memorandum") summarizing its findings.[116] The Memorandum found that EPA staff unanimously supported the granting of the Waiver Application, that Administrator Johnson himself originally supported the granting of the Waiver Application, and that Administrator Johnson reversed his position after communications with Bush Administration officials.[117] The Memorandum concludes:

> It appears that the White House played a significant role in the reversal of the EPA position. This raises questions about the basis for the White House actions. The Clean Air Act contains specific standards for considering California's petition. It would appear to be inconsistent with the President's constitutional obligation to faithfully execute the laws of the United States if the President or his advisors pressured Administrator Johnson to ignore the record before the agency for political or other inappropriate reasons.[118]

The controversy surrounding the decision casts a dubious light on Administrator Johnson's decision. If it were true that he was improperly influenced by Bush Administration officials, then it would appear that he ignored his mandate to decide the Waiver Application on its merits and the denial of the Waiver Application would thus be tainted.

IV. Current State of Affairs

This controversy has undergone significant change since the beginning of the Obama Administration in January 2009. There has been a shift in EPA policy priorities under the Obama Administration in a manner that sug-

gests that reversal of Administrator Johnson's denial of the Waiver Application was likely and appropriate.

California's Waiver Application applied to 2009 and subsequent model year automobiles. At the time of publication of this Note, the 2009 and 2010 model year automobiles are already out on the market. Accordingly, this issue is moot with regard to the 2009 and 2010 model year automobiles. However, this issue has undergone significant changes in treatment by the federal government since the end of the Bush Administration and the beginning of the Obama Administration in January 2009. On January 21, 2009, Governor Schwarzenegger wrote a letter to President Obama requesting that the EPA act promptly and favorably on reconsidering California's Waiver Application.[119] On January 23, 2009, the United States Senate unanimously confirmed Lisa Jackson to succeed Andrew Johnson as EPA Administrator.[120] On January 26, 2009, President Obama directed the EPA to reconsider the California Waiver Application.[121] The EPA quickly carried out President Obama's mandate and found it appropriate to re-open the California Waiver Application docket for additional public comment.[122] In its Reconsideration Notice, the EPA overtly criticized the legality of former Administrator Johnson's denial of the waiver.[123] The Reconsideration Notice re-opened the notice and comment period, which closed on April 6, 2009.[124] Administrator Jackson sought comment on "(1) whether EPA's interpretation and application of section 209(b)(1) in EPA's March 6, 2008 waiver denial was appropriate, and (2) the effect of the March 6, 2008 denial on whether California's [greenhouse gas emissions] standards are consistent with section 202(a) of the Act, including lead time."[125] On January 23, 2009, on her first day at her new position, Administrator Jackson stated in a memo to all EPA employees her commitment to reducing greenhouse gas emissions as a top priority:

> The President has pledged to make responding to the threat of climate change a high priority of his administration. He is confident that we can transition to a low-carbon economy while creating jobs and making the investment we need to emerge from the current recession and create a strong foundation for future growth. I share this vision. EPA will stand ready to help Congress craft strong, science-based climate legislation that fulfills the vision of the President. As Congress does its work, we will move ahead to comply with the Supreme Court's decision recognizing EPA's obligation to address climate change under the Clean Air Act.[126]

On July 8, 2009, EPA granted the California Waiver Application with respect to the subsequent automobile model years.[127]

V. Conclusion

EPA's July 2009 reversal of its previous denial of the Waiver Application renders the pending actions[128] moot. However, it also suggests, as argued in this Note, that Administrator Johnson's decision to deny California's Waiver Application was deficient in that it clashed with the plain meaning of Clean Air Act Section 209, clashed with the legislative history surrounding the enactment of Section 209, was an unreasoned significant departure from prior agency precedent, and failed to rebut California's findings of fact that there exist compelling and extraordinary conditions for which the regulations are necessary. Due to the EPA's shift in policy priorities, however, California has been granted the authority to regulate greenhouse gas emissions in future automobile model years.

Endnotes

1. Lyndon B. Johnson, Remarks Upon Signing the Air Quality Act of 1967 (Nov. 21, 1967), *in* 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON, 1967, at 1067 (1968).
2. *See infra* text accompanying note 17.
3. Clean Air Act § 209, 42 U.S.C. § 7543 (1990).
4. *See generally* DAVID HUNTER, ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 639-649 (3rd ed. 2007); CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE IPCC, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY (Martin Parry et al. eds., 2007), *in* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, IPCC FOURTH ASSESSMENT REPORT: CLIMATE CHANGE 2007, *available at* http://www.ipcc.ch/ipccreports/ar4-wg2.htm; *but cf.* HEARTLAND INST., NATURE, NOT HUMAN ACTIVITY, RULES THE CLIMATE: SUMMARY FOR POLICYMAKERS OF THE REPORT OF THE NONGOVERNMENTAL INTERNATIONAL PANEL ON CLIMATE CHANGE 13-19 (S. Fred Singer ed., 2008), *available at* http://www.heartland.org/custom/semod_policybot/pdf/22835.pdf (stating that predictions of future global climate are unreliable and that sea levels are unlikely to rise).
5. *See* HUNTER, ET AL., *supra* note 4, at 633 ("Although areas of uncertainty still exist with respect to the ultimate impacts of climate change, dozens of scientific studies and real-time observations around the world clearly indicate that: (a) the earth's climate is changing; (b) that the changes are the result of human activity; (c) that the changes are happening at both a faster rate and with greater impacts than previously projected; and (d) that immediate action is needed to reduce greenhouse gas emissions and avoid reaching more harmful levels."); *see generally* CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE IPCC, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS (Susan Solomon et al. eds., 2007), *in* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, IPCC FOURTH ASSESSMENT REPORT: CLIMATE CHANGE 2007, *available at* http://www.ipcc.ch/ipccreports/ar4-wg1.htm; *see id.* at 665 ("Human-induced warming of the climate system is widespread. Anthropogenic warming of the climate system can be detected in temperature observations taken at the surface, in the troposphere and in the oceans."); *but cf.* HEARTLAND INST., *supra* note 4, at 2-13 (arguing that most modern global warming is due to natural, as opposed to anthropogenic, causes); MICHAEL CRICHTON, STATE OF FEAR (2004) (providing an informative and entertaining critique of the science behind the theory of global warming and the projected impacts thereof).
6. *See* HUNTER, ET AL., *supra* note 4, at 680 ("[I]n February 2001 President Bush announced that the United States would no longer support the Kyoto Protocol. The Bush Administration offered neither an apology nor an alternative, leaving Europeans and others furious at the unilateral shift.").

7. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 (1998).

8. *See* HUNTER, ET AL., *supra* note 4, at 680 ("Most European countries agreed to lower their emissions 8% below 1990 levels, while the United States agreed to a 7% reduction.… All of the reduction targets must be met over a five-year commitment period—from 2008 to 2012—which is to be followed by subsequent commitment periods and presumably stricter emission targets.).

9. *See id.* at 651 (listing "Road (automobile, trucks, etc.)" greenhouse gas emissions as constituting 9.9% of total greenhouse gas emissions by end use, tied for second percentage-wise (Deforestation 18.2%, Residential buildings 9.9%)).

10. T.A. Boden, et al., United States of America Fossil-Fuel CO2 Emissions, Carbon Dioxide Information Analysis Center, *available at* http://cdiac.ornl.gov/trends/emis/tre_usa.html (last visited Feb. 17, 2010).

11. Clean Air Act §§ 101-618, 42 U.S.C. §§ 7401-7671q (1990).

12. Massachusetts v. EPA, 549 U.S. 497, 499-500 (2007).

13. *Id.* at 500.

14. Clean Air Act § 202, 42 U.S.C. § 7521 provides:

> The [EPA] Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Clean Air Act § 202(a)(1), 42 U.S.C. § 7521.

15. Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44354 (July 30, 2008).

16. CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY AIR RESOURCES BOARD, REQUEST FOR A CLEAN AIR ACT SECTION 209(B) WAIVER OF PREEMPTION FOR CALIFORNIA'S ADOPTED AND AMENDED NEW MOTOR VEHICLE REGULATIONS AND INCORPORATED TEST PROCEDURES TO CONTROL GREENHOUSE GAS EMISSIONS: SUPPORT DOCUMENT Dec. 21, 2005, *available at* http://www.regulations.gov/fdmspublic/ContentViewer?objectId=090000648022f701&disposition=attachment&contentType=pdf [hereinafter "Waiver Application"].

17. *See* Section III(F) *infra*, pp. 26-27.

18. Clean Air Act § 209, 42 U.S.C. § 7543.

19. *See Problems and Progress Associated With Control of Automobile Exhaust Emissions: Hearings Before the Subcomm. on Air and Water Pollution of the Comm. on Public Works*, 90th Cong. 9 (1967) (statement of Sen. Thomas H. Kuchel).

20. Clean Air Act § 209, 42 U.S.C. § 7543.

21. *See, e.g.*, Gary Polakovic & Miguel Bustillo, *Davis Signs Bill to Cut Greenhouse Gases; Emissions: Vehicles Must Meet Tailpipe Standards in 2009. Auto Makers Promise a Fight*, L.A. TIMES, July 23, 2002, at A1.

22. Waiver Application, *supra* note 16.

23. *Id.* at 2 n.2.

24. *Massachusetts*, 549 U.S. 497 (2007).

25. Letter from William L. Wehrum, Acting Ass't Adm'r, to Catherine Witherspoon, Executive Officer, California Air Resources Board, Feb. 21, 2007, *available at* http://www.regulations.gov/fdmspublic/ContentViewer?objectId=090000648020a53b&disposition=attachment&contentType=pdf.

26. *Massachusetts*, 549 U.S. 497 (2007).

27. Clean Air Act § 209 requires the EPA Administrator to make his decision only "after notice and opportunity for public hearing…." Clean Air Act § 209(b)(1); 42 U.S.C. § 7543(b)(1).

28. California State Motor Vehicle Pollution Control Standards; Request for Waiver of Federal Preemption; Opportunity for Public Hearing, 72 Fed. Reg. 21260 (April 30, 2007), *available at* http://www.epa.gov/fedrgstr/EPA-AIR/2007/April/Day-30/a8168.pdf.

29. *Id.* at 21260.

30. California v. EPA, No. 07-1457 & 07-1462 (D.C. Cir. filed Nov. 8, 2007).

31. Letter from Stephen L. Johnson, Adm'r, Environmental Protection Agency, to Arnold Schwarzenegger, Governor, State of California, Dec. 19, 2007, *available at* http://www.regulations.gov/fdmspublic/ContentViewer?objectId=09000064803a1908&disposition=attachment&contentType=pdf.

32. *See* Brief of Plaintiff at 23-24, California v. EPA, No. 07-1457 (D.C. Cir. Jan. 15, 2008), 2008 WL 596715.

33. *See, e.g.*, Lisa Friedman, *EPA Rejects State's Bid For Tighter Climate Rules; Emissions: Brown, Schwarzenegger Vow To Overturn Decision*, L.A. TIMES, Dec. 20, 2007, at A6 ("The Environmental Protection Agency denied California's two-year-old request to exceed federal clean-air requirements…."); John M. Broder & Felicity Barringer, *E.P.A. Says 17 States Can't Set Greenhouse Gas Rules for Cars*, N.Y. TIMES, Dec. 20, 2007, at A1 ("The [EPA] on Wednesday denied California…the right to set their own standards for carbon dioxide emissions from automobiles.").

34. Clean Air Act § 307(b), 42 U.S.C. § 7607(b).

35. California v. EPA, No. 08-70011 (9th Cir. filed Jan. 3, 2008), *consolidated with* Sierra Club v. EPA, No. 08-70030 (9th Cir. filed Jan. 3, 2008) (consolidated actions dismissed Jul. 25, 2008 for lack of subject matter jurisdiction); California v. EPA, No. 1:07-CV-02024 (D.D.C. filed Nov. 8, 2007) (seeking to compel EPA either to grant or deny California's waiver request; voluntarily withdrawn by plaintiffs on Mar. 4, 2008); California v. EPA, No. 08-1063 (D.C. Cir. filed Feb. 19, 2008) (challenging December 19, 2007 EPA denial letter; dismissed based on preclusive effect of decision rendered in 9th Cir. action, *infra*).

36. Order, Schroeder, Leavy & Hawkins, JJ., California v. EPA (9th Cir. July 25, 2008) ("The December 19, 2007 correspondence from Stephen L. Johnson…to Arnold Schwarzenegger…is not a reviewable 'final action' of the Administrator under the Clean Air Act.").

37. California v. EPA, No. 08-1063, 2008 U.S. App. LEXIS 23112, at *1 (D.C. Cir. Oct. 8, 2008).

38. California v. EPA, No. 08-1178 (D.C. Cir. filed May 5, 2008), *consolidated with* New York v. EPA, No. 08-1179 (D.C. Cir. filed May 2008) and National Resources Defense Council v. EPA, No. 08-1180 (D.C. Cir. filed May 2008) (challenging EPA's March 6, 2008 denial of California's Waiver Application). In these three actions, a combined total of nineteen states (California, New York, Arizona, Connecticut, Delaware, Florida, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington) have sued the EPA together with numerous other environmental organizations, congressional members, and other petitioners and amicus curiae. These states have sued the EPA because they wish to adopt the California emissions standards in their own states. Clean Air Act § 177, 42 U.S.C. § 7507 permits states to adopt stricter automobile emissions standards than the federal standards if "such standards are identical to the California standards for which a waiver has been granted for such model year." Clean Air Act § 177, 42 U.S.C. § 7507

39. Arlington Cent. School Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006) ("When the statutory 'language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'") (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A., 530 U.S. 1, 6 (2000) (quotations omitted)).

40. *Id.*; Lamie v. United States Trustee, 540 U.S. 526, 530-31 (2004); U.S. Nat. Bank of Oregon v. Independent Ins. Agents of America, Inc., 508 U.S. 439, 462 (1993).

41. Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles [hereinafter "Notice of Denial"], 73 Fed. Reg. 12156 (Mar. 6, 2008).

42. Clean Air Act § 209(a), 42 U.S.C. § 7543(a).

43. For a discussion of federal preemption of municipal law, *see generally* 56 Am. Jur. 2d *Municipal Corporations, Etc*. § 173 ("The doctrine of preemption, a corollary to the Supremacy Clause of the Federal Constitution, provides that any municipal law that is inconsistent with federal law is without effect. Municipal regulations are preempted in one of three ways: (1) when Congress expressly preempts the regulation; (2) when Congress implicitly preempts a local regulation by regulating a certain area in a comprehensive fashion; and (3) when a local regulation conflicts with federal law, thus frustrating the purpose of the federal legislation (citations omitted)).

44. Clean Air Act § 209(b), 42 U.S.C. § 7543(b).

45. *See* Motor Vehicle Mfrs. Ass'n v. N.Y. State Dep't of Envtl. Conservation, 17 F.3d 521, 525 (2d Cir. 1994).

46. *See, e.g.*, Clean Air Act §§ 171, 216, 234 & 241, 42 U.S.C. §§ 7501, 7550, 7574 & 7581.

47. Clean Air Act §§ 201-250, 42 U.S.C. §§ 7401-7590.

48. Clean Air Act § 201, 42 U.S.C. § 7401.

49. Clean Air Act §§ 202-219, 42 U.S.C. §§ 7521-7554.

50. Clean Air Act § 216, 42 U.S.C. § 7550.

51. Clean Air Act § 202(a)(1), 42 U.S.C. § 7521(a)(1).

52. *Id.*

53. *Massachusetts*, 549 U.S. 497 (2007). *See* Section I *supra*, pp. 2-4.

54. Clean Air Act §§ 301-329, 42 U.S.C. §§ 7601-7628.

55. Clean Air Act § 302, 42 U.S.C. § 7602.

56. Clean Air Act § 302(k), 42 U.S.C. § 7602(k).

57. *See* Rapanos v. United States, 547 U.S. 715, 732 (2006) (using Webster's New International Dictionary to find definition of "water" where the Clean Water Act lacked a definition for the term).

58. American Heritage Dictionary of the English Language 427 (New College ed. 1976).

59. *Id*.

60. Clean Air Act § 202, 42 U.S.C. § 7521.

61. Clean Air Act § 209(b), 42 U.S.C. § 7543(b) (emphasis added).

62. *See, e.g.*, Jama v. Immigration & Customs Enforcement, 543 U.S. 335, 346 (2005) (explaining that the use of the term "may" typically connotes discretion).

63. Notice of Denial, *supra* note 41, at 12158 (emphasis added).

64. *See* Motor & Equipment Mfrs. Ass'n, Inc. v. EPA, 627 F.2d 1095, 1120 (D.C. Cir. 1979) ("That [the Administrator] must deny a waiver if certain facts exist does not mean that he must independently proceed to make the opposite of those findings before he grants the waiver regardless of the state of the record.").

65. Clean Air Act § 209(b)(1), 42 U.S.C. § 7543(b)(1) (emphasis added).

66. *Id*.

67. *Id*.

68. *See* 2A Sutherland Statutory Construction § 47:8 (7th ed.) ("Provisos serve the purpose of restricting the operative effect of statutory language to less than what its scope of operation would be otherwise.…[W]here there is doubt concerning the extent of the application of the proviso on the scope of another provision's operation, the proviso is strictly construed. The reason for this is that the legislative purpose set forth in the purview of an enactment is assumed to express the legislative policy, and only those subjects expressly exempted by the proviso should be freed from the operation of the statute."); *see also* Commissioner v. Clark, 489 U.S. 726, 739 (1989) ("In construing provisions such as § 356 [of the Internal Revenue Code of 1954], in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision.").

69. Clean Air Act § 209(b)(1), 42 U.S.C. § 7543(b)(1).

70. *Id*.

71. American Heritage Dictionary of the English Language 847 (New College ed. 1976). *See supra* note 58.

72. Notice of Denial, *supra* note 41, at 12168 ("[S]ection 209(b)(1)(B) also requires that conditions be 'compelling and extraordinary,' in particular with regard to California.").

73. Discussed in Section III(D) *infra*, pp. 20-23.

74. Notice of Denial, *supra* note 41, at 12158 (Administrator Johnson's interpretation "calls for EPA to exercise its own judgment to determine whether the air pollution problem at issue—elevated concentrations of [greenhouse gases]—is within the confines of state air pollution programs covered by section 209(b)(1)(B).").

75. Clean Air Act § 209(b)(1), 42 U.S.C. § 7543(b)(1) (emphasis added).

76. *Id.*

77. *Id.* (emphasis added).

78. Notice of Denial, *supra* note 41, at 12157.

79. In previous enactments, the section was originally numbered 208. Subsequent amendment moved the section to number 209.

80. Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 (1967) (codified as amended at 42 U.S.C. §§ 7543 *et seq.* (1990)).

81. *See Problems and Progress Associated With Control of Automobile Exhaust Emissions: Hearings Before the Subcomm. on Air and Water Pollution of the Comm. on Public Works*, 90th Cong. 334 (1967) (statement of Edmund D. Edelman, Councilman, 5th District, City Council of the City of Los Angeles).

82. *See id*.

83. *Problems and Progress Associated With Control of Automobile Exhaust Emissions: Hearings Before the Subcomm. on Air and Water Pollution of the Comm. on Public Works*, 90th Cong. 4 (1967) (statement of Sen. Thomas H. Kuchel).

84. James E. Krier & Edmund Ursin, Pollution & Policy 180-82 (1977).

85. *Problems and Progress Associated With Control of Automobile Exhaust Emissions: Hearings Before the Subcomm. on Air and Water Pollution of the Comm. on Public Works*, 90th Cong. 4 (1967) (statement of Sen. George Murphy, Member, S. Subcomm. on Air and Water Pollution).

86. Krier & Ursin, *supra* note 84 at 181 (1977).

87. *See Problems and Progress Associated With Control of Automobile Exhaust Emissions: Hearings Before the Subcomm. on Air and Water Pollution of the Comm. on Public Works*, 90th Cong. *passim* (1967).

88. Rachel L. Chanin, *California's Authority to Regulate Mobile Source Greenhouse Gas Emissions*, 58 N.Y.U. Ann. Surv. Am. L. 699, 716 (2003).

89. Air Quality Act of 1967, Pub. L. No. 90-148, § 208(b), 81 Stat. 485, 501 (1967) (prior to amendments).

90. Chanin, *supra* note 88, at 716 (2003).

91. H.R. Rep. No. 90-728 (1967), *as reprinted in* 1967 U.S.C.C.A.N. 1938, 1958.

92. *Id*.

93. *Id.* at 1956-57.

94. *See* Section III(B)(2) *supra*, pp. 12-16.

95. California State Motor Vehicle Pollution Control Standards: Waiver of Federal Preemption, 40 Fed. Reg. 23102 (May 28, 1975).

96. *See* Section III(B) *supra*, pp. 8-16.

97. Notice of Denial, *supra* note 41, at 12165-68.

98. Administrative Procedure Act of 1946, 5 U.S.C. § 706(2)(a) (1966).

99. Motor & Equipment Mfrs. Ass'n, Inc., 627 F.2d at 1105 (D.C. Cir. 1979.); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414 (1971).

100. 323 U.S. 134, 140 (1944) (emphasis added).

101. *Id.*; *see* Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993) ("the consistency of an agency's position is a factor in assessing the weight that position is due"); INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." (quoting Watt v. Alaska, 451 U.S. 259, 273 (1981))).

102. Notice of Denial, *supra* note 41, at 12158 (Administrator Johnson found "that it is appropriate to review whether California needs its [greenhouse gas] standards to meet compelling and extraordinary conditions separately from the need for the remainder of California's new motor vehicle program. I base this decision on the fact that California's [greenhouse gas] standards are designed to address global climate change problems that are different from the local pollution problems that California has addressed previously in its new motor vehicle program.").

103. 40 C.F.R. § 85.1605, removed and reserved by 73 F.R. 59178 on Oct. 8, 2008, provided, in part, "(a) The Administrator shall grant the authorization if California determines that California standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. (b) The authorization shall not be granted if the Administrator finds that…(2) California does not need such California standards to meet compelling and extraordinary conditions." 40 C.F.R. § 85.1604(a), (b)(2).

104. Notice of Denial, *supra* note 41, at 12161.

105. 49 Fed. Reg. 18887, 18890 (May 3, 1984).

106. *See* Section III(B)(2), *supra*, pp. 11-16.

107. Administrative Procedure Act of 1946, 5 U.S.C. § 706(2)(a) (1966).

108. *Motor & Equipment Mfrs Ass'n*, 627 F.2d at 1121 (D.C. Cir. 1979).

109. California Environmental Protection Agency Air Resources Board, Regulations to Control Greenhouse Gas Emissions From Motor Vehicles: Final Statement of Reasons, August 4, 2005, *available at* http://www.regulations.gov/fdmspublic/ContentViewer?objectId=090000648022f917&disposition=attachment&contentType=pdf.

110. *Hearing on the California Air Resource Board's Request For a Waiver of Preemption For Its Motor Vehicle Greenhouse Gas Standards*, 25-26 (statement of Former California Assemblywoman Fran Palvey) (May 22, 2007), *available at* http://www.regulations.gov/fdmspublic/ContentViewer?objectId=0900006480249beb&disposition=attachment&contentType=pdf.

111. United States of America Environmental Protection Agency, Climate Change and California, Sept. 1997, *available at* http://nepis.epa.gov/Adobe/PDF/40000IXM.PDF.

112. *Id*.

113. Notice of Denial, *supra* note 41, at 12163-68.

114. This Section summarizes accusations that Administrator Johnson may have been improperly influenced by Bush Administration officials; however, this Note makes no conclusions and passes no judgment on the issue of improper influence, but merely summarizes congressional committee findings.

115. *See* Letter from Nancy Pelosi, Speaker of the H., to Stephen L. Johnson, EPA Adm'r (Dec. 21, 2007), *available at* http://www.regulations.gov/fdmspublic/ContentViewer?objectId=0900006480384cf9&disposition=attachment&contentType=pdf ("The actions of the EPA in denying the California request cannot help but raise serious questions about the support of the Bush Administration for state efforts to safeguard the environment and the health of their residents. As we discussed, your decision will be challenged immediately in the courts and will be carefully scrutinized by the Congress as well."). Letter from Henry A. Waxman, Chair. of H. Comm. on Oversight & Gov't Reform, to Stephen L. Johnson, EPA Adm'r (Dec. 21, 2007, *available at* http://www.regulations.gov/fdmspublic/ContentViewer?objectId=0900006480382261&disposition=attachment&contentType=pdf ("Your decision appears to have ignored the evidence before the agency and the requirements of the Clean Air Act. In fact, reports indicate that you overruled the unanimous recommendations of EPA's legal and technical staffs in rejecting California's petition. Your decision not only has important consequences to our nation, but it raises serious questions about the integrity of the decision-making process. Accordingly, the Committee has begun an investigation into this matter.").

116. Memorandum from Comm. on Oversight and Gov't Reform, Majority Staff to H. Comm. on Oversight & Gov't Reform (May 19, 2008), http://www.oversight.house.gov/images/stories/documents/20080519131253.pdf.

117. *Id*. at 1.

118. *Id*. at 20.

119. Press Release, Gov. Arnold Schwarzenegger, Governor Schwarzenegger Sends Letter to President Obama Urging Reconsideration of California's Waiver Request for Cleaner Cars (Jan 21, 2009), *available at* http://gov.ca.gov/index.php?/print-version/press-release/11404.

120. Biography of Administrator Lisa Jackson, http://www.epa.gov/administrator/biography.htm (last visited Mar. 14, 2009).

121. Memorandum for the Administrator of the Environmental Protection Agency, 74 Fed. Reg. 4905, 4905-6 (Jan. 28, 2009). (Pres. Obama writes, "[Y]ou are hereby requested to assess whether the EPA's decision to deny a waiver based on California's application was appropriate in light of the Clean Air Act. I further request that, based on that assessment, the EPA initiate any appropriate action.").

122. Reconsideration of Previous Denial of a Waiver of Preemption, 74 Fed. Reg. 7040 (Feb 12, 2009).

123. *Id*. at 7041 ("The denial was a substantial departure from EPA's longstanding interpretation of the Clean Air Act's waiver provisions.").

124. *Id*.

125. *Id*. at 7042.

126. Memorandum from Administrator Lisa Jackson to EPA Employees, (Jan. 23, 2009), *available at* http://www.epa.gov/administrator/memotoemployees.html.

127. Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 74 Fed. Reg. 32744 (July 8, 2009).

128. *See supra* note 40.

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Moving New York Towards a Clean Energy Future: The Critical Role of Solar

By Jennie L. Shufelt, Jessica Reinhardt, and Julie Sanchirico

Growing public and political concern over the potentially devastating consequences of climate change, together with an increasing resolve within the United States to become energy independent, have heightened awareness of the need to shift to an energy system built around clean, renewable, and domestic sources of energy. As a result, investment in alternative energy research, development, and implementation has increased exponentially over the past few years. Researchers and the energy sector are exploring a myriad of new energy production and storage technologies in the hopes of building a new energy economy.

Several states, including New York, are leading the charge towards this new energy economy by aggressively pursuing substitute methods of electricity generation other than fossil fuels. For New York, a shift towards clean energy will likely require the widespread implementation of a range of alternative energy technologies. Among these, solar energy is uniquely suited to meet New York's energy needs and is likely to become a major electricity source for the state. Solar technology, which harnesses the sun's energy for human consumption, has the potential to provide New York with a clean, environmentally friendly energy supply, and to spur economic growth and job security within the state.

This article explores the challenges and benefits to solar energy production and argues that, due to the unique benefits of solar in comparison to other alternative energy options, solar power has the potential to become a leading source of electricity in New York. Section 1 briefly describes solar technologies and provides an overview of relevant law and policy. Section 2 details the multitude of benefits associated with solar, including both the benefits of solar as an alternative energy, as well as the unique benefits of solar not associated with other alternative energy sources. Finally, Section 3 discusses some of the challenges associated with solar technology.

Section 1: Solar Technology and Policy Overview

Solar energy encompasses all methods used to convert sunrays into usable energy.[1] Solar technologies, which obtain energy by way of direct sunlight or heat,[2] can be divided into several, albeit non-exclusive, categories: (1) passive, (2) active, and (3) concentrating.[3] Passive technologies require no energy conversion for use. Rather, they incorporate the sun with an intentional architectural design.[4] Active methods, in contrast, harness and either store or convert solar energy for use.[5] Two active solar energy systems are thermal and photovoltaic (PV). Typically, thermal systems employ the sun's heat to power devices or mechanisms using a conductive fluid.[6] In contrast, PV systems produce usable energy with solar cells containing semiconductors that convert solar energy into electric current.[7] Solar cells combined with others form modules, which when grouped, form arrays. PV systems are frequently on grid (utility connected) and located on rooftops. Finally, concentrating systems are active systems that focus solar energy with mirrors or lenses to increase its intensity.[8] Concentrating systems frequently incorporate either thermal or PV technologies and are, thus, more complicated. On a larger scale, concentrating solar systems can generate vast amounts of usable energy.[9]

History of Solar Energy and Policy

Although solar technology has long been available, it was not until the 1970s energy crisis that the federal government focused attention on alternative energy development.[10] During this time, several solar research and development support programs were established.[11] In addition, the federal government began to offer tax credit incentives for solar energy system installation.[12] Symbolizing strong support of solar energy, President Carter installed solar heating panels on the White House roof.[13]

Unfortunately, solar energy's forward momentum halted in the 1980s when oil prices fell and the Reagan administration took over.[14] Reduced research funding, reduced tax incentives, and the dismantling of the White House solar heating system evidenced a clear lack of solar support. As a result, solar energy progressed slowly during the late '80s and early '90s. In the mid to late '90s, renewed recognition of solar energy's importance led to an increase in supportive government activity.[15] The 1992 Energy Policy Act required states to consider energy planning alternatives including combinations of alternative energy sources.[16] Also, in the late '90s, residential systems were the focus of President Clinton's "Million Solar Roofs" Initiative.[17]

At the federal level, support for development of solar energy currently continues to increase. Tax incentives encourage growth in the PV installation industry,[18] including a 30% federal tax incentive for qualifying solar system installation.[19] The Renewable Energy Production Incentive (REPI)[20] provides incentives for renewable energy electricity produced and sold by qualified renewable energy generation facilities.[21] Several recently enacted laws also demonstrate renewed solar support in Congress. The Energy Interdependence and Security Act of 2007 (EISA) was adopted with the express goal of advancing renewable energy electricity sources, including solar.[22] In addition, the American Recovery and Reinvestment Act of

2009 gives owners of eligible solar energy projects a size proportional tax credit for the system's first ten years.[23]

New York's Solar Law and Policy

New York shows strong solar energy policy support. The state's Renewable Portfolio Standard (RPS) requires a minimum percentage of the state's energy consumption to come from renewable energy.[24] In 2004, New York adopted an RPS goal of 25% of renewable energy use by the year 2013.[25] The RPS includes residential PV solar systems.[26] New York's RPS will help give solar energy technology a stronger presence in New York's energy market.[27] Additionally, New York's RPS offers a Solar Electric Incentive Program that provides cash incentives for approved applicants installing eligible solar electric or PV systems.[28] Net metering is another important statutory incentive in New York for solar energy.[29] For on-grid solar systems, net metering allows excess solar energy to be sold back to the electric utility.[30] In essence, the grid acts like a battery, backing up the solar system when the sun is low.[31]

In addition, New York participates in the Regional Greenhouse Gas Initiative (RGGI), a ten-state "cap and trade" program aimed at reducing electric power provider greenhouse gas emissions.[32] RGGI requires New York's energy providers to have enough allowances to cover their GHG emissions or they must purchase other providers' unused allowances.[33] RGGI supports New York's solar technology market because it encourages utilities to pursue emission-free technologies like solar energy and also provides funding for alternative energy development.[34]

New York also supports a market for voluntary green power providers.[35] New Yorkers are able to choose an alternative Energy Service Company (ESCO) instead of their regular utility provider. Thus, customers can choose a service company that incorporates solar energy technologies.[36] The New York Public Service Commission's website contains a list of ESCOs and also generally provides green power information to consumers.[37] Finally, the New York State Energy Research and Development Authority (NYSERDA) offers various incentives under its "Energy $mart" program.[38] For example, the "Energy $mart" program offers reduced interest rate loans, which offset a substantial percent of PV system installation costs.[39] These loans are usually available for residential and non-residential construction and renovation.[40]

Solar Policy Outlook

Solar energy is within the future focus of both the Federal government and New York. The passage in the House of the American Clean Energy and Security Act of 2009 (ACES) is an indication that global warming is now considered a real and serious threat.[41] New York is moving in a similar solar direction. On October 5, 2009, Governor Paterson announced the creation of the New York Energy Policy Institute (NYEPI) as an effort to coordinate ongoing research projects in New York and to provide a valuable energy resource to policymakers.[42] Two days later, Governor Paterson announced an expansion of New York's solar energy funding[43] to include ten million dollars for New York State solar projects via competitive statewide solicitation.[44] According to Governor Paterson, "statewide interest in developing our solar energy production is proof that New York is fertile ground for the clean energy economy."[45] Furthermore, he said that New York is becoming a "global leader in renewable energy resources and energy efficiency, and by doing so creating a self-sustaining economy that will put people to work and can export technology around the world."[46]

Section 2: The Benefits of Solar

Alternative energy technologies such as solar have the potential to yield numerous important benefits for New York State. The benefits of alternative energy include environmental benefits, such as a reduction in carbon dioxide emissions, increased energy independence, and economic stimulus and job creation. In addition, solar technology in particular yields unique benefits that make it particularly suitable for New York State, including both the ability of solar to generate significant amounts of electricity during times of "peak demand," and to be located at the point of utilization.

Solar as a "Green Energy"

Like many other alternative energy sources, solar energy is considered a "green energy" because, unlike electricity generated from burning fossil fuels, solar energy systems are not a significant source of greenhouse gas emissions. Research has demonstrated that these greenhouse gases are causing global warming.[47] The Intergovernmental Panel on Climate Change (IPCC) concluded in its 2007 report that "[w]arming of the climate system is unequivocal."[48] According to the IPCC report, if warming continues at the projected rate, significant impacts, such as sea level rise, decreased snow cover, substantial, if not complete, melting of sea ice, increased frequency of heat waves, heavy precipitation, typhoons and hurricanes, and changes in wind and temperature patterns are expected.[49] Relying on the work of the IPCC and other scientists, the Environmental Protection Agency recently released an "Endangerment Finding" for greenhouse gases in accordance with the Clean Air Act. The Endangerment Finding "recognizes that human-induced climate change has the potential to be far-reaching and multi-dimensional."[50]

Fossil fuels also release particulate matter into the air when they are burned, regardless of efforts to reduce such emissions.[51] Among other things, such emissions affect the environment in the form of smog, which poses a serious health risk.[52] Again, because the generation of solar power is not reliant upon combustion, the energy produced does not contribute to air pollution. With a rap-

idly expanding world economy, and the strong growth in highly populated areas, the demand for energy is increasing at an alarming rate.

Energy Independence

Over the past few years, the state has experienced fluctuating (and oftentimes very high) energy prices. Analysts point to cyclical growth in U.S. energy consumption or surging demand from China, India, and other rapidly industrializing countries to explain this trend. When combined with existing demand from Europe, Asia, and elsewhere, these increases have outpaced any gains in global production and reduced excess capacity to near zero.[53] Economic development will continue in China and India, with their need for oil growing as fast as their economies.[54]

At present, the world's oil wealth remains concentrated in a relatively few countries. Four of the five nations with the largest oil reserves are in the Middle East: Saudi Arabia, Iran, Iraq, and Kuwait at 104 billion barrels.[55] As such, a large portion of the world's oil reserves are outside the easy reach of markets like those of the United States because such countries exercise their power over the global market by restraining investment. In addition, the volatile relationship that the U.S. has with many Middle Eastern countries has also contributed to the lack of access to such fuel reserves; arguably, this has contributed to increasing fuel prices.

In contrast, alternative energy sources like solar, which are situated to produce electricity domestically, are less vulnerable to international energy politics and constraints. This is particularly true for solar because the sun is not limited to specific regions as are other energy sources. Therefore, a concentration on developing solar energy could enable the United States and New York to move towards energy independence, driving down costs and potentially decreasing the need for United States' presence in a hostile region.

Solar as an Economic Stimulus

As power demands increase, New York must be able to continue to provide reliable sources of energy at low costs. Reliance on imported fossil fuels, and the instability of prices inherent in the fossil fuel market, is untenable. The need for a stable and low-priced electricity source is heightened in the current economic downturn. A shift towards alternative sources of energy will help stimulate the economy by providing low-cost energy to the consumer, decreasing U.S. dependence on volatile fossil fuel markets, and create a new and ample job market. Because solar energy utilizes sunlight to produce electricity, the "fuel" is free and is not subject to volatile markets for fuel such as natural gas and oil. In recent years, such volatility has hurt consumers with skyrocketing fuel costs, contributing to the current economic instability.[56] In contrast, solar energy ensures price stability relative to other such energy sources.

Solar energy systems can be sited close to where the electricity is used and usually require much shorter distribution lines than those needed to bring power from the utility grid.[57] In addition, solar energy systems eliminate the need for a transformer to "step down" the power from utility lines. Less wiring means lower transmission costs, including shorter construction times and reduced permitting paperwork, which is a particular problem in densely populated urban areas such as New York City where space is scarce and energy demand is high.

Unlike oil and natural gas systems, solar energy systems are easy and inexpensive to maintain. Such systems often have no moving parts so visual checks and battery servicing are enough to keep them up and running.[58] Furthermore, because manufacturers test solar panels for hail impact, high wind and freeze-thaw cycles representing year-round weather conditions, weather damage is no more of a threat to solar energy systems than other types of energy production systems. In fact, solar energy systems were developed for use in space where repairs are extremely expensive, if not impossible. As a result, these systems are highly reliable because they are intended to operate for long periods of time with virtually no maintenance.[59]

In addition to providing low-cost energy to consumers, the solar energy industry has a positive and direct impact on various facets of U.S. commerce and New York State economic development. As of 2006, the U.S. solar industry employed more than 30,000 men and women in high-value, high-tech jobs representing about 300 companies, universities and utilities.[60] Furthermore, with technological innovations lowering costs, the industry is expected to grow toward a workforce of 150,000 by 2020.[61] Jobs associated with the solar energy industry include engineering, science, management, architecture, construction, sales, finance, research, manufacturing, training, education and installation. Manufacturing is especially vital to struggling upstate economies which have seen the job market significantly decline as a result of outsourcing and relocation of manufacturing plants outside of New York. As solar energy costs decrease, such markets will continue to open up across the country and the state.

Solar energy's potential economic development opportunities have been recognized by legislative and regulatory authorities throughout New York and the country. Policy initiatives incentivizing the implementation of solar energy systems have been regularly adopted in recent years. For example, NYSERDA manages a state rebate program for eligible solar energy system installers in order to increase the network of eligible installers throughout the state.[62] In addition, the New York Public Service Commission implemented the renewable portfolio standard which requires utilities to purchase a certain percentage of their electricity from solar energy producers.[63]

The economic benefits of solar cannot be overlooked, particularly in the current economic climate. The potential for significant job creation, the establishment of new markets, and the stabilization of energy prices, should make solar energy development a priority for New York.

The Unique Benefits of Solar: Place and Time

Given the convergence of public concern about the threat of climate change and the consequences of a continued reliance on imported fossil fuels, it is clear that New York must shift from a primarily fossil-fuel based economy to one built on clean technology. Over the coming years, the range of possible alternative energy technologies will compete for market share in this new clean energy economy. While the ultimate solution will likely require a combination of multiple alternative energy sources, there will clearly be "winners" and "losers" in the race for market share. The exact mix of alternative energies will likely vary across the country, depending on the local climate, available incentives, and the unique benefits and downfalls of the various alternatives. For New York State, solar technology appears to be positioned to gain a prominent place in New York's new energy economy. Solar technology is associated with a number of benefits, in addition to those common to all alternative energies, that make it uniquely beneficial and appropriate for New York State. Solar energy, unlike other alternative energies, can be generated on site, without the need for costly transmission lines. The current electric grid in New York State, as well as across the United States, is outdated. Large increases in electric use, outdated technology, and the structure of U.S. electricity markets, have all placed enormous strain on the grid and led to increasing grid failures.[64] Alternative energy generation, particularly on a commercial scale,[65] places significant additional strains on the grid. This is true for commercial solar energy plants as well. Solar energy plants must be located where a) the sun shines enough to make the plant economically viable; and b) where there is enough open space to accommodate the large numbers of solar panels that would be required for significant generation capacity.[66]

An added problem for commercial generation in New York is that, while the amount of sun does not vary widely across the state, the amount of available land does. In New York, the majority of the state's electricity is *consumed* in New York City and on Long Island. Adequate space for a solar power plant, however, only exists in upstate and western New York. Of course, "[e]lectricity is and always can be transmitted long distances over high-voltage transmission lines."[67] However, as discussed above, the transmission system is already strained, so adding to the transmission requirements on the grid is challenging. Building new transmission lines can be very costly and often suffers under significant public (local and regional) opposition. In addition, the construction of new transmission lines typically faces a number of legal impediments, including environmental review under the National Energy Policy Act (NEPA),[68] the inconvenience of negotiating access through private property and emboldened communities,[69] and the now-stigmatized dilemma of obtaining rights-of-way through the use of eminent domain authority.[70]

While transmission challenges are common across all energy production sources, solar technology's capacity to be installed on site (*i.e.*, at the end-user's location) can avoid such transmission challenges. This distributed generation capability "reduces energy losses in transmission and distribution lines, provides voltage support, reduces reactive power losses, defers substation upgrades, defers the need for new transmission capacity, and reduces demand for spinning reserve capacity."[71] The avoidance of the need for additional transmission capacity is particularly beneficial in states such as New York, where the siting of new transmission lines to New York City is controversial and will face significant roadblocks.

Distributed generation is also beneficial for rural areas. Getting electricity to remote areas is difficult due to transmission impediments, *e.g.*, lack of power lines. However, because solar energy systems can be sited at the point of use, the need for transmission is limited. This ability enables remote areas to power equipment used for environment and security monitoring, as well as communication devices such as cell towers and "help" boxes along highways. Finally, solar energy systems generate the most electricity during peak demand periods. The demand for electricity is at its greatest in the middle of the day during the summer months due to an increased use in air conditioners.[72] For example, the northeast blackout in 2003 was the result of an overwhelming demand for electricity on a hot summer day without the supply required to meet such demand. It is at these times when solar energy is best suited to produce electricity because the intensity of the sun's rays is at its peak.

Section 3: Challenges to Solar Energy

While there are clearly many benefits associated with solar energy, the movement towards an energy economy that increasingly relies on solar energy must also overcome a number of challenges, including cost, the intermittent nature of solar technology, and property disputes.

Cost

Although the operating costs of a solar energy system after installation are very low, its up-front costs are significant, making solar energy overall more costly than traditional energy sources such as coal.[73] According to Marty Hoffert, "in spite of dramatic cost declines for solar and wind technologies, these generation technologies for the most part remain more costly today than electric generation from fossil fuels, especially in the case of photovoltaics."[74] A typical residential 5 kW system in New York costs approximately $40,000 before incentives.[75]

The argument that solar should not be pursued because it is not "cost efficient" is somewhat circular, however, because the cost of new technologies typically declines with increased market volume.[76] In essence, it is precisely because solar is not widely used that it is so expensive. Furthermore, advances in technology will continue to decrease the cost of solar. For example, recent advances in "thin-film" technology have resulted in the development of panels that are approaching grid parity. According to Hoffert, "[t]he potential of PV, and the magnitude of the solar resource, is too great to be deterred by presently high costs." [77]

Intermittence

One of the most widely cited downfalls of solar technology is its intermittent nature (*i.e.*, electricity is only produced when the sun is shining on the panels).[78] Intermittence is a problem because electricity is, for the most part, not stored. Rather, power is continually produced as it is consumed, with certain "base-load" facilities providing a stable and predictable amount of power. That power is supplemented by intermediate-load plants and peak-load plants.[79] The electricity grid is also supplied by "variable must-run plants," which is where renewable power sources such as solar come into play. Variable must-run plants are renewable-based plants that are economical to use for base load, intermediate load, or peak load, but only if certain conditions are met (*e.g.*, it is economical to use a solar plant on a sunny day).[80] This reliance on the fulfillment of certain conditions (*e.g.*, sunshine) is what prevents solar from making a significant dent in the "base load" of New York's power supply. As Fred Bossleman put it, "the electric utility must be able to supply [electric] instantaneously, and if... the sun isn't shining... other reliable sources must be there to replace the unreliable sources."[81]

Without massive storage capacity, the intermittence of solar requires utilities to manage supply and demand imbalances. While this management is fairly simple when the percentage of power coming from intermittent sources is low, intermittency becomes a significant challenge as the proportion of power coming from these sources becomes more substantial.[82] According to Edna Sussman, "[i]t has been estimated that solar photovoltaic rooftop panels can supply 10% of grid electricity without creating grid management problems."[83] Going beyond that, however, does not seem feasible without technological advances in storage, transmission and distribution of electricity, and the implementation of "smart" grid technologies.[84]

While cost-efficient energy storage technologies already exist (*e.g.*, elevated water), they do not currently exist on a scale adequate to accommodate significant increases in solar. Furthermore, these "natural" storage technologies are not practical for customer-sited small-scale renewable.[85] The most likely alternative for customer-sited solar is battery storage. However, batteries can be expensive, do not have a long life span, and add significantly to the greenhouse gases associated with the renewable energy system.[86] While these storage issues clearly present significant challenges, they should not deter movement toward a solar energy market. Rather, policy makers should package incentives for adoption and diffusion of existing technology with significant funding to support research and development into storage options.[87] Unfortunately, to date, "R&D programs have exhibited roller-coaster funding cycles, at times doing more harm than good to sustained development and deployment of specific technologies."[88]

Individual Property Disputes

As discussed previously, the transmission challenges that often plague commercial scale electric generation projects can be overcome by focusing on customer-sited solar energy. This distributed generation approach, however, faces its own challenges. Edna Sussman introduces the private property controversies that surround solar panel installation on private residences with the following story: "Al Gore, former Vice President and global warming activist, was blocked from installing solar panels on his home. Local code requirements simply did not permit it. It took months to amend the local code, which was based on considerations unrelated to solar power, so that he could proceed."[89]

Similar property rights issues, zoning restrictions, and private covenants may complicate the widespread adoption of solar technology through customer-sited systems in New York.[90] For the most part, there is currently no pervasive legal framework in place to assure that a property owner who invests in solar will be able to secure long-term "rights" to the sun's rays. This is particularly problematic in light of the large up-front costs associated with solar technology.[91] Recognizing the many types of individual property disputes that can arise in relation to the installation and operation of a solar electric system (SES), states and municipalities have begun to experiment with a number of possible solutions.

Many states have enacted statutes that govern "sunlight rights" through a) prior appropriation-like approaches; b) incorporation of sunlight access in zoning rules; and c) providing for sunlight easements.[92] For example, California's 1978 Solar Shade Control Act protects solar energy systems against obstruction resulting from trees and foliage that were planted or grew after installation of the system. California has also provided for "sunlight" easements and "declared void all covenants, restrictions or conditions which effectively prohibit or restrict SES's, and prohibited local ordinances from unreasonably restricting the use of SES's."[93] Furthermore, at least one court has signaled that obstruction of a solar

energy system may give rise to a cause of action for private nuisance.[94] The courts have also struck down private covenants that prohibit PV systems on public policy grounds.[95]

According to Sara Bronin, a successful legal framework for recognizing "solar rights" must a) take into account sunlight's natural characteristics, b) clarify both the "holder" of the solar right and the nature of that right, c) allocate sunlight based on principles of beneficial use,[96] and provide for adequate compensation to burdened landowners.[97] Bronin turns to water rights allocation systems as a potential model for allocating solar rights, finding many similarities between water and solar as natural resources. For example, because solar rays reach the United States at an angle (and, as a result, usually must travel across neighboring properties), securing rights to solar, like rights to water, requires enforcing one's rights against neighboring property owners. Similarly, sunlight, like water, reaches parcels of land differently, depending on topography, latitude, and other characteristics. Therefore, any successful regime for regulating solar rights must recognize and account for this.[98] As state and local governments seek to develop law and policy that protects and encourages solar installation, these principles can help to frame the range of options most likely to succeed.

Conclusion

New York State is well on its way to building an energy economy that does not rely on fossil fuels. This new energy economy will likely incorporate a number of different technologies, each with its own advantages and disadvantages. However, solar technology, which is already well-developed and commercially available, is likely to command a dominant position in this new energy economy. The numerous benefits of solar, its ability to meet New York's electricity needs and overcome some of the challenges faced by other alternative energies, and the potential of solar to grow jobs and strengthen the economy, uniquely position solar technology to become a leading source of electricity in New York and across the country.

Given the foregoing, the state should aggressively act to encourage the adoption and dissemination of solar technology. New York has the ability to encourage the development of solar throughout the state through a variety of policy options, ranging from the implementation of educational programs to providing financial and statutory/regulatory incentives. As a leader in the move towards a clean energy economy, New York State has the ability to influence solar energy development on the national, state, and local level. State programs such as the Green Jobs/Green New York program can serve as models for other states throughout the country.[99]

Endnotes

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11. *See* Dunlop, *supra* note 4, at 7. Research and development programs established during this era included the Solar Heating and Demonstration Act of 1974 (42 USCA §§ 5501 et seq.), the Solar Energy, Research, Development, and Demonstration Act of 1974 (42 USCA §§ 5551 et seq.), The Solar Photovoltaic Energy, Research, and Development Act of 1978 (42 USCA §§ 5581 et seq.), and the Solar Energy Conservation Act of 1980 (42 USCA §§ 8285–8286b).
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36. *Id.*
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51. EPA, *supra* note 47.
52. *Id.*
53. Energy Information Administration, International Energy Outlook (2009), *available at* http://www.eia.doe.gov/oiaf/ieo/index.html.
54. *Id.*
55. Energy Information Administration, International Crude Oil and Liquid Fuels Supply, Consumption, and Inventories, *available at* http://www.eia.doe.gov/emeu/steo/pub/3atab.pdf.
56. Energy Information Administration, *Energy Price Volatility and Forecast Uncertainty*, *available at* http://www.eia.doe.gov/emeu/steo/pub/special/2009_sp_05.html.
57. SunEdison, *Benefits of Solar: Solar Energy Advantages that Benefit Everyone. And Everything*, *available at* http://www.sunedison.com/benefits--solar-energy-savings-advantages-disadvantages.php.
58. *Id.*
59. *Id.*
60. *Directory of the U.S. Photovoltaics Industry*, Solar Energy Industries Association, 2006.
61. *Energy Alternatives and Jobs*, Renewable Energy World, November/December 2000, at 26–32.
62. New York State Energy and Research Development Authority, Solar Electric Incentive Program, *available at* http://www.powernaturally.org/Programs/Solar/incentives.asp.
63. *Order Approving Renewable Portfolio Standard Policy*, Case 03-E-0188, NY Public Service Commission, Sept. 24, 2004.
64. *Id.* at 7.
65. As discussed previously, customer-sited systems can actually reduce transmission costs.
66. Fred Bosselman, *The Ecological Advantages of Nuclear Power*, 15 N.Y.U. Envtl. L.J. 1, 21 (2007); *see also* Daniel C. Rislove, *Global Warming v. Non-Proliferation: The Time has Come for Nations to Re-Assert Their Right to Peaceful Use of Nuclear Energy*, 24 Wis. Int'l L.J. 1069, 1079 (2007). ("[S]olar and wind power plants require enormous footprints compared to more traditional power sources.").
67. Bosselman, *supra* note 66, at 21.
68. 42 U.S.C. §§ 4321 et seq.
69. Lynne Gillette et al., *Using Collaboration to Address Renewable Energy Siting Challenges*, 56 Fed. Law. 50, 51 (2009).
70. *See, e.g.*, *Banks v. Georgia Power Co.*, 481 S.E.2d 200 (Ga. 1997) (holding that the use of property for the purpose of providing electrical power to the public is a "public use").

71. Thomas J. Starrs, *Barriers and Solutions to Interconnection Issues for Solar Photovoltaic Systems* 1 (2000).

72. *Id.*

73. Frederick R. Fucci, *Alternative Energy in Commercial Real Estate and Multi-Family Housing—Application of Distributed Resources—Practical and Legal Ramifications*, 565 Prac. L. Inst. 313, 338 (2009).

74. Martin I. Hoffert, Renewable Energy Options—An Overview 3 (2004), *available at* http://www.pewclimate.org/docUploads/10-50_Full%20Proceedings.pdf (Paper prepared for the Pew/NCEP "10-50 Solution" Workshop).

75. Calculated using the New York State Energy Research and Development Authority's Clean Power Estimator, and based on a residential 5 kW system in Albany, New York, *available at* http://nyserda.cleanpowerestimator.com/nyserda.htm (finding available incentives projected to cover $26,018, leaving a net customer cost of $15,633 which includes a projected $1,400 projected total federal tax increase).

76. Hoffert, *supra* note 74, at 5. In the past, it was also argued (still in a circular manner, but less obviously so) that the lack of efficient technology was the primary market driver. *See, e.g.*, *Prah v. Maretti*, 312 N.W.2d 182 (Mich. Ct. App. 1982) (Callow, J., dissenting).

77. *Id.* at 6.

78. *See, e.g.,* Rislove, *supra* note 66.

79. Bosselman, *supra* note 66, at 5–6.

80. *Id.*

81. *Id.* at 21.

82. Hoffert, *supra* note 74, at 4.

83. Edna Sussman, *Reshaping Municipal and County Laws to Foster Green Building, Energy Efficiency, and Renewable Energy*, 556 Pract. L. Inst. 103, 135 (2008).

84. Hoffert, *supra* note 74, at 3.

85. *Id.* at 7.

86. *Id.* at 8.

87. For example, "[c]o-production of electricity and H2 fuel [could] enable massive deployment of intermittent electric generation by making efficient use of otherwise almost unavoidable excess generation." *Id.*

88. *Id.* at 9.

89. Sussman, *supra* note 83, at 107.

90. For example, disputes can arise when one landowner interferes with the sunlight that would otherwise reach their neighbor's system. Jay M. Zitter, *Solar Energy: Landowner's Rights Against Interference with Sunlight Desired for Purposes of Solar Energy*, 29 A.L.R. 4th 349 (2009).

91. Sara C. Bronin, *Modern Lights*, 80 U. Colo. L. Rev. 881, 884 (2009).

92. *Id. See also,* Adrian J. Bradbrook, *Future Directions in Solar Access Protection*, 19 Env. L. 167 (1988).

93. *Kucera v. Lizza*, 59 Cal. App. 4th 1141 (Cal. Ct. App. 1997).

94. *See, e.g.*, *Prah v. Maretti*, 312 N.W.2d 182 (Wis. 1982); *see also*, Zitter, *supra* note 90.

95. *Kraye v. Old Orchard Ass'n* No. C 209 453 (Cal. Super. Ct. Feb. 28, 1979), *noted in* 1 SOLAR L. REP. 8 (1979).

96. Bronin, *supra* note 91, at 885. As a result, Bronin concludes that "solar rights should be assigned…[to] the solar collector user, and not the potential obstructor." *Id.*

97. *Id.* at 886.

98. *Id.* at 894.

99. *See* N.Y. Pub. Auth. Law Art. 9-A (McKinney 2009).

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Reducing Your Carbon Footprint: How to Reduce Your Own Greenhouse Gas Emissions Without Really Trying

By Walter Mugdan[1] and Cullen Howe

I. Introduction

In the past several years, policymakers at the state, federal and international levels finally have begun to take climate change seriously and to implement measures to reduce greenhouse gases (GHGs). For example, in August 2009, New York Governor David Paterson signed an executive order setting a goal of reducing statewide greenhouse gas emissions in the state by 80% by 2050, compared with 1990 levels.[2] In June 2009, the U.S. House of Representatives passed the American Clean Energy and Security (ACES) Act by a vote of 219-212.[3] The bill, which has yet to be passed by the Senate, would cut U.S. greenhouse gas (GHG) emissions by 17% by 2020, and 83% by 2050, from 2005 levels by establishing a cap-and-trade system. At the international level, countries have recently concluded climate negotiations at the United Nations Climate Change Conference in Copenhagen, Denmark. Although the United States, Brazil, China, India, and South Africa are members of the so-called Copenhagen Accord, the agreement is not legally binding and significant tension still exists between developed and developing countries.[4]

"[W]e can reduce our primary carbon footprint by using more energy-efficient fixtures and lights and by driving less.… [T]he only way to reduce our secondary footprint is to buy and consume less, or to carefully choose those products that we consume."

Although these governmental responses are long overdue and certainly welcome, the slow pace of measures to reduce GHGs in response to mounting evidence that climate change is occurring and, in fact, happening much faster than expected, can lead one to become discouraged and to believe that one is powerless to do anything about it. Happily, this is not the case. In fact, a person can reduce his or her carbon footprint with virtually no change in lifestyle at all. An October 2009 report by the National Academy of Sciences found that 20% of household GHG emissions in the U.S. or 7.4% of total emissions could be eliminated in 10 years through actions and efficiency measures that would not require changes in lifestyle and could be done at minimal cost.[5]

II. What Is a Carbon Footprint?

A person's carbon footprint is a measure of the impact his or her activities have on climate change. It relates to the amount of GHGs produced by our day-to-day activities through the burning of fossil fuels for electricity, heating, transportation, etc. Put more succinctly, a person's carbon footprint is the measurement of all GHGs he or she produces, or is responsible for producing. It is customarily measured in tonnes or kilograms of carbon dioxide equivalent (CO_2e), which is a quantity that describes, for a given mixture and amount of greenhouse gas, the amount of CO_2 that would have the same global warming potential.[6]

A person's carbon footprint is made up of two parts: the person's primary footprint and the person's secondary footprint. A primary carbon footprint is the measure of a person's direct emissions of CO_2 from the burning of fossil fuels, such as for energy use in homes and in cars for transportation. Generally, we have some measure of control over our primary carbon footprint. For example, we can reduce our primary carbon footprint by using more energy-efficient fixtures and lights and by driving less. A secondary carbon footprint is a measure of a person's indirect CO_2 emissions from the entire lifecycle of products and services that he or she uses. An example of this is the GHG emissions from the production and delivery of the food that we purchase in grocery stores and restaurants. Generally, the only way to reduce our secondary footprint is to buy and consume less, or to carefully choose those products that we consume.[7]

People have widely differing carbon footprints. For example, a person who lives in an apartment in a dense urban environment such as New York City, and relies on public transportation or rides a bike, has a smaller carbon footprint than a person who lives in a single-family home in a suburban setting and relies on a single-occupancy vehicle for transportation.[8] Similarly, a person who travels frequently for business or pleasure will have a larger footprint than one who tends to stay close to home.

III. Two Incredibly Easy Ways to Reduce Your Carbon Footprint

There are many simple and more or less painless ways to reduce your carbon footprint. These include, among other things, turning off lights and other equipment such as computers and electronic devices when not

in use, turning down the setting on your thermostat and water heater by a few degrees, running the dishwasher and washing machine only with a full load, hanging your laundry on a clothesline instead of using a dryer, and walking or riding a bicycle instead of using an automobile. Steps that require minimal investment include replacing normal light bulbs with energy-efficient compact fluorescents (CFLs), insulating hot water tanks and exposed steam pipes, installing wall and ceiling insulation in your home, weatherizing your windows and doors, using a ceiling fan instead of the air conditioner on nights that are warm but not hot, and replacing old and inefficient appliances with Energy Star-labeled ones.

These steps will yield noticeable reductions in your electric bills as well as your carbon footprint. Important as they are, however, they will never come close to erasing that footprint, or even reducing it by the large percentages society needs to achieve if we are to avoid the worst effects of global climate change. Given that inescapable reality, we submit for your consideration two additional, incredibly simple ways to dramatically reduce your personal carbon footprint: switching to renewable electricity and purchasing carbon offsets.

A. Switching to Electricity from Renewable Sources

Renewable electricity is simply energy that is produced from non-fossil fuel sources. The obvious advantage of renewable energy is that its production does not involve a significant net release of GHGs into the atmosphere. The most common forms of renewable energy include hydro power, wind, and solar, although there are many other sources including geothermal, tidal, and biomass.[9]

Most utility companies include options that allow customers to purchase renewable energy instead of energy produced from conventional sources such as coal-fired power plants.[10] For example, Con Ed offers two renewable energy products to its customers—"green power" and "wind power." According to Con Ed, "green power" is a mix of 35% wind power and 65% small hydropower,[11] while "wind power" is 100% wind.[12] It should be noted that the power grid works in such a way that no energy supplier can guarantee that the actual electrons from a specific type of energy source are delivered to a particular building or customer. However, the amount of renewable energy that is purchased by customers is delivered to the power grid for distribution, which reduces the overall need for conventional sources of energy. And, of course, the greater the consumer demand, the more investment dollars there will be for building additional renewable electricity installations.

Clearing your conscience in this way is indeed easy and effective, but it is not yet "free." At present, renewable energy is typically more expensive than conventional forms of energy. The cost difference, however, is minimal, making this a very affordable way to "do the right thing." For example, Con Ed states that its "green power" product costs an additional one cent per kilowatt-hour, while its "wind power" product costs an additional two-and-a-half cents per kilowatt hour. Some utilities offer discounts to encourage customers to switch to renewable sources of power.

Thorough consumers may also wish to ensure that the renewable energy they purchase is "Green-e" certified. Green-e is an independent company that sets consumer protection and environmental standards for electricity products and verifies that certified products meet these standards.[13]

B. Buying Carbon Offsets

The second incredibly easy way to reduce your carbon footprint is to purchase offsets for those activities that emit GHGs. Carbon offsets are financial instruments that can be used to compensate for emissions produced in one place by funding an equivalent CO_2 saving somewhere else.[14] Offsets are typically achieved through financial support of projects that reduce the emission of greenhouse gases in the short or long term. A common offset type is funding the construction or purchase of renewable energy, such as wind farms, biomass energy, or hydroelectric dams. Other types of offsets include energy efficiency projects, the destruction of industrial pollutants or agricultural byproducts, the capture and beneficial use or destruction of landfill methane, and reforestation projects.

In the GHG compliance market, companies, governments, or other entities buy carbon offsets in order to comply with caps on the total amount of CO_2 they are allowed to emit. For example, the Kyoto Protocol allows offsets as a way for governments and private companies to earn carbon credits, which can be traded on a marketplace. The Protocol established the Clean Development Mechanism (CDM), which validates and measures projects to ensure they produce authentic benefits and are genuinely "additional" activities that would not otherwise have been undertaken.[15] Organizations that are unable to meet their emissions quota under the Protocol can offset their emissions by buying CDM-approved "certified emissions reductions," although this process has been met with some controversy.

In the voluntary market, individuals can purchase carbon offsets to mitigate their own GHG emissions from transportation, electricity use, and other sources. For example, a person can purchase carbon offsets to compensate for the GHG emissions associated with air travel. Many companies, including major airlines and car rental agencies, offer carbon offsets for purchase as part of their web-based ticket or rental sales operations, enabling customers conveniently to mitigate the emissions related with the product or service they have just bought. United Airlines and Jet Blue are two examples of airlines

with websites that invite customers to buy offsets when purchasing a ticket.[16] Similarly, Avis car rental allows customers to purchase offsets through a third-party vendor.[17] There are also quite a number of entities that allow you to purchase carbon offsets directly for various GHG-emitting activities. The cost for these carbon offsets is minimal. For example, Carbonfund.org, a leading carbon offset company, charges $1.25 for offsetting 300 pounds of CO_2, a typical daily output for one person. It charges $5.00 for 1,200 pounds, equal to a person's normal output for a week, and $20 for 4,800 pounds, a typical month's output.[18]

When purchasing carbon offsets, it is important to find a quality provider. Because carbon offsets are somewhat intangible, it is wise to ensure that your purchase is having the intended impact. Thus, there are several questions you should ask. First, are the projects that are funded through the money paid for offsets certified according to industry standards and verified by third parties? There are a variety of standards available that provide assurance that projects follow rigorous quality metrics.[19] Second, is the offset provider's portfolio audited? Like a financial audit, this audit ensures your money was used for the purposes you designated. Comparison sites such as Carbon Catalog[20] and EcoBusinessLinks[21] can make it much easier to evaluate the options available.

IV. Do the Right Thing

As we have shown, it is neither difficult nor expensive to reduce your carbon footprint. Doing so is important not only because it lowers the amount of GHGs in the atmosphere, but also because it serves to encourage others to do the same, which can lead to wholesale societal transformation.

So do your part: it's not hard, it's not expensive, it helps the planet, your actions will spur others to do the same…and you'll sleep better at night.

Endnotes

1. Walter Mugdan currently serves as Superfund division director at Region 2 of the U.S. Environmental Protection Agency (EPA), in New York City. Any opinions expressed in this article are his own, and do not necessarily reflect the position of the EPA.
2. A copy of this executive order is available at http://www.state.ny.us/governor/executive_orders/execorders/eo_24.html.
3. The bill, H.R. 2454, *available at* http://energycommerce.house.gov/index.php?option=com_content&view=article&id=1633&catid=155&Itemid=55.
4. The Copenhagen Accord, *available at* http://unfccc.int/resource/docs/2009/cop15/eng/l07.pdf.
5. Thomas Dietz et al., *Household Actions Can Provide a Behavioral Wedge to Rapidly Reduce US Carbon Emission,* Proceedings of the National Academy of Sciences of the United States of America, November 3, 2009. This report is available at http://www.pnas.org/content/106/44/18452.full. The report details a number of steps that can be taken by individuals, including improving home insulation, using low-flow shower heads, reducing laundry temperatures, driving at 55 miles per hour, and purchasing fuel-efficient vehicles.
6. For example, the common gas methane is, pound for pound, over 20 times more potent than CO_2 in its ability to trap solar heat—that is, to function as a greenhouse gas. *See* http://www.epa.gov/methane/index.html. (While most of us are not directly responsible for a lot of methane emissions, we are almost all indirectly methane producers. Methane is a product of the bacterial breakdown of organic material in the landfills where our garbage ends up, and in the treatment plants or septic systems where our sewage ends up. The huge animal husbandry operations that provide us with meat and dairy products are also significant global sources of methane from the animals' own "off-gassing.") Other chemicals associated with our complex modern lives, like hydrofluorocarbons, are hundreds and even thousands of times more potent GHGs than methane. *See* http://www.epa.gov/highgwp/scientific.html#hfc. A complete reckoning of our personal carbon footprint needs to consider the entire life cycle of the products we buy and the food we eat. As a practical matter, however, CO_2 remains by far the dominant component of our personal and societal carbon footprint because of the huge amounts of fossil fuel we burn.
7. You can also achieve some reductions through buying more thoughtfully. For example, you can rely more on locally raised food, available in farmers' markets and through food co-ops. Even at the supermarket it is possible to make better informed choices. For example, should you feel compelled to buy bottled water at all, you may wish to consider the carbon footprint of that bottle from Fiji compared to the bottle of Aquafina which is made locally from municipal tap water by a Pepsico subsidiary (http://www.aquafina.com). Similarly, a bottle of wine from Australia or New Zealand has a higher carbon footprint than a bottle from Long Island or the Finger Lakes. A note of caution, however: it is sometimes difficult to intuit these relationships. The highest carbon footprint among vintages a New Yorker is likely to consider purchasing will be for California wines. The Australian wines reach New York by boat (which is a relatively fuel-efficient means of transport), while those Napa Valley bottles arrive here by truck (which is less efficient on a pound-for-pound basis). National Geographic Magazine (May 2009), *available at* http://www.drvino.com/2009/04/14/the-carbon-footprint-of-wine-in-national-geographic.
8. There are a number of websites that allow you to calculate your carbon footprint. One of these websites is available at http://www.carbonfootprint.com/calculator1.html.
9. Biomass is currently one of the largest renewable energy sources in the U.S., second only to hydropower. Burning biomass to generate electricity or heat does emit CO_2, but an equivalent amount of CO_2 is removed from the atmosphere by growing trees or other plants that provide the biomass; thus the net carbon footprint is roughly neutral. The GHG calculus becomes much more complex when you factor in the infrastructure for raising biomass, including fertilizer, transportation, processing, and the impact of land use changes. Not all biomass energy is created equal when the full life cycle impacts are considered. *See*, *e.g.*, http://www.environment-agency.gov.uk/static/documents/Research/Minimising_greenhouse_gas_emissions_from_biomass_energy__generation.pdf.
10. To locate utilities in your state from which you can purchase renewably generated electricity, *see* http://apps3.eere.energy.gov/greenpower/buying/buying_power.shtml. Switching to green power is very easy—typically taking five minutes or less and requiring just a few mouse clicks.
11. Small hydro installations have far fewer ecological impacts than the large dams we usually associate with hydro power.
12. Additional information about these two products is available at http://www.conedsolutions.com/residential_green_power.html.
13. Information about Green-e is available at http://www.green-e.org.
14. This is a feasible strategy because GHG emissions are a global, rather than a local problem. Thus GHG reductions anywhere on earth are equally beneficial in mitigating climate change.

15. Additional information about the CDM is available at http://unfccc.int/kyoto_protocol/mechanisms/clean_development_mechanism/items/2718.php.
16. Information about United Airlines' carbon offset program is available at http://www.united.com/page/article/0,6722,53032,00.html. Jet Blue has a similar program which is available at http://www.carbonfund.org/jetblue.
17. Information about Avis' carbon offset program is available at http://www.avis.com/car-rental/content/display.ac?contentId=green-initiative-US_en-005366.
18. The cost for one of the authors to offset a recent plane trip from New York City to Rochester and back was $2.86; the cost to offset two roundtrip air tickets to Detroit was about $9; and the cost to offset annual GHG emissions from his family's two cars was $96. Additional information is available at http://www.carbonfund.org.
19. These include the U.N.'s CDM, the Chicago Climate Exchange, the Environmental Resources Trust, the California Climate Action Registry, the Voluntary Carbon Standard, and the Green-e Climate and Gold Standard.
20. Carbon Catalog is available at http://www.carboncatalog.org/providers.
21. EcoBusinessLinks is available at http://www.ecobusinesslinks.com/carbon_offset_wind_credits_carbon_reduction.htm.

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OPEN FOR DISCUSSION

Attorney-Client Privilege and Spills at Petroleum Bulk Storage Facilities

By Randall C. Young

For this issue's "Open for Discussion" column, Randall Young discusses the potential conflict between the attorney-client privilege and 6 NYCRR 613.8, which requires anyone with knowledge of a petroleum spill to report it. This issue is particularly timely because of recent changes to the New York ethics rules. Mr. Young begins with a discussion of the Middleton *case, which addressed the duty of an environmental consultant to disclose under 613.8, then provides a discussion of the attorney-client privilege, and concludes with a list of questions for attorneys to think about.*

On December 31, 1998, the Commissioner of the New York State Department of Environmental Conservation (DEC) issued a ruling that may have affected the ability of attorneys and engineers to claim professional privilege as a basis for non-disclosure of known petroleum spills under 6 NYCRR 613.8. In expanding the duty to report petroleum spills and leaks to "…any person with knowledge of a spill…" the decision may signal a professional responsibility to report where privilege was previously assumed.[1]

The decision came from the reversal of an Administrative Law Judge (ALJ) ruling dismissing an administrative enforcement action against environmental consultants Middleton, Kontokosta Associates, Ltd., and Donald Middleton.[2] The Respondents were not "operators or owners" required to report spills under N.Y. Environmental Conservation Law (ECL) § 17-1743, nor were they attorneys or engineers eligible to claim professional privilege as a basis for non-disclosure. The Commissioner's decision therefore raises the issue of the interplay between 6 NYCRR 613.8 and New York's attorney-client privilege.

1. The *Matter of Middleton*

In the *Matter of Middleton, Kontokosta Associates, Ltd., and Donald Middleton,* Ruling, October 14, 1998, DEC staff alleged that Respondents violated 6 NYCRR 613.8 by failing to report contaminated soil at a petroleum bulk storage facility where they were observing site work on behalf of the owner.[3] Donald Middleton, the vice president of Middleton, Kontokosta Associates, Ltd., was present during the taking of soil borings in the area of a 3,000-gallon underground storage tank at the facility. In an affidavit, he stated that based on color and smell the soil might have been contaminated, but he did not perform any tests that would have verified the presence of petroleum contamination in the soil.[4]

The relevant portion of 6 NYCRR 613.8 states:

> Any person with knowledge of a spill, leak, or discharge of petroleum must report the incident to the Department within two hours of discovery…[5]

In dismissing the complaint, the ALJ interpreted the "any person" requirement of 6 NYCRR 612-614 in the context of ECL § 17-1743, which addressed only "owners and operators."[6]

Upon appeal of the October 14 ruling, the DEC Commissioner reversed the ALJ dismissal, stating:

> The term "any person" is intended to apply, not only to persons who are "owners" and "operators," but also to all other persons with knowledge of a spill, leak, or discharge.… The reporting duty is on everyone with knowledge of the spill.[7]

The above interpretation of 6 NYCRR 613.8 would require an attorney with knowledge of a spill at a petroleum bulk storage facility to report the spill within two hours of gaining knowledge. The Commissioner's ruling specifically sidestepped the issue of professional privilege, noting that:

> …Mr. Middleton is not a professional engineer, and therefore cannot claim that he is under a professional obligation not to disclose under the Code of Ethics for Engineers, assuming that the code was otherwise applicable under the circumstances. Nor is Mr. Middleton an attorney, and therefore, the attorney-client privilege could not be asserted as a basis for his non-disclosure.[8]

This raised, but did not address, the question of whether attorneys who learn of their clients' spills in the course of representation must report those spills pursuant to 6 NYCRR Part 613.8, and whether reporting such spills would violate the attorney-client privilege. Although more than a decade has passed, no decision of the Commissioner or of the courts has addressed the conflict between attorney-client privilege and the spill reporting requirement of 6 NYCRR 613.8.

2. Attorney-Client Privilege in New York

In New York, attorney-client privilege is statutory. New York Civil Practice Law Rules (CPLR) § 4503 states:

> Unless the client waives the privilege, an attorney…shall not disclose, or be allowed to disclose, such [confidential] communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding, or hearing conducted on by or on behalf of any state, municipal or local governmental agency…

This appears to provide an explicit exemption from the requirement for an attorney to comply with the regulatory requirement to report a spill that the lawyer learned of through a privileged communication. Information disclosed to the attorney is privileged if the holder of the privilege is or sought to become the attorney's client; the person to whom the communication was made was an attorney or an attorney's subordinate who was acting as the person's lawyer in connection with the matter; and the communication related to a fact of which the attorney was informed by his client outside the presence of strangers for the purpose of obtaining legal advice or representation.[9]

Further, Rule 1.6 (a) of the Rules of Professional Conduct states:

> A lawyer shall not knowingly reveal confidential information, as defined by this section…unless: (1) the client gives informed consent as defined in Rule 1.0(j); (2) the disclosure is impliedly authorized to advance the best interests of the client;…or (3) the disclosure is permitted by paragraph (b).[10]

Confidential information is:

> …information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has required be kept confidential…[11]

Therefore, if an attorney learns of an unreported spill at a client's facility during the course of representation of the client, the presence of such spill would likely be confidential information. The attorney would be constrained from reporting the spill by Rule 1.6(a) unless an exception to the requirement to protect confidential information applies.

However, unlike most privileged communications, the failure to report a spill can be a crime. Refusing to report a spill constitutes a misdemeanor punishable by a penalty of up to $37,500, and as much as one year in jail for a first offense.[12] Accordingly, a client's failure to report a spill may constitute a crime; and if the client informs the lawyer of the existence of the unreported spill, the lawyer's failure to report might itself be a crime.

"The intent to commit a crime is not a protected confidence or secret."[13] Further, Rule of Professional Conduct 1.6 states:

> (b) a lawyer may reveal confidential information the lawyer reasonably believes necessary:… (2) to prevent the client from committing a crime.[14]

By its terms, the exception privilege in Rule 1.6(b)(2) does not apply to information about past actions revealed to the attorney during the course of representation.[15] The question, therefore, is whether the attorney's reporting of a client's spill would prevent a crime. Considering the on-going nature of the client's obligation to report the spill, reasonable minds may differ on whether the crime is wholly past or continuing.

3. Exceptions to Attorney-Client Privilege

Courts have disagreed as to whether knowledge related to continuing violations or crimes is subject to attorney-client privilege. An attorney was required to disclose the location of his bail-jumping client because the court considered the illegal conduct to be on-going.[16] However, in a later case, it was held that no exception to the privilege existed for on-going conduct if the crime was complete and chargeable prior to the time the client contacted the attorney even if the client's conduct might be considered a continuing violation.[17] In our case this implies that the failure to report a spill would be complete and chargeable two hours after the client learned of the incident.[18] Therefore, whether a client's disclosure of an unreported spill would fall within the crime-prevention exception of Rule 1.6(b)(2) remains unsettled to date.

Public policy also plays a role: "…where the technical requirements of the privilege are satisfied, it may, nonetheless, yield in a proper case, where strong public policy requires disclosure."[19] A strong argument exists that public policy may favor the disclosure of spills if they present a significant threat to health, safety, or the environment, or if failure to report could dramatically increase the cost of cleanup for which the state may ultimately pay.[20]

In regard to extreme situations, Rule 1.6(b)(1) states that a lawyer may reveal confidential information "to prevent reasonably certain death or substantial bodily harm."[21] Some spills can result in vapors that create a risk of explosion and fire in sewers and buildings. If the lawyer is aware of these conditions, reporting of the spill might be done without violating the Rules of Professional Conduct. However, the circumstances would need to be egregious and the attorney would need specific information to determine that the spill would cause "reasonably certain death or substantial bodily injury" as required by Rule 1.6(b)(1).

A final consideration is that Rule 1.6(b) states that a lawyer may reveal or use confidential information "(6) when permitted or required under these Rules or to comply with other law or court order."[22]

On its face, this appears to allow the attorney to report a spill at a petroleum bulk storage facility because the law requires such reporting. However, the potential for criminal prosecution of a client who may have violated the requirement to report a spill has implications for the Fifth Amendment rights of the client.[23]

The Court of Appeals has said that attorney-client privilege "…exists to ensure that one seeking legal advice will be able to confide fully and freely in his attorney, secure in the knowledge that his confidences will not later be exposed to public view to his embarrassment or legal detriment."[24] Requiring attorneys to disclose clients' unreported spills would defeat the ability of people to obtain legal advice regarding their situation and make the client's disclosure of the spill to the attorney tantamount to self-incrimination. Under such circumstances, the client's constitutional rights to counsel and to be free from self-incrimination may allow the attorney to withhold information the law otherwise requires people to disclose.

The Matter of People v. Belge is illustrative of the constitutional issue. Attorney Francis R. Belge represented Robert F. Garrow, who was charged with murder. During preparation of Garrow's defense, Belge reportedly learned of other murders committed by his client as well as the location of one of the victims. Belge kept this information confidential. At trial, the defendant pursued an insanity defense and the other murders were revealed.

Belge's failure to report the other murders and the location of the victim became a public outrage. A grand jury indicted Belge for violating provisions of Public Health Law § 4143 that required anyone with knowledge of a death that took place without medical attendance to report it to specified officials. The trial court dismissed the charge stating:

> Garrow was constitutionally exempt from any statutory requirement to disclose the location of the body.… The criminal defendant's self-incrimination rights become completely nugatory if compulsory disclosure can be exacted through his attorney.[25]

One could attempt to avoid the Fifth Amendment issue by reporting the spill without disclosing the client's knowledge of the spill. However, if reporting the spill would prompt an investigation that could reveal the client's failure to report the spill, reporting of the spill by the attorney would be contrary to the attorney's obligations to the client.

Unfortunately, the Committee on Professional Ethics is jurisdictionally unable to answer questions of law such as interpretation of reporting requirements, and is likely to decline to offer an opinion regarding whether an attorney is required to report a client's spill pursuant to a regulation. Any opinion offered by the Committee would be limited to whether revealing the spill would violate the Rules of Professional Conduct. Therefore, the question of whether attorneys who fail to report their clients' spills are liable for violations of 6 NYCRR 613.8 seems unlikely to be answered until the Commissioner of the DEC or the courts address it.

Discussion

No decision has since been issued in New York addressing this issue, and therefore it remains to be seen whether the full stretches of 6 NYCRR 613.8 will require professionals to cede their privilege duties for reporting duties. However, the decision does have immediate implications for environmental attorneys, engineers, and their clients. For example, professionals should be aware of this issue and advise their clients that they may be required to immediately report any spills of which they gain knowledge. The many caveats of attorney-client privilege in New York stir up the already murky waters. Among the open questions are:

- Does the requirement of 6 NYCRR 613.8 that "any person" with knowledge of a petroleum spill must report it to the National Response Center extend to attorneys, engineers, and other professionals who are eligible to assert professional privilege as a basis for non-disclosure?
- Does the relationship between attorney-client privilege and 6 NYCRR 613.8's reporting requirement change after the two-hour time limit for reporting expires?
- Is failure to report a known spill a wholly past, or an on-going violation?
- If 6 NYCRR 613.8 requires "any person" with knowledge of a spill to make a report, then what is the import of the N.Y. Environmental Conservation Law (ECL) § 17-1743 requirement that "operators and owners" must report known spills?
- Does public policy favor the disclosure of known spills if they pose significant health or safety risks? Who is in a position to make such a judgment?
- To what extent does a law or court order require a lawyer to reveal confidential information? Could the Commissioner's Ruling be used to force an attorney to reveal a known spill to his client's detriment?

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

Endnotes

1. *Matter of Middleton, Kontokosta Associates, Ltd., and Donald Middleton*, Commissioner's Ruling, December 31, 1998.
2. *Id.* at 1-3.
3. *Id.*
4. *Id.* at 3.
5. 6 NYCRR 613.8. By policy, the Department does not require reporting of spills known to be less than 5 gallons that do not reach the ground or waters of the state if such spills are completely cleaned up within two hours. NYSDEC Field Guidance Manual, Spill Reporting and Initial Notification Requirements (available online). Nav. Law § 192, 17 NYCRR 32 and ECL § 71-1943 also require reporting of petroleum spills, but these provisions apply to owners, dischargers and those in possession or control of the material spilled, not anyone with knowledge of the spill.
6. *Matter of Middleton, Kontokosta Associates, Ltd., and Donald Middleton*, Commissioner's Ruling, at 3, December 31, 1998.
7. *Id.*
8. *Id.* at 3-4.
9. *People v. Belge*, 59 A.D. 2d 307, 309 (4th Dept. 1977).
10. 22 NYCRR Part 1200.1.6(a)(1)-(3).
11. 22 NYCRR Part 1200.1.6(a).
12. ECL § 71-1933(1).
13. *People v. DePallo*, 96 N.Y. 2d 437, 442 (2001).
14. 22 NYCRR Part 1200.1.6(b)(2).
15. See NY St. Bar Assoc. Comm. on Prof. Ethics, Op. 479 (1978).
16. *Matter of Grand Jury of Suffolk County*, 117 Misc. 2d 197 (1982).
17. Grand Jury Investigation, Onondaga County, 175 Misc. 2d 398 1998).
18. 6 NYCRR Part 618.3; ECL § 71-1933.
19. *Priest v. Hennessy*, 51 N.Y. 2d. 62, 69 (1980).
20. *Inter alia*, Nav. Law § 181.
21. 22 NYCRR 1200.1.6(b)(1).
22. 22 NYCRR Part 1200.1.6(b)(6).
23. *People v. Belge*, 83 Misc. 2d 186 (1975), *aff'd*, 41 N.Y. 2d 60 (1976).
24. *Priest v. Hennessy*, 51 N.Y. 2d 62, 67-68 (1980).
25. *People v. Belge*, 83 Misc. 2d 186, 190.

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Nothing in this article reflects the position of the State of New York or NYSDEC regarding any issues discussed. This article is presented for informational purposes to illustrate issues. Anyone facing a situation similar to one discussed herein should obtain advice from counsel familiar with the specific facts of the particular situation.

Administrative Decisions Update

Prepared by Thomas F. Puchner

In re Application for Permits pursuant to Articles 17 and 24 of the Environmental Conservation Law, Section 401 of the Federal Clean Water Act, and 6 NYCRR Parts 663 and 750-758 by Town/ Village of Harrison, New York, Applicant (Project Home Run)

Ruling on SEQRA Compliance

August 21, 2009

Summary

ALJ orders NYSDEC to make its own SEQRA determination seven years after lead agency's SEQRA negative declaration because the applicant could not demonstrate compliance with coordinated review procedures.

Decision

This decision arises from a project known as Project Home Run by which the Town and Village of Harrison ("Harrison") propose to redevelop a previously remediated brownfield site with a recreational complex. The Administrative Law Judge's ruling involves the interplay between the State Environmental Quality Review Act ("SEQRA") and New York State Department of Environmental Conservation ("NYSDEC") adjudicatory hearing proceedings in light of the Permit Hearing rule that SEQRA issues will not be considered where NYSDEC does not assume lead agency status and the lead agency has determined that an environmental impact statement is not required (a "negative declaration").

In a May 29, 2009 Ruling on Issues and Party Status (the "Issues Ruling"), Administrative Law Judge Daniel P. O'Connell ("ALJ") required Harrison to produce copies of relevant SEQRA documents for the hearing record. In an August 21, 2009 Ruling on SEQRA Compliance (the "SEQRA Ruling"), the ALJ determined that Harrison failed to conduct coordinated review in accordance with SEQRA procedures, and therefore, that the Department staff ("Staff") erred by relying on Harrison's negative declaration and by not making an independent declaration of significance. The ALJ remanded the matter to the Department for its own determination of significance.

I. Background

In 1997, Harrison commenced a brownfield remediation project on a 14-acre site known as the Beaver Swamp Brook site. The remedial action took place under the Department's Brownfield Cleanup Program and was completed in July 2008. In addition to the remediation project, Harrison proposed to redevelop part of the remediated site as a public recreation complex through a project known as "Project Home Run." Because the project construction would impact a State regulated Freshwater Wetland and adjacent area, Harrison filed a joint permit application pursuant to ECL Articles 17 (Water Pollution Control) and 24 (Freshwater Wetlands), and related implementing regulations, as well as an application for a Water Quality Certificate pursuant to Section 401 of the Federal Clean Water Act. (Issues Ruling, at 1-3).

II. The Issues Ruling

During the permit hearing proceedings for Project Home Run, the City of Rye ("Rye") proposed a number of issues for adjudication, including issues related to SEQRA. In the Issue Ruling, the ALJ determined that the SEQRA issues raised by Rye were excluded from the adjudicatory hearing based on 6 NYCRR § 624.4(c)(6)(ii)(a). (*Id.*, at 42-43). That section of the Department's Permit Hearing regulations provides that where another agency serves as SEQRA lead agency and "has determined that the proposed action does not require the preparation of a DEIS [a 'negative declaration'], the ALJ will not entertain any issues related to SEQRA."

Notwithstanding the exclusion of SEQRA issues from the hearing, the ALJ recounted discussion at the issues conference regarding the coordinated review procedures under SEQRA, including the various requirements necessary to bind other involved agencies.[1] At the hearing, Staff could not confirm whether Harrison had complied with the procedures for coordinated review. Later, in subsequent comments, Staff took the position that Harrison had undertaken coordinated review based on a copy of a lead agency coordination letter from Harrison (the "coordinated review letter"), dated April 11, 2002, but received by the agency on December 20, 2006 (over 4 years later). Rye maintained that there were issues about whether coordinated review took place because the Harrison did not produce the coordinated review letter in response to an earlier Freedom of Information Request submitted by Rye. (Issues Ruling, at 42-46).

Citing several court cases involving SEQRA procedural compliance, the ALJ concluded that the consequence of non-compliance may be annulment of an involved agency's approval.[2] Consistent with the ALJ's determination that Rye's SEQRA issues were excluded from the adjudicatory hearing, the ALJ concluded that "whether Harrison complied with applicable SEQRA procedures is beyond the scope of this administrative proceeding." Nonetheless, the ALJ held that a procedural defect related to Harrison's SEQRA review "could render the Commissioner's final determination about the pend-

ing permit application, or other approvals that may be necessary for Project Home Run a nullity." Therefore, the ALJ required that Harrison and the other parties provide copies of relevant SEQRA documents, including the April 11, 2002 coordinated review letter, for the hearing record. (Issues Ruling, at 45, 54).

III. The SEQRA Ruling

Harrison subsequently provided copies of SEQRA documents related to both the brownfield project and Project Home Run. These submissions included two resolutions declaring Harrison's intent to be lead agency, as well as resolutions adopting negative declarations for the projects. Apparently, having not received the requested coordinated review letter, the ALJ reiterated the request during a July 2009 conference call. Staff later provided a copy of the coordinated review letter, stamped received in December of 2006. The ALJ also noted that Staff did not produce a copy of the SEQRA environmental assessment form prepared by Harrison. (SEQRA Ruling, at 2-3).

In the SEQRA Ruling, the ALJ reiterated that the adequacy of Harrison's SEQRA compliance was "beyond the scope of this administrative proceeding," but that a procedural defect in coordinated review could render the Commissioner's final determination a nullity. Therefore, the ALJ's stated purpose for reviewing the SEQRA issue was "to determine whether Department staff has any SEQRA-related obligations concerning the review of the pending permit application materials." (SEQRA Ruling, at 3).

Based on the submissions, the ALJ concluded that Harrison failed to conduct coordinated review according to the SEQRA regulations. As a result, the ALJ further held that Staff erred: (1) by relying on Harrison's negative declaration; and (2) by failing to make its own determination of significance. Therefore, the ALJ remanded the matter to Staff for a determination of significance.

IV. Update

No appeals were filed from the ALJ's SEQRA ruling. To date, Staff has not made a SEQRA determination pending receipt and review of additional information from Harrison. The adjudicatory hearing has been adjourned without date.[3]

Endnotes

1. 6 NYCRR § 617.6(b)(3). Briefly stated, coordinated review applies to Type I actions, and Unlisted actions undergoing coordinated review, where more than one agency has jurisdiction to fund, approve or directly undertake an action (and, therefore, are involved agencies). *See* 6 NYCRR § 617.2(s) (defining involved agency) and 6 NYCRR § 617.6(b)(3) (pertaining to coordinated review). The lead agency must transmit Part 1 of the environmental assessment form (EAF), or a draft environmental impact statement (DEIS), and a copy of the application to all involved agencies and notify such agencies that a lead agency must be agreed upon within 30 days. Following that process, the lead agency must determine the significance of the action (by either determining that no significant adverse environmental impacts will occur (a "negative declaration"), or by determining that there may be at least one significant adverse environmental impact (a "positive declaration") such that a draft environmental impact statement must be prepared. *See* 6 NYCRR § 617.6(b)(3)(ii), 617.7. If the lead agency identifies all other involved agencies and provides written notice of its determination of significance, involved agencies are bound by the lead agency's determination. They may not later require preparation of an EAF, DEIS, or negative declaration in connection with the action. 6 NYCRR § 617.6(b)(3)(iii).
2. The Issues Ruling cites *Matter of Rye Town/King Civic Association v. Town of Rye*, 82 A.D.2d 474 (2d Dept. 1981), *appeals dismissed*, 55 N.Y.2d 747 (1981), *lv. dismissed*, 56 N.Y.2d 985 (1982); *Webster Associates. v. Town of Webster*, 59 N.Y.2d 220 (1983).
3. E-mail from ALJ Daniel P. O'Connell to Author (January 13, 2010) (copy on file).

* * *

In re Matter of Alleged Violation of Article 9 of the Environmental Conservation Law and 6 NYCRR Part 196 by James W. McCulley, Respondent

Decision and Order of the Commissioner

May 19, 2009

Summary

Commissioner dismisses enforcement proceeding for use of motor vehicle in the forest preserve where NYSDEC Staff failed to prove the road was abandoned or otherwise not a public right of way.

Decision

This is the latest in a series of legal disputes between the New York State Department of Environmental Conservation ("NYSDEC") and Respondent James W. McCulley regarding the use of motorized vehicles and snowmobiles on an old road running through the State Forest Preserve in the Towns of North Elba and Keene.[1] In this matter, NYSDEC Staff commenced an enforcement proceeding alleging that McCulley violated 6 NYCRR § 196.1 which prohibits operation of a motor vehicle within the State forest preserve. Following a hearing and issuance of a hearing report, the Commissioner granted the Respondent's motion to dismiss, concluding that Staff failed to meet its burden.

I. Background

A. The Motor Vehicle Prohibition

The NYSDEC regulations at 6 NYCRR § 196.1 provide that motorized vehicles are generally prohibited in the forest preserve, except for limited exceptions. Those exceptions relevant to the McCulley case involve: (1) roads under the jurisdiction of the New York State Department of Transportation ("NYSDOT") or a town or county highway department; or (2) where a legal right of way exists for public or private use. 6 NYCRR §§ 196.1(b)(1),(b)(5).

B. Old Mountain Road

Old Mountain Road is part of a larger road, the "Northwest Bay-Hopkinton Road" or "Old Military Road" which dates to the 1800s and runs from Lake Champlain to St. Lawrence County. The section in question traverses forest preserve lands in the Towns of North Elba and Keene. The Towns have not maintained the road in many years and it is used primarily for non-motorized recreation, such as cross-country skiing and hiking. It is also less frequently used for snowmobiling, all-terrain vehicles and similar motorized vehicles. The road has been maintained for non-motorized use by volunteers associated with the Adirondack Ski Touring Council ("ASTC"). Prior to 2001, NYSDEC Staff viewed the Old Mountain Road as a town road not subject to the prohibitions of § 196.1. Apparently following adoption of the 2001 Adirondack Park State Land Master Plan, NYSDEC Staff took the position that Old Mountain Road had been abandoned by the Towns and was, therefore, closed to motorized vehicles. In response to an inquiry from McCulley, as President of the Lake Placid Snowmobile Club, NYSDEC Staff stated that the road was closed to snowmobiles. (March 27, 2009 Hearing Report of Chief Administrative Law Judge James T. McClymonds ("Hearing Report"), at 3-4, 8-10, 14-21).

C. McCulley's Ride

On May 22, 2005, McCulley backed his pickup truck down Old Mountain Road, past the State land boundary by approximately 30 feet and parked it. Apparently this event took place just after signs prohibiting motor vehicles were posted.[2] McCulley was ticketed for driving on forest preserve land. Following initial charges in Town Court, Staff commenced an enforcement proceeding by administrative complaint dated June 10, 2005. (Hearing Report, at 5-6). McCulley did not dispute that he drove his vehicle into the State forest preserve. Apparently, he did so to force a determination as to the status of Old Mountain Road. (May 19, 2009 Decision and Order of the Commissioner ("Decision"), at 1).

II. Procedural History

Respondent McCulley submitted an answer denying the alleged violation and raising numerous affirmative defenses. On September 7, 2007, the Chief Administrative Law Judge, James T. McClymonds (the "ALJ") issued a ruling granting in-part and dismissing in-part NYSDEC Staff's motion to dismiss various affirmative defenses and for an order without a hearing on the complaint. Following a hearing, the ALJ issued a hearing report, dated March 27, 2009, in which he recommended that Respondent's motion to dismiss be granted. Among the conclusions supporting the recommendation were that Old Mountain Road: (1) is a town road; (2) a legal public right-of-way; and (3) was never abandoned; therefore, the ALJ concluded that McCulley's operation of a motor vehicle did not violate the law.

Notwithstanding the dismissal recommendation, the ALJ added that although "respondent McCulley is correct on the law, the equities…do not favor him." The ALJ cited testimony that use of the road by snowmobiles would present a danger to cross-country skiers and other users of the road. The ALJ also contrasted the snowmobile group's lack of responsibility for maintenance of the road with the ASTC's maintenance of the road with volunteer labor and capital, which he characterized as "in the spirit" of the road's founders.

Based on these added concerns, the ALJ recommended that the Commissioner take action under § 212 of the Highway Law[3] to discontinue the road to "preserve significant State interests, including the 'forever wild' provision of the New York State Constitution, and to protect the Old Mountain Road for those pedestrian and horseback users that have given the Road its most significant use in modern times." (Hearing Report, at 35-37).

III. Decision of the Commissioner

The Commissioner adopted the ALJ's recommendation of dismissal, concluding that both of the exceptions in 6 NYCRR 196.1 were applicable to McCulley. At the outset, the Commissioner addressed the threshold issue of whether the road was within the forest preserve and, therefore, subject to regulation at all. On this point, McCulley had argued that forest preserve lands do not include town roads that run through it, essentially arguing that the State does not own the roads themselves or the underlying roadbeds. The Commissioner rejected this argument, however, concluding that the State acquired fee title to the forest lands over which the road traverses, including the roadbed. Therefore, McCulley was incorrect in arguing that the State did not own the roadbed or that the road was not part of the forest preserve. Essentially, the fact that the forest preserve land is subject to a town road or right of way does not mean it is not within the forest preserve. (Decision, at 2).

Turning to the regulatory exceptions under 196.1(b)(1) and (b)(5), the Commissioner found that Department Staff failed to meet their burden of proving that they were inapplicable. On the question of whether the road was under the jurisdiction of the town highway department, the Commissioner concluded that a town road remains a town road unless it is: (1) affirmatively abandoned under the mechanisms of Highway Law § 205; (2) it is abandoned through non-use under the common law; or (3) the State asserts jurisdiction pursuant to Highway Law § 212 (as urged by the ALJ).

A. Highway Law 205

Highway Law § 205 contains two mechanisms for abandonment of town roads. First, under § 205(1), a town can abandon a road that has not been used for six years if the town superintendent of highways, with written con-

sent of the town board, files a description of the highway in question with the town clerk. Highway Law § 205(1). In addition, a town may pursue a "qualified abandonment" where the road has not been "wholly disused," by which procedure a town is relieved of all maintenance responsibility for the road but the highway remains available for public use as a public easement and for use by adjoining landowners. Highway Law § 205(2). Based on the Hearing Report, the Commissioner determined that Old Mountain Road had historically been a town road within the Towns of North Elba and Keene, and that while both towns had initiated abandonment proceedings at different times, neither had completed the process. (Decision, at 2-4).

B. Common Law Abandonment

Apparently recognizing that the requirements of Highway Law § 205 had not been met, Department Staff focused on a theory of common law abandonment. The Commissioner rejected this argument, since the record clearly established that the road had been regularly used for various activities for many years, up through the time of McCulley's ride. The Commissioner also rejected Staff's novel argument that since the road had not been used for motor vehicles, that specific use had been abandoned, since the argument was unsupported by any law in New York. Finally, the Commissioner rejected Staff's argument that the Town's failure to maintain the road or list it in its town road inventory constituted abandonment. (Decision, at 4).

Based on the fact that Old Mountain Road had not been abandoned by Highway Law § 205 or the common law, the Commissioner concluded that the road met both regulatory exemptions from the motorized vehicle prohibition in 6 NYCRR § 196.1—it was both a town road and a legal public right of way. Finally, the Commissioner noted that NYSDEC had not exercised its authority under Highway Law § 212, which gives State agencies authority to order abandonment of highway portions running through State-owned lands under their jurisdiction. (Decision, at 5).

Conclusion

Since the two regulatory exemptions in § 196.1(b)(1) and (b)(5) clearly applied, the Commissioner granted McCulley's motion to dismiss the enforcement proceeding. However, the decision came with a strong admonishment to the Towns of North Elba and Keene that their jurisdiction over the road and the use of motorized vehicles on a road which is not maintained for or suitable for such use in its current condition "presented a host of liability issues," in addition to the potential for incompatible uses. Finally, the Commissioner declined the ALJ's recommendation to invoke NYSDEC's authority to abandon the road under Highway Law § 212, since that issue was not material to whether Department Staff had met its burden in the enforcement proceeding.

Endnotes

1. McCulley was previously convicted following a bench trial in Town Court in the Town of Keene for driving a snowmobile on Old Mountain Road in March, 2003. That conviction, obtained under 6 NYCRR 196.2 (operating a snowmobile in the forest preserve) was overturned on appeal to the Essex County Court, based on that court's conclusion that 6 NYCRR 196.2 was ultravires. *People v. McCulley*, 7 Misc.3d 1004(A) (Essex County 2005) (unreported) (reversing Town Court judgment and holding that the People failed to prove that McCulley had violated a valid regulation).

   As described above, the subsequent proceedings that are the subject of this article stem from McCulley's driving a pickup truck on the road on May 22, 2005. In response to the enforcement action, McCulley filed an action in federal court and sought a temporary restraining order against, inter alia, NYSDEC. The District Court subsequently stayed the federal court proceedings and abstained under the *Younger* and *Pullman* abstention doctrines until the State proceedings were concluded. *McCulley v. N.Y.S. Dep't. of Envtl. Conservation*, 593 F.Supp.2d 422 (N.D.N.Y. 2006).
2. According to the Hearing Report, the signs had been removed following McCulley's acquittal in *People v. McCulley*. *See supra* n.4.
3. Highway Law § 212 provides for abandonment or discontinuance of highways passing over State lands by order of the State authority having jurisdiction over such lands.

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Recent Decisions and Legislation in Environmental Law

Recent Decisions

Friends of Tims Ford v. Tennessee Valley Authority, 585 F.3d 955 (2009)

Facts

The Tennessee Valley Authority (TVA) completed the Tims Ford Reservoir in 1970 for purposes including flood control, hydroelectric generation, recreation, and economic development. In 1998, TVA and Tennessee Department of Environmental Conservation (TDEC) contracted to create the Tims Ford Reservoir Land Management and Disposition Plan (LMDP) to determine specific uses of TVA and TDEC land at the reservoir. They prepared a Final Environmental Impact Statement (FEIS), under the National Environmental Policy Act of 1969 (NEPA).[1]

Plaintiff-Appellant Friends of Tims Ford (FTF) is an unincorporated association of nearby land owners concerned about the environmental impact of land development near, and increased use of, the reservoir. FTF sought declaratory and injunctive relief against the TVA and TDEC for a procedurally deficient FEIS in implementation of the LMDP and for violations of the TVA Act of 1993 (TVA Act)[2] in the development of two parcels of land.

Issues

The district court dismissed FTF's case on summary judgment for lack of standing. The Sixth Circuit primarily addressed whether FTF had standing to sue TVA and TDEC for their alleged violations of NEPA and the TVA Act.

Reasoning

Looking to NEPA, the Council on Environmental Quality's (CEQ) regulations which implement NEPA,[3] and *Dep't of Transp. v. Pub. Citizen*,[4] the court stated that if an EIS's flaws are so obvious that there is no need for a commentator to point them out, one will not lose its ability to challenge a proposed action by failing to comment. Here, the TVA failed to show why the development of the reservoir after a deficient FEIS was so obscure as to require FTF to comment in order to preserve its right to appeal.

FTF failed, however, to show a cognizable injury in fact, which is required for constitutional standing.[5] Because the plaintiff sought judicial review of an agency action under the APA, the plaintiff also had to demonstrate prudential standing.[6] As an association, it additionally had to demonstrate associational standing.[7]

Where a plaintiff claims a procedural injury, she must allege that the agency violated certain procedural rules which are intended to protect the plaintiff's interests and that it is reasonably probable that those interests will be threatened by the challenged action.[8] Procedural injury is met in a NEPA case, for example, when plaintiffs allege that a proper EIS has not been prepared, and also "that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity."[9] Here, the court found that FTF failed to connect the alleged procedural harm to specific injuries suffered by FTF's members. FTF's members claimed harm from already constructed boat docks rather than from the alleged flaws in the FEIS. Because FTF failed to allege a procedural injury, the court did not reach the issues of causation and redressability.

In regard to the plaintiff's claims for aesthetic and recreational injuries, the court found that the affidavits of two of FTF members only alleged harm from already constructed boat docks rather than from a future harm which could be prevented by the injunctive or declaratory relief sought. FTF's suit also did not seek the destruction or modification of the boat docks nor remedial measures to prevent any harms caused by the current docks. Therefore, the court said that there was no value to a declaratory judgment stating that TVA and TDEC violated NEPA and the TVA Act.

Conclusion

The Sixth Circuit affirmed the district court's dismissal of FTF's federal and state law claims without prejudice for lack of standing.

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Endnotes

1. 42 U.S.C. §§ 4331, *et seq*. (1970).
2. 16 U.S.C. § 831c(k)(a) (2004) and 16 U.S.C. § 831y-1 (1935).
3. 40 C.F.R. § 1500-1508 (2009).
4. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 765 (2004).
5. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-04 (1998).
6. *Courtney v. Smith*, 297 F.3d 455, 460-61 (6th Cir. 2002).
7. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).
8. *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1170 (11th Cir. 2006).
9. *Friends of Tims Ford v. Tennessee Valley Authority*, 585 F.3d 955, 969 (quoting *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167, 183 (2000) (internal quotations omitted).

* * *

In Re Parminder Kaur v. New York State Urban Development, 892 N.Y.S.2d 8 (1st Dept. 2009)

Introduction

This case involves the use of eminent domain to take buildings in so-called "blighted" areas. In general, a public use or benefit must be present in order to exercise the power of eminent domain.

Facts

Respondent New York State Urban Development Corporation, d/b/a Empire Sate Development Corporation (ESDC), exercised its eminent domain power to take buildings in the Manhattanville area of West Harlem for the development by Columbia University (Columbia) of a new campus. Petitioners, owners of storage facilities and gas stations in the area designated for the new campus, challenged ESDC's determination that the development project qualified for use of eminent domain[1] as a Land Use Improvement Project and as a Civic Project under the authority of the New York State Urban Development Corporation Act (UDCA).[2]

Prior to the determination, Respondent retained Allee, King, Rosen and Fleming, Inc. (AKRF) (notably, the same consultant employed by Columbia University) to conduct a study of the project area.[3] AKRF's study concluded that the area was blighted, but relied on the conditions of buildings purchased or controlled by Columbia as evidence of blight in the area.[4] Then, after the objectivity of AKRF's study was questioned by the First Department, ESDC hired Earth Tech to evaluate the AKRF study.[5] Earth Tech confirmed AKRF findings and identified further deterioration in the buildings in the area.[6] These studies formed the primary legal grounds on which ESDC sought to acquire the properties by eminent domain.

Before the record closed in this matter, Petitioner Tuck-It-Away Associates challenged ESDC's refusal to publicly disclose certain documents that petitioner had requested under the Freedom of Information Law.[7] Both the New York County Supreme Court and the First Department ruled that the documents were subject to disclosure.[8] However, instead of disclosing the requested documents, ESDC filed for reargument and for leave to appeal the First Department's decision, and in the meantime, closed the record from further commenting.[9] Petitioners' efforts to extend the deadline for closing the record were denied by ESDC.[10]

Issues

The main issue in this case is whether the ESDC was justified in invoking the power of eminent domain. In making such a determination, the court considered: 1) whether the Columbia Project served a public purpose; 2) whether there was proof of blight in Manhattanville sufficient to empower ESDC to acquire the property; 3) whether the Columbia Project qualified as a civic project under the UDCA; 4) whether the UDCA was properly applied to acquire the property; and 5) whether the record that formed the basis for the ESDC decision to invoke eminent domain was sufficient.

Reasoning

The court first looked to the Supreme Court case *Kelo v. City of New London*[11] to determine whether the acquisition served a public purpose.[12] The court largely relied on Justice Kennedy's concurrence, which addressed the issue of pretext where transfers to private parties involved only minor, secondary benefits to the public.[13] In contrasting the elements of the New London plan (at issue in *Kelo*) with those of the Columbia project, the court found that the Columbia project did not serve a public purpose. The Columbia Project, unlike the New London plan, was not intended to address the economic depression of the Manhattanville area.[14] Instead, the project was funded and its plan was created primarily by the University to expand its campus.

The court also disapproved of the ESDC's determination that the area was blighted. The court noted that there was no evidence of blight in Manhattanville prior to the University's acquisition of the majority of property in the area.[15] The court was troubled by the existence of identified unanswered reports (including the New York City Economic Development Corporation's West Harlem Master Plan) that concluded the area was not blighted. Ultimately the court concluded that there was no independent credible evidence of blight in Manhattanville.[16]

The court specifically criticized the notion of "underutilization" by AKRF and Earth Tech to support their finding of blight. Both firms based their blight findings on the difference between a chosen standard floor area ratio (FAR) of 60% and the current buildings, and in both, the difference justified a conclusion that the existing neighborhood underutilized the space. After questioning the basis for the standard, the court stated that "[t]he time has come to categorically reject eminent domain takings solely based on underutilization."[17]

Next, the court examined the UDCA to determine whether the Columbia project was a civic project. The court found that a private university does not constitute facilities for a civic project under the UDCA. The court held that only a State legislature was entitled to grant a civic purpose status to a private purpose.[18] Because the New York Legislature failed to do so in this case, the court concluded that there was no civic purpose to the use of eminent domain.

The court agreed with the petitioners that the UDCA as applied in this case was unconstitutional. The UDCA was unconstitutionally vague in defining what constitutes blight, which was evident by the different criteria used to define blight. The same firm used different standards

to determine blight in the Atlantic Yards Project and the Columbia Project. The court found that one had to guess which factors would be used in each finding of blight.[19]

Lastly, the court examined the sufficiency of the administrative record to support ESDC's determination regarding the Columbia Project. The Eminent Domain Procedure Law (EDPL) requires that prior to the close of the record, a party whose property will be seized if the eminent domain is invoked be given an opportunity to be heard and to submit other documentary evidence concerning the proposed public project into the record.[20] The court concluded that the Petitioners were not given an opportunity to participate in this case, and that through litigation and litigious tactics the ESDC had sought to prevent full disclosure of the record to the interested parties. The court held that the ESDC's actions deprived the Petitioners of a reasonable opportunity to be heard under the EDPL and violated their due process rights under both the U.S. and New York Constitutions.[21]

Conclusion

The court concluded that the ESDC's acquisition of private property for the Columbia Project was not a proper use of eminent domain. The project benefited the University, but failed to serve a public or civic purpose. Moreover, the court rejected the finding of blight to validate the acquisition. The UDCA as applied and the closure of the record were unconstitutional.

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Endnotes

1. *See* Urban Development Corporation Act, L. 1968, ch. 174 §§ 3 (12), 10(c)(1); McKinney's Unconsol. §§ 6253(12), 6260(c)(1).
2. *In Re Parminder Kaur v. New York State Urban Development*, 892 N.Y.S.2d 8, 15 (1st Dept. 2009).
3. *Id.* at 13-14.
4. *Id.* at 20-21.
5. *See Matter of Tuck-It-Away Assoc., L.P v. Empire State Dev. Corp*, 879 N.Y.S.2d 55, 60 (1st Dep't 2008).
6. *In Re Parminder*, 892 N.Y.S.2d at 14.
7. *See Tuck-It-Away*, 861 N.Y.S.2d at 55.
8. *In Re Parminder*, 892 N.Y.S.2d at 13.
9. *Id.* at 27.
10. *Id.*
11. 545 U.S. 469 (2005).
12. *In Re Parminder*, 892 N.Y.S.2d at 16.
13. *Id.* at 18.
14. *Id.* at 19.
15. *Id.* at 20.
16. *Id.*
17. *Id.* at 23.
18. *Id.* at 25.
19. *Id.* at 26.
20. See Eminent Domain Procedure Law § 203.
21. *In Re Parminder*, 892 N.Y.S. at 26.

* * *

Save the Pine Bush, Inc. v. Common Council of City of Albany, 13 N.Y.3d 297 (N.Y. October 27, 2009)

Facts

In September 2003, Tharaldson Development Company, the owner of a 3.6-acre parcel of land, applied for a rezoning of the parcel to allow for construction of a hotel. The land was zoned for residential use but was being used as a parking lot at the time and had been surrounded by other commercial properties. Tharaldson's property is not part of the area protected by the Albany Pine Bush Preserve Commission, but it is near protected areas including Butterfly Hill, a habitat of the endangered Karner Blue butterfly.

The City of Albany (the City) determined that the proposed rezoning required the preparation of an Environmental Impact Statement (EIS). In August 2004, the City circulated to interested parties a "Draft Scoping Checklist" for the EIS that listed a number of environmental aspects of the project that it planned to examine, including terrestrial and aquatic ecology and the "Pine Bush." Under each of these headings, the checklist stated that the impact on the Karner Blue butterfly's habitat would be analyzed. No other plant or animal species was mentioned in the checklist.

In a response letter sent by the Department of Environmental Conservation (DEC), it stressed the importance of including a detailed evaluation "of potential site use by Karner Blue butterflies…."[1] "one species in a rare habitat that is known to support numerous rare or unusual species."[2] The letter also named four other species—the Frosted Elfin butterfly, the Hognosed Snake, the Worm Snake, and the Eastern Spadefoot Toad—and asked that the City's biological investigation include them.[3]

The City and Tharaldson completed the preparation of a draft environmental impact statement (DEIS), which the City accepted in March 2005. The DEIS identified two "Significant Items": the proximity of the project to the Karner Blue butterfly habitat and an increase in traffic.[4] Additionally, a report by biologist Dr. Richard Futyma concluded that the site "'does not constitute a significant resource for the Karner Blue butterfly.'"[5] Nothing was mentioned in the DEIS of the other species that the DEC had previously identified.

When the DEIS was made available for comment, several agencies, including the United States Fish and Wildlife Service (FWS), the Albany Pine Bush Preserve Commission and DEC, discussed Karner Blue butterflies in detail. The FWS and DEC comments mentioned the

Frosted Elfin butterfly briefly but no comments by any of these agencies, or otherwise, referred to the Hognosed Snake, the Worm Snake, or the Eastern Spadefoot Toad.

The final EIS was accepted in November 2005 and the City approved the zoning change in December 2005.

Procedural History

In March 2006, Save the Pine Bush, Inc. and several of its members challenged the City's action under SEQRA. Individual petitioners alleged that they "live near the site of the hotel project" and that they "use the Pine Bush for recreation and to study and enjoy the unique habitat found there."[6] The petitioners challenged the sufficiency of the EIS for an alleged failure to evaluate possible threats to the Frosted Elfin butterfly, the Adder's Mouth Orchid, the Hognosed Snake, the Worm Snake, or the Eastern Spadefoot Toad.

The Supreme Court denied a motion to dismiss the proceeding for lack of standing and in a later opinion vacated the City's SEQRA determination and annulled the rezoning. The Supreme Court found the EIS was flawed because it did not take "a hard look" at the potential impact of the project on rare plants and animals (other than the Karner Blue butterfly). The Appellate Division affirmed,[7] and the City appealed to the Court of Appeals as of right, pursuant to CPLR 5601(a).

Issues

Whether petitioners have standing to challenge the sufficiency of the EIS, and whether the EIS was deficient for failing to evaluate possible threats to the "Frosted elfin butterfly or any other listed species."

Reasoning

The Court of Appeals first analyzed the issue of standing, starting from the premise that "in land use matters…the plaintiff, for standing purposes, must show that it would suffer direct harm, injury that is in some way different from that of the public at large."[8] Furthermore, in cases involving environmental harm, "the standing of an organization could be 'established by proof that agency action will directly harm association members in their use and enjoyment of the affected natural resources.'"[9] Here, the Court held that the petitioner's alleged use of the Pine Bush for recreation, study, and enjoyment was sufficient to show that the threatened harm of which they complain affected them differently than "the public at large."

However, the Court disagreed with the lower court's decision regarding the EIS. The Court stated that the lower court erred in assuming that the City was required to examine all environmental problems that were brought to its concern. "An agency complying with SEQRA need not investigate every conceivable environmental problem; it may, within reasonable limits, use its discretion in selecting which ones are relevant."[10] Although the EIS focused on the Karner Blue butterfly, the Court held the EIS satisfactorily evaluated the threat of other species—specifically the Frosted Elfin butterfly and the Adder's Mouth Orchid. Additionally, the Court held that it was not necessary to include in the record an investigation relating to other species because there was no evidence offered into the record suggesting the project would threaten them, and the Court found no other commentator in the SEQRA process made any mention of them. "That [the City] chose not to investigate some matters of doubtful relevance is an insufficient reason for prolonging the process further, and for adding to the expense."[11]

Conclusion

The Court of Appeals reversed the lower court's decisions in part, holding that although petitioners have standing to challenge the City's determination, the City nonetheless complied with SEQRA when it focused its attention on the rezoning's impact on the Karner Blue butterfly, not on other rare species located in the preserve.

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Endnotes

1. *Save the Pine Bush, Inc. v. Common Council of City of Albany*, 13 N.Y.3d 297, 302 (*citing* letter from the Department of Environmental Conservation in response to City's "Draft Scoping Checklist").
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id. (quoting* Dr. Richard Futyma).
6. *Id.* at 303.
7. *Matter of Save the Pine Bush, Inc. v. Common Council of the City of Albany*, 56 A.D.3d 32, 37 (3d Dep't 2008).
8. *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 774 (3d Dep't 1991).
9. *Id.* at 775.
10. *Save the Pine Bush, Inc.*, 13 N.Y.3d at 307.
11. *Id.* at 308.

* * *

Matter of Fleming v. New York City Department of Environmental Protection, 66 A.D.3d 777, 887 N.Y.S.2d 206 (2d Dep't 2009)

Introduction

In a dispute over the environmental impacts of a proposed development along the lower Hudson River, petitioners sought Article 78 review of the New York City Department of Environmental Protection's (DEP) approval of (i) participation of the applicants' project in the New York State/New York City Phosphorus Offset Pilot

Program (POPP)[1] and (ii) the applicants' final supplemental environmental impact statement (SEIS) prepared under SEQRA. The trial court denied the petition, and petitioners appealed. The Appellate Division, Second Department, affirmed the trial court's judgment as to both of the DEP's determinations.

Facts

The subject of the proceedings is Kent Manor, a site along the lower Hudson River in Putnam County (the County), which has been proposed for a residential development by Kent Acres Development Company (Kent Acres) since the early 1980s.[2] The original proposal was for a project consisting of 318 condominiums and a related wastewater treatment plant (WWTP). At the time of the first proposal, the County Department of Health held authority to review and approve construction plans for sewage disposal systems in that region. The discharge of phosphorus from the WWTP into the drinking water supply was a major concern, as the chemical contributes to eutrophication (resulting in, e.g., algal blooms) which degrade water quality; excessive phosphorus content may also lead to anoxic conditions as more organic matter develops and then dies and decomposes, which in turn can upset the water body's overall ecosystem.[3] After revising the size of the project downward to 303 units and lowering the phosphorus discharge from the WWTP by half, approval was granted, and construction commenced. The project subsequently faced financial difficulties in the early 1990s due to the failure of the developer's lending institution, and construction halted in 1993 while Kent Acres sought reorganization through bankruptcy proceedings.[4]

Meanwhile, authority over activities affecting water quality shifted to the DEP, including the design, construction and operation of wastewater treatment plants[5] and the administration of the Phosphorus Offset Pilot Program (POPP) in Putnam County.[6] As part of Kent Acres' reorganization, the project property was to be purchased by Lexington Realty Development Corp. (Lexington), subject to ascertaining the validity of the prior approvals. However, the DEP denied the validity of the prior approval of the WWTP[7] based on concerns about the discharge of phosphorus into Palmer Lake and eventually the Croton Falls Reservoir.[8] Lexington then sought to be included in the POPP. Inclusion was granted by the DEP subject to local consent, but Town and County consent were withheld in 1999. This dispute resulted in an earlier civil action,[9] brought by the developers, which removed local opposition to the project's participation in the POPP.[10]

By the time the action was resolved, the DEP had assumed lead agency status, approved a somewhat smaller project (273 units plus WWTP) for inclusion in the POPP, and found that the applicants' final supplemental environmental impact statement (FSEIS) for the revised project complied with the State Environmental Quality Review Act (SEQRA). The petitioners—several individuals, Hill & Dale Property Owners, Inc., and Riverkeeper, Inc.—sought to have these approvals annulled in an Article 78[11] proceeding against the DEP, alleging that legal and regulatory standards had not been met by the approval process.

Issues

Petitioners alleged that the DEP "failed to take a hard look at the potential environmental impacts of the project, improperly approved the project for participation in the POPP, failed to provide sufficient time to review the FSEIS, and evaded public scrutiny and comment regarding potential impacts to Palmer Lake…by failing to discuss, in the draft SEIS, all potential impacts to the lake."[12] The Court asked "'whether the [DEP] identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination[s].'"[13]

Reasoning

In an Article 78 proceeding, an agency's determination may only be annulled where it is found to be arbitrary and capricious or unsupported by the evidence.[14] Where an agency's determination concerning the adequacy of an environmental impact statement is in question, the Court must ask whether the agency's "reasoned elaboration" addressed the extent to which adverse environmental effects revealed in the environmental impact statement will be minimized or avoided to the maximum extent practicable.[15] The Court first found, without discussion, that the DEP's inclusion of the project in the POPP was not arbitrary and capricious. The Court next found that the DEP had taken a hard look at relevant areas of environmental concern, including the potential environmental impacts to Palmer Lake. Moreover, the Court found that the DEP provided a sufficiently reasoned elaboration of the basis for its determination that the project's significant adverse environmental impacts would be minimized or avoided to the maximum extent practicable. Finally, the Court found that the DEP had complied with all procedural requirements of SEQRA, providing an adequate basis for public consideration with a draft SEIS; and that a reasonable time had been afforded for consideration of the FSEIS.

Conclusion

The Appellate Division, Second Department, found that the DEP's approval of the applicants' final SEIS and inclusion of the WWTP in the POPP were not arbitrary and capricious and that the process employed by DEP was adequate under SEQRA.

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Endnotes

1. *See* 15 RCNY 18-82(g); 10 NYCRR 128-8.2(g).
2. For a detailed history, s*ee Kent Acres Dev. Co., Ltd. v. City of New York*, 41 A.D.3d 542 (2d Dep't 2007).
3. *See, e.g.*, http://ga.water.usgs.gov/edu/urbanpho.html; http://www.water-research.net/phosphate.htm.
4. New York City Department of Environmental Protection, Appendix C, Project History, available at http://www.nyc.gov/html/dep/pdf/kent/km_appendix_c.pdf.
5. 15 RCNY 18-14(a)(6); 10 NYCRR 128-1.4 (a)(6).
6. 15 RCNY 18-82(g); 10 NYCRR 128-8.2 (g).
7. *Kent Acres*, 41 A.D.3d at 546.
8. *See, e.g.*, http://www.riverkeeper.org/campaigns/safeguard/enforcement-compliance/kent/.
9. *Kent Acres*, 41 A.D.3d 542.
10. *Id.* at 549.
11. N.Y. CPLR 7803 -7806 (2009).
12. *Fleming*, 66 A.D.3d at 779.
13. *Id.* at 779 (*quoting Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400 , 417 (1986)).
14. *See* CPLR 7803(3)–(4).
15. *See* ECL § 8-0109(8); 6 NYCRR 617.11(d).

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Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009)

Introduction

Comer v. Murphy Oil involves a class action lawsuit by Mississippi landowners and residents along the gulf coast against various national energy, fossil fuel and chemical corporations for property damages allegedly resulting from global warming. In support of their claims sounding in nuisance, trespass, negligence, fraudulent concealment, and unjust enrichment, the plaintiffs claimed that the greenhouse gas emissions from defendants' business activities contributed to global warming which increased sea levels, enhanced the ferocity of Hurricane Katrina, and ultimately caused the destruction of plaintiffs' property and the loss of use of public beaches.

The district court dismissed the plaintiffs' claims for lack of standing and for presenting non-justiciable political questions,[1] and the plaintiffs appealed. On appeal, the Fifth Circuit held that the plaintiffs had standing under the holding of *Massachusetts v. EPA* to bring common law claims resulting from the emission of greenhouse gases by the defendants, essentially expanding that holding of *Massachusetts v. EPA* to private plaintiffs.

Issue

Do plaintiffs' claims, the injuries for which relate to global climate change, present justiciable questions for the court?

Reasoning

In *Comer*, the Fifth Circuit reversed the district court's dismissal of the plaintiffs' trespass, public and private nuisance, and negligence claims. Relying on *Massachusetts v. EPA*,[2] the Fifth Circuit rejected defendants' argument that the chain of causation between the defendants' emissions and the plaintiffs' injuries was too attenuated. Characterizing the causal chain challenged by defendants as "virtually identical" to the one considered in *Massachusetts v. EPA*, the court noted that the U.S. Supreme Court has "accepted as plausible the link between man-made greenhouse gas emissions and global warming."[3] Similarly, the court relied on *Massachusetts v. EPA* in rejecting defendant's attempt to argue that traceability was lacking because their emissions contributed only minimally to climate change. In doing so, the Fifth Circuit essentially expanded the applicability of the Supreme Court's holding by finding that standing for claims arising from global warming may exist for private plaintiffs, not just as the state plaintiffs seeking relief in *Massachusetts v. EPA*.

The Fifth Circuit also reversed the district court's finding that the plaintiffs' nuisance, negligence, and trespass claims constituted non-justiciable political questions. According to the Fifth Circuit, "the federal courts are not free to invoke the political question doctrine to abstain from deciding politically charged cases like this one, but must exercise their jurisdiction as defined by Congress whenever a question is not exclusively committed to another branch of the federal government."[4] Non-justiciable questions are particularly unlikely to arise in common law tort cases and cases in which damages are sought, rather than injunctive relief. The plaintiffs' public and private nuisance, trespass, and negligence claims were remanded for further proceedings.

The Fifth Circuit, however, affirmed the dismissal of the conspiracy, fraudulent misrepresentation, and unjust enrichment claims, finding that the plaintiffs failed to satisfy the federal prudential standing requirement for each. The prudential standing requirement bars "adjudication of generalized grievances more appropriately addressed in the representative branches."[5] The court found that plaintiffs' claims constituted generalized grievances to be addressed by the representative branches of government.

Conclusion

In *Comer*, the Fifth Circuit recognized as justiciable plaintiffs' common law claims for injuries resulting from the release of significant amounts of carbon dioxide and the resulting impact on the global climate. *Comer* applies and expands *Massachusetts v. EPA* by holding that private party plaintiffs, not just plaintiff-states, have standing to bring actions for the harms resulting from climate change.

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Endnotes

1. *Comer v. Murphy Oil USA, Inc.*, 2007 WL 6942285 (S.D. Miss. 2007).
2. *Massachusetts v. EPA*, 549 U.S. 497 (2007).
3. 549 U.S. at 522-23 (2007).
4. 585 F.3d 855, 873 (5th Cir. 2009).
5. *Citing Allen v. Wright*, 468 U.S. 737, 751 (1984).

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Summers v. Earth Island Institute, 129 S. Ct. 1142 (2009)

Facts

In 1992, Congress enacted the Forest Service Decision Making and Appeals Reform Act ("Appeals Reform Act").[1] This statute requires the National Forest Service to establish a notice, comment, and appeal process for any "proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans developed under the Forest and Rangeland Renewable Resources Planning Act of 1974."[2] Following the 2002 fire in the Sequoia National Forest in Northern California, the Forest Service approved the Burnt Ridge Project, a salvage sale of timber encompassing 238 acres damaged in the fire. However, the Forest Service did not provide public notice of the sale, afford an opportunity for public comment on the project, or afford an appeal process to prospective plaintiffs. In December 2003, a group of environmental organizations ("collectively referred to as Earth Island") filed a complaint in the Eastern District of California, alleging violations of the Appeals Reform Act in the Burnt Ridge Project. Following issuance of a preliminary injunction against the timber sale, the parties settled the dispute over the Burnt Ridge Project. Although the district court recognized that the Burnt Ridge Project was no longer at issue, the court still adjudicated the merits of the case and invalidated several provisions in the Forest Service's regulations. The Ninth Circuit largely upheld the decision.

Issue

Does Earth Island retain standing to challenge the regulations of the Forest Service in the absence of a live dispute over the application of those regulations?

Reasoning

Under Article III of the U.S. Constitution, courts only have authority to redress or prevent actual or threatened injuries. This limitation "is founded in concern about the proper and properly limited role of the courts in a democratic society,"[3] and requires courts to inquire into whether "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction."[4] Therefore, to establish standing in an action for injunctive relief, a plaintiff must show an "injury in fact" that is traceable to the challenged action of the defendant and the likelihood that a favorable judicial decision will prevent or redress the injury.[5] These strict requirements assure that "there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party."[6]

In this case, Earth Island asserted that its members' recreational interests in the Sequoia National Forest would be impaired by the Forest Service's Burnt Ridge Project, and that the threat was sufficiently concrete and particularized to qualify as an "injury in fact." To support its claim, a member of Earth Island (Marderosian) asserted that he had repeatedly visited the Burnt Ridge Project site, that he had plans to do so again, and that his interests in viewing the flora and fauna of the area would be significantly harmed if the Burnt Ridge Project went forward. The Court ruled that such interests would be sufficient to establish Article III standing, notwithstanding the fact that a generalized harm to the forest or the environment will not alone support standing, because the harm in fact affects the recreational or even the mere esthetic interests of the plaintiffs.[7]

The problem raised in this case was that Marderosian's asserted injuries had been remedied before the trial and they were "not at issue in this case."[8] As the Court recognized, there is "no known precedent for the proposition that when a plaintiff has sued to challenge the lawfulness of certain action or threatened action but has settled that suit, he retains standing to challenge the basis for that action, apart from any concrete application that threatens imminent harm to his interests."[9] Such a holding would "fly in the face of Article III's injury-in-fact requirement."[10]

Conclusion

The Court addressed the question of whether, in the absence of a live dispute over the application of federal forest regulations, respondents have standing to challenge the failure to apply such regulations. In this case, the Court concluded that Earth Island lacked standing to bring its suit. Earth Island voluntarily settled a portion of its lawsuit pertaining to any alleged member's interests and also failed to show that any of its members planned to visit the sites where the challenged regulations were being applied in a manner that would harm a particular member's interests. The circumstances rendered the Court unable to redress the alleged injuries: Earth Island's challenge to the Burnt Ridge Project related to an already remedied injury, rather than an imminent future injury. Therefore, Earth Island did not retain standing to challenge governmental regulations absent a live dispute over their concrete application.

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Endnotes

1. *See* Pub. L. 102-381, Tit. III, § 322, 106 Stat. 1419.
2. *Id.*
3. *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *see also United States v. Richardson*, 418 U.S. 166, 179, 188-97 (1974).
4. *Warth,* 422 U.S. at 498-99.
5. *See Friends of Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 180-81 (2000).
6. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221(1974).
7. *See Sierra Club v. Morton*, 405 U.S. 727, 734-36 (1972).
8. *See Earth Island Institute v. Pengilly,* 376 F. Supp. 2d 994, 999.
9. *Summers,* 129 S.Ct. 1149-50.
10. *Id.* at 1150.

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Lighthouse Pointe Property Association v. New York State Department of Environmental Conservation, No. 3, 2010 N.Y Slip Op. 01377, 2010 WL 546058 (N.Y. Feb. 18, 2010)

Facts

Petitioner Lighthouse Pointe Property Association, Inc. ("Lighthouse Pointe") brought an action under CPLR Article 78, challenging Department of Environmental Conservation's ("DEC") denial of petitioner's application for acceptance into the Brownfield Cleanup Program ("BCP").

This case involved a proposal to develop two parcels—the 25.4-acre Inland Site and the 22-acre Riverfront Site—along the Genesee River in Monroe County as a mixed-use neighborhood at a cost of $250 million. The Inland Site had previously served as a landfill and housed a wastewater treatment plant for sixty years. The landfill, which ceased operation in the 1960s or 1970s, served as a depository for residential refuse, ash, slag, construction debris, and sewage sludge. The Riverfront Site contained industrial waste, construction debris, sewage sludge, and residential refuse as fill material. A remedial investigation report revealed the presence of contaminants in quantities that exceeded soil and groundwater standards, costing $4 million to $8 million to remediate.

Petitioner Lighthouse Pointe sought inclusion in the BCP on grounds that these contaminants significantly complicated its plans to redevelop the area. DEC's environmental engineer, however, found that the exceedances were too small in number and magnitude to necessitate remediation. On the basis of the engineer's findings, DEC denied petitioner's application, concluding that contamination did not complicate redevelopment of the property. Petitioner appealed to the Monroe County Supreme Court, which granted petitioner's motion for Article 78 relief. The Appellate Division, Fourth Department, reversed in a 3–1 decision, on the basis that it is improper for "courts to second-guess a reasoned agency determination or to invade the process by which such a conclusion is reached."

Issue

The question in this case is whether or not DEC reasonably interpreted the phrase "may be complicated" in the statutory definition of the term "brownfield site" when it determined petitioner to be ineligible for acceptance into the BCP.

Reasoning

DEC maintained that determining eligibility for acceptance into the BCP was "an environmental decision of which [DEC] is the sole arbiter."[1] Moreover, "[w]ithout the benefit of the agency's expertise or perspective borne of experience, the courts lack any basis to substitute their own judgment for that of DEC."[2] The Court of Appeals disagreed. In reinstating the judgment of the Monroe County Supreme Court, granting petitioner's motion, the Court held that DEC's interpretation of the term "brownfield site" ran contrary to both the text and legislative history of the brownfield statute.

A "brownfield site" is "any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant."[3] The Court noted that the term "brownfield site" "does not, on its face, mandate the presence of any particular level or degree of contamination."[4] Further, the word "complicate" is to be understood according to its common English usage: "to make complex, involved, or difficult." The Court opined that the low eligibility threshold was consistent with the statute's legislative history. The Legislature intended the BCP to improve upon its predecessor, the Voluntary Cleanup Act, and further encourage voluntary cleanups by offering tax incentives and limited liability relief. The aim was to reach even marginally polluted properties that owners had abandoned rather than face high clean-up costs and risk incurring strict, joint and several liability.

The Court of Appeals reversed the Appellate Division and reinstated the judgment of the Supreme Court, granting petitioner's motion. The Court held that petitioner's property fit squarely within the broad statutory definition of a "brownfield site": it was undisputed that multiple contaminants were present in levels exceeding a variety of environmental standards; moreover, the contamination frustrated petitioner's efforts to develop the largest portion of the Inland Site and receive financial backing.

Conclusion

The Court's ruling confirmed that the question of BCP eligibility is one of "pure statutory reading," rather than a matter solely within the discretion of DEC.[5] The Court rejected DEC's interpretation of a "brownfield site" as encompassing only those properties where "redevelopment or reuse may be complicated by the need for a cleanup."[6] Thus, the Court sent a clear message that the Legislature intended a low eligibility threshold to apply, and that contaminated properties—even those that DEC determines are not polluted enough to warrant cleanup—will nonetheless qualify for eligibility to the BCP as a matter of right, so long as the contamination is shown to complicate redevelopment or reuse of the property.[7] The question of what guideline factors DEC may reasonably consider in eligibility determinations remains unanswered.

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Endnotes

1. Lighthouse Pointe Prop. Assocs. v. N.Y. State Dep't of Envtl. Conservation, No. 3, 2010 N.Y. Slip Op. 01377 (Feb. 18, 2010).
2. *Id.*
3. N.Y. Envtl. Conserv. Law § 27-1405(2) (McKinney 2007 & Supp. 2009).
4. No. 3, 2010 N.Y. Slip Op. 01377.
5. *Id.*
6. *Id.*
7. *Id.*

* * *

Connecticut v. American Electric Power Company, Inc., 582 F.3d 309 (2d. Cir. 2009)

Plaintiffs, comprised of eight States, New York City, and three land trusts, sought equitable relief under federal common law against six electric power corporations operating in twenty states. The plaintiffs petitioned for an abatement of greenhouse gas emissions to curtail domestic contributions to climate change, the effects of which are already being felt and likely will not abate before causing billions of dollars of nationwide harm.[1] After the Southern District of New York dismissed the case for lack of justiciability, the Second Circuit, similar to the Supreme Court in *Mass. v. EPA*,[2] allowed a presumptively global problem to be captured within the limited scope of tort claims. The opinion by the Second Circuit illustrates a narrow, more pragmatic view of non-justiciability.

The District Court relied upon the third of six *Baker v. Carr* factors in deciding that the causes of action were "'impossi[ble] [to] decid[e] without an initial policy determination of a kind clearly for non-judicial discretion.'"[3] The Second Circuit reviewed this decision de novo analyzing all six *Baker* factors, as well as standing, applicability of federal common law, and displacement of the plaintiffs' claims. In terms of non-justiciability, the Second Circuit set a high standard under *Baker*: there must be an "'inextricable [link] from the case at bar.'"[4] Notably, the court cautioned that a politically charged issue is not synonymous with non-justiciability. To ameliorate the justiciability of a politically charged issue, the controversy must "revolve[s] around policy choices and value determinations constitutionally committed" to the Legislative or Executive Branch.[5]

Of the six *Baker* factors evaluated, the second and third bear the brunt of analysis. The second factor asks whether manageable standards exist for resolving the case. The court determined that manageable standards do exist because the framework of Plaintiffs' tort claim has been adjudicated in the past in *Missouri v. Illinois*[6] and *Georgia v. Tenn. Copper Co.*[7] and the standards for nuisance have been developed in the Restatement (Second) of Torts.[8] Tort encompasses the Plaintiff's primary claim, that defendants created, contributed, or maintained a public nuisance in the form of a "posit[ed] [] proportional relationship…'[between carbon dioxide] emissions, [to] greater and faster [] temperature change[s] [], with greater resulting injuries'"[9] from the emission of millions of tons of carbon dioxide annually.[10] Later in the decision, addressing applicability of Federal Common Law, the court laid out the Restatement § 821B(1) nuisance elements as: an "unreasonable interference" and "a right common to the general public."[11]

The third factor, impossibility to decide without a prior non-judicial policy decision, was heavily relied upon by the District Court. The Second Circuit construed this factor through the lens of Plaintiffs' reliance on tort. Citing *United States v. Texas*[12] the court emphasized that a refusal to legislate does not amount to displacement of common law; however, it conceded that later regulation "may in time pre-empt the field of federal common law of nuisance."[13] As it stands, the court held that the plaintiffs may pursue federal common law claims that "have been adjudicated in federal court for over a century."[14]

Related to this subject is the court's analysis of displacement of Federal Common Law. Federal Common Law is resorted to by the courts only "in the absence of an applicable Act of Congress."[15] Finding no specific act or amalgam of several acts that "'[speaks] *directly* to [the] question otherwise answered by federal common law," the court found that neither Congress nor EPA has displaced Federal Common Law by regulating the subject matter of plaintiffs' claims.[16]

The court's role in reviewing the plaintiffs' standing should have been limited, as this appeal was presented from a motion for summary judgment. In such situations, plaintiffs need not "present scientific evidence to prove… injury…or that the remedy they seek will redress those injuries."[17] Yet, the court cited *Summers v. Earth Island Inst*.[18] and *Lujan v. Defenders of Wildlife*[19] in addressing the broad history and platform of environmental standing, affirming *sua sponte* Plaintiffs' standing at this stage of litigation.

The Second Circuit vacated the summary judgment decision and remanded the case to the District Court, finding the federal common law claim made by the Plaintiffs to be proper, justiciable, and not displaced. Without subsequent legislation, or at the very least, without responsive rulemaking by the EPA, tort law may remain a source of viable litigation strategy to confront major polluters.

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Endnotes

1. *Connecticut v. Am. Elec. Power Co*, 582 F.3d 309, 317–18 (2d Cir. 2009).
2. 549 U.S. 497 (2007).
3. *Baker v. Carr*, 369 U.S. 186 (1962); *Connecticut v. Am. Elec. Power Co.*, 406 F.Supp.2d 265, 272 (S.D.N.Y. 2005) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004)).
4. *Connecticut*, 582 F.3d at 321 (quoting *Baker*, 369 U.S. at 217).
5. *Connecticut*, 582 F.3d at 323 (quoting *Japan Ass'n v. Am. Cetacean So'y*, 478 U.S. 221, 230 (1986)).
6. 180 U.S. 208 (1901).
7. 206 U.S. 230 (1907).
8. *Connecticut*, 582 F.3d at 327–28.
9. *Id.* at 317.
10. *Id* (quoting *National Academy of Sciences).*
11. *Id.* at 326 (citing Restatement (Second) Torts § 821B(1) (the court further fleshes out these elements by discussing § 821B(2) which includes examples of interference with a public right)).
12. 507 U.S. 529 (1993).
13. *Id.* (citing *Milwaukee II*, 451 U.S. 304, 313–14 (1981)).
14. *Connecticut*, 582 F.3d at 331.
15. *Id.* at 387.
16. *Id.* at 374 (quoting *Milwaukee II*, 451 U.S. at 351).
17. *Id.* at 333.
18. 129 S.Ct. 1142 (2009).
19. 504 U.S. 555 (1992).

* * *

Legislation

New York Green Building Construction Act

New York was among the first states in the nation to offer a tax incentive program for the developers and builders of environmentally friendly buildings[1] although several states (including Arizona, California, Pennsylvania, and Washington) have policies that require green building practices for public buildings. Green buildings practices are intended to use resources (including energy, water, and land) more efficiently and provide healthier living environments for occupants than buildings constructed under conventional methods. Green buildings also seek to mitigate negative environmental consequences by reducing the amount of waste generated in the building process, encouraging the use of recycled or recyclable material, incorporating renewable and energy efficient power systems, and reducing water consumption.

In recent years, the State of New York has adopted several measures intended to encourage Green building.[2] The most recent Green Building Construction Act amends Chapter 565 of 2008 and the Public Buildings Law[3] to more effectively promote the development of high-performance green sustainable buildings built by the state. The new law[4] requires that construction and substantial renovation of state buildings comply with "green" building standards as established by the Office of General Services (OGS). OGS will issue regulations in consultation with the New York State Energy Research and Development Authority (NYSERDA), the Department of Environmental Conservation (DEC), the Department of Health (DOH), the Dormitory Authority of the State of New York (DASNY), the Department of State (DOS), the Department of Education (SED), the Office of Parks, Recreation and Historic Preservation (OPRHP), and any other agency deemed necessary.

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Endnotes

1. Ch. 63 of L.2000.
2. Ch. 565 of L.2008.
3. Art 4-C, Pub. Bldg. L. §§ 80-83.
4. Ch. 380 of L.2009.

* * *

Green Jobs/Green New York Bill

In fall of 2009, the Green Jobs/Green New York bill[1] was signed by Governor Paterson, passed the Senate 52-8, and passed the Assembly unanimously. The goal of the bill is to make one million homes, businesses and not-for-profits in New York more energy efficient and to create and train workers for new green jobs.

The bill authorizes the New York State Energy Research and Development Authority (NYSERDA) to distribute loans of up to $13,000 for residential and $26,000 for commercial properties to retrofit a home or business. The property and business owners will pay back the loans with the money they save on their energy bills. Through the retrofitting, the owners will reduce their total energy usage by 30 to 40% and yield a profit because their loan repayments will be less than the money saved. Those eligible for the program will be determined through a competitive application process. In addition, NYSERDA and the New York State Department of Labor will create workforce training programs throughout the state to prepare the state's workforce to tackle the massive retrofitting.

The loan and job training programs will be funded with the money raised from the auction of carbon emission credits through the Regional Greenhouse Gas Initiative (RGGI). Of the $120 million raised from auction, $70 million will be used for the revolving loan fund while $2 to $4 million will be provided to establish the green job training programs. Fifty percent of the loan money will go towards residential retrofitting.

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Endnote

1. Ch 487 of L.2009.

* * *

Expansion of the New York State Returnable Container Act (The Bottle Bill)

Late in 2009, a long-time fight over expansion of New York State's bottle bill[1] came to an end. The "Bigger, Better Bottle Bill," which became law on April 7, 2009,[2] expanded New York's 1982 Bottle Bill[3] by including bottled water and requiring beverage companies to return 80 percent of unclaimed bottle deposits. The expanded legislation also makes the program more "user-friendly" by improving the infrastructure for collecting and recycling bottles and cans. To accomplish this goal, the bill requires statewide chain retailers with stores over 40,000 square feet to install reverse vending machines.[4] Further, to prevent deposit refunds for non-New York bottles, all New York deposit containers are required to have a separate UPC code.

It is the latter provision which triggered The International Bottled Water Association, a trade association, and two bottlers, Nestle Waters North America, and Polar Corp., to challenge the constitutionality of the "Bigger, Better Bottle Bill" on May 22, 2009.[5]

In May 2009, U.S. District Judge Thomas P. Griesa enjoined implementation of any part of the law until April 1, 2010. However, in August 2009, District Judge Deborah Batts, a Federal District Court Judge in Manhattan, ordered that all elements of the bill should go into effect immediately including the return of 80 percent of the unclaimed deposits to the state and increased handling fees for bottle redemption centers. Judge Batts also ruled that the bottled water industry must comply with the expanded bottle bill unless it can demonstrate that compliance is impossible. Noting that the bottled water industry's challenge to the expanded bottle bill was "walking on unusually inhospitable legal terrain,[6]" Judge Batts stated that "it is the Court's expectation that [bottled water companies] are actively working to achieve compliance"[7] by October 22, 2009. As indicated in the Court Order issued on October 23, 2009, the injunction on implementation and enforcement of the 2009 amendments pertaining to bottled water products was set to expire at 11:59 p.m. on October 30, 2009.

Only one provision of the expanded bottled bill, which requires bottles sold in New York to have a UPC label code specific to New York, remains subject to the injunction. The State did not seek to modify that part of the injunction.

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Endnotes

1. Article 27, Title 10 ECL §§ 27-1001 to 27-1019. The applicable regulations are at 6 NYCRR Part 367.
2. Chapter 59 of the Laws of 2009 were enacted on April 7, 2009.
3. The original bill is known as The New York State Returnable Container Act. It was enacted June 15,1982, and effective July 1, 1983, pursuant to Chapter 200 of the Laws of 1982. Laws of 1983, 1984, 1988 and 1997 made changes to the original law.
4. A reverse vending machine "automates beverage container recycling by accepting containers directly from the consumer, accounting for each container processed, and refunding the deposit to the consumer." Referenced from http://www.envipco.com/reverse.asp.
5. http://www.nestle-watersna.com/pdf/Complaint.pdf.
6. 09 civ. 4672, Dkt~ No. XX, Order, August 15, 2009 at 10.
7. *Id*.

* * *

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

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