NYSBA SPRING/SUMMER 2013 | VOL. 33 | NO. 1

The New York Environmental Lawyer

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

Message from the Chair


Carl Howard

Many thanks to so many Section members who have given freely of their time to various events over the past few months. You all received from me an email asking that you complete the Questionnaire I have been promoting, and many of you responded. To date 104 responses have been received. While I was hoping for a bigger response (membership is over 1,000), I recognize that people have many reasons for not responding. I know that time is an issue, and some have objected that filling out a Questionnaire is not helpful in the effort of combating climate change, and still others remain unconvinced of the reality of climate change or that it is caused primarily by man-made carbon emissions. Obviously, I disagree and continue to argue that it is only by taking personal responsibility for this overwhelming threat that we can hope to effectively respond to it. How we each live our life matters and so I continue to request that you fill out the Questionnaire and make climate change considerations a factor throughout your day every day no matter where you are or what you are doing. The link / web address for the Questionnaire appears at the end of this Message.

More argumentatively, I don't think any one of us who is not an expert in climate change issues has the right to deny that climate change is occurring. It is. When virtually every scientist studying ice cores, the movement of plants and animals north and attitudinally upward, earlier arrival and later departure times for migrations, earlier dates for vegetation ripening, and flowering, and earlier dates for hatching and birthing of many animals, concludes that the planet is warming at an alarming rate, who are we non-expert, non-scientists, to say it isn't? And when virtually every leading scientist not aligned with

Inside

the oil and gas industry concludes that the warming is almost certainly due to anthropogenic actions, carbon emissions from, *inter alia*, power plants, planes and other petroleum-based vehicles, and other combustion of fossil fuels, on what basis does one disagree? Recent studies have tightened the link between rising carbon levels and a warming planet. Yes, it has happened before, but not at this pace, a pace too rapid for most living organisms to adapt. I don't see how one argues with this. You don't get to express a legitimate opinion as to whether or not gravity exits, or the "theory" of evolution. Scientists are still honing our understanding of the mechanisms of evolution, but one cannot credibly argue, based on religious belief or anything else, that intelligent design or creationism or anything other than evolution accounts for all of life on earth. I don't see that climate change, given all the scientific evidence and scientific unity, is any different.

We are also learning that the conservative predictions on the effects of climate change are turning out to be anything but conservative estimates. Polar ice is melting more rapidly than expected, sea level rise is swallowing Pacific Island nations faster than expected, the number of storms and their severity is occurring with greater frequency and savagery than expected, the number of environmental refugees displaced, harmed and killed by these storms is greater than predicted, the amount of economic devastation globally is beyond all expectations, artificial boundaries separating nations, parks, and wildlife refuges are moving more rapidly than expected, formerly fertile agricultural areas are being devastated by floods and/or drought and/or wild fires with greater frequency and damage than expected, formerly lush tropical forests are drying quicker than expected, releasing more water vapor to the atmosphere fueling devastating storms. Oceanic currents and water temperature, the basis for all weather systems on earth, are being altered faster and to a greater extent than expected, leading to unpredictable climate and altered growing seasons causing greater disruptions to more species than expected. And on and on and on. I have yet to see any scientific evidence that this is not occurring or that it is natural and therefore benign.

Here in New York, many in our Section are still dealing with the impacts of Hurricane Sandy. Many coastal communities have not been rebuilt and will not rebuild anytime soon, if ever. Insurance companies, which have already declined to offer flood insurance, are now raising premiums, if they are offered at all, for other types of recovery aid from storms as the frequency, and amount, of claims increase yearly. The disruptions go beyond mere economics. Family heirlooms were destroyed by Sandy, families who had lived in communities for generations have been uprooted and forced into strange communities, their children abruptly transferred to new schools, friendships and relationships severed. New regulations may cause further social disruption as only the wealthy may be able to afford to raise their homes and to pay for insurance or to rebuild without a mortgage in areas now deemed risky and uninsurable.

Some people find this all to be too much to handle and look away. That is understandable. But I argue that one need not undertake drastic changes. I suggest that people do what they feel they can do. That's a start. The Questionnaire is intended to provide ideas as to the kinds of things one can do, every day, everywhere. And I assert that it will take every one of us acting every day as if our actions matter, to make a difference. I believe we can make a difference or I would not have devoted my career to environmental protection. Those of us who wish to lead this effort will continue to do so regardless of how many or how few follow. It is my belief that over time increasing numbers of people are getting the message and are pitching in. Ultimately, as many of you have written into the space provided for feedback in the Questionnaire, we will need more, and more effective, legislation. But politicians won't lead us there. They will follow us. They will poll us and find out what we want. We need to demonstrate what we want with every dollar we spend, with every activity we engage in, with every candidate we endorse. That's when we'll get the representation we deserve and the legislation we need. We need a carbon tax. We need Congress to emerge from its stalemate and paralysis. But this will not happen unless we all act together. I remain hopeful that our Section, the Environmental Law Section, will play a greater leadership role as a Section. So far I see that happening in limited ways. But as I said, I, and many other dedicated souls, will continue our efforts and hope that more will join us.

Submitting your response to the Questionnaire will help signal that our Section wishes to lead on this issue. I was hoping to send the Questionnaire to the other sections of NYSBA. Ultimately we need more than just ELS members to sign on to this effort. We need vast majorities in New York State, in the U.S., in the world, to recognize the challenge facing the planet. But one step at a time. If we get a sufficiently large response to the Questionnaire, that will give us the momentum I think we need for me to take the next step and urge other sections to think about climate change. Thank you Kristen Wilson and Megan Brillault of the Pollution Prevention Committee for your help in developing the Questionnaire with me. As more results are submitted we will synthesize them and report back to the Section.

I have informed many of you of the steps the Global Climate Change Committee (GCCC) has taken to contact the other NYSBA sections pursuant to another effort. I noted that we had requested of the various other section chairs that they identify one or two of their members to participate in a conference call with me and the GCCC to discuss the statutes, rules and regulations that they are expert in that might need amendment to deal with some of the current and projected impacts of climate change.

We have received responses from several sections and will proceed with this effort. Thank you Michael Gerard, Kevin Healy and Ginny Robbins for initiating this project.

Thank you to Jim Rigano, Jim Periconi and Maureen Leary of the CLE Committee, and welcome to Myriah Jaworski, our newest member, who have agreed to help rescue the Section's finances. While we still have a surplus, it is dwindling. The wonderful ladies of NYSBA, Lisa Bataille, Lori Nicoll, and Kathy Plog, continue to help plan, promote and run our programs. In early June, 2013, Jim Rigano, Myriah and Lisa hosted a Section-run program on hydrofracking, which enabled the Section to keep profits from that event. The plan is then for the CLE Committee to acquire sufficient expertise to put on more such Section-lead programs, and webinars, to the benefit of the Section. We have generous offers to utilize free space for such programs, such as law schools, and anyone who may be able to assist either in planning such programs or arranging for free space or gathering email addresses for target audiences, is urged to contact me and/or the CLE Committee.

Thank you again to Marla Weider and Michael Zarin for a successful January meeting in New York City. That event is always a lot of fun, well-attended, and informative. This year's event was no exception in that regard. Similarly, thank you to our Section Treasurer, Terresa Bakner, who will be Vice-Chair at the time of publication, and who put together the Fall meeting in Lake Placid where we had the honor of hearing Bill McKibben speak so powerfully about climate change issues (which are further detailed in his book, which I highly recommend, "Eaarth," the extra "a" signifies that we now inhabit a different planet than the old earth, due to the sweeping changes we are witnessing from climate change).

Our Section Secretary, Michael Lesser, who will be Treasurer at the time of publication, put together the Spring Legislative Forum which took place on May 15, 2013, at the Bar Association offices in Albany. And our Section's Vice-Chair, Kevin Reilly, who will be Chair at the time of publication, is busy planning the next Fall Meeting (Oct. 25-27, 2013) for Jiminy Peak. As always, we have very busy, dedicated, Section officers.

Our Section continues to be a vibrant and active one. There are many others who are putting together programs, writing articles and otherwise doing great work for this Section. I am honored to be your Chair. I do not apologize for my stridency but do apologize if I have upset or irritated anyone. Please feel free to contact me as I am willing to discuss these issues. You elected me to be an officer, and after 28 years with the United States Environmental Protection Agency, what did you expect? Please check our website for future ELS events, as well as our blog (thank you, Sam Capasso), which is available via our website (NYSBA.ORG/ENVIRONMENTAL). Once again, the Questionnaire is also available via our website (NYSBA.ORG/ELSQuestionnaire, or via: http://vovici.com/wsb.dll/s/752dg504de).

Finally, thank you Phil Dixon, as Counsel to the Chair, and others who regularly participate in the monthly Cabinet conference calls: Howard Tollin, John Greenthal, Joan Matthews, and our *Journal* Editor-in-Chief, Miriam Villani, who is responsible for this fine publication. It is truly a pleasure to work with you all.

Carl R. Howard

From the Editor-in-Chief

As I write this, the floodwaters of Superstorm Sandy are long gone, but the damage is still visible in the coastal communities of Long Island and the New York metropolitan area. As is not unusual in the aftermath of natural disasters, the sense of loss and fear slowly evaporates and is replaced with the spirit of resilience and strength. These feelings typically manifest in a dedication to rebuilding; a physical symbol of resurgence. How to rebuild is the difficult question.

The Federal Emergency Management Agency ("FEMA") jumps into action during and after natural disasters, most visibly in providing temporary shelter and assisting in the rebuilding effort. FEMA also has the lesser known responsibility of development of flood maps. The purpose of these maps is to identify the risk of flooding in areas during storm events. The maps are used by local governments to set building codes and by insurance companies to determine appropriate insurance rates.

When Sandy reached our coasts, FEMA was in the middle of reworking the flood maps. The maps for some areas had not been updated since the 1980s. The process of finalizing flood mapping typically takes three to five years, but in the interest of providing guidance to property owners looking to rebuild post-Sandy, FEMA released draft / advisory flood maps.

The advisory flood maps have caused uncertainty, especially in areas where the flood map designation will change. Several homes located in a Velocity Zone ("V-zone"), identified by FEMA as areas where wave action and / or high velocity water can cause structural damage in a 100-year flood, may be changed to the lesser severe A-Zone when the final flood maps are released next year. This may sound like a good thing, but because properties in the V-zone must be elevated higher than A-zone properties, a later change in zones could result in a property owner spending more now on construction than ultimately will be required. FEMA recently issued updated maps for four counties in New Jersey that will finally allow for residents to move forward with certainty. Nevertheless, whether to elevate a home remains a difficult decision.

Property owners can rebuild a home exactly as it was prior to the storm, but then their flood insurance premiums will increase significantly. According to FEMA, flood insurance for homes built four feet below the current advisory elevation in a high-hazard zone could cost $31,000 / year, whereas the insurance premium drops to $7,000 / year for homes built to the new standard. Nevertheless, since elevating a home could cost close to $100,000, even with the $30,000 FEMA grant to assist with the increased cost of compliance, the expense is significant. It is a tough decision for homeowners. Do they hedge their bets that another storm like Sandy will not happen again in the near future, or do they put up a considerable amount of capital to elevate their homes in accordance with the FEMA base flood elevations. Both options come at a cost.

Or do they choose door number three? Should property owners sell and move inland, and never have to deal with storm surges and sea walls again? This sounds like a good choice, as long as they do not move to a location where river flooding or tornadoes are a concern. Our world is changing and we will be facing a greater risk of weather-related disasters and destruction wherever we settle.

To reduce the risk for these events in the long term, our sustainability efforts, our greening efforts, and our efforts to reduce our individual carbon footprints must be redoubled. Fill out the survey Carl has sent you. Become aware of your habits and learn what you can do to make changes that will lessen your impact on the planet. Counsel your clients to do the same. Let us work together as a Section to do our small part in protecting our environment.

Miriam E. Villani

From the Student Editorial Board

Does the State Constitution Bar Electric Car Charging Stations on Public Land?

Electric vehicle (EV) charging stations have made their way to New York State, but at least some municipalities are claiming the state Constitution prevents them from putting these stations on public land, or helping to pay for their installation, because of the Constitution's gifts prohibition. Is this a valid legal argument, or merely a politically convenient one?

One of the first communities to make this argument publicly was the City of Watertown in Jefferson County. There, City Mayor Jeffrey Graham voiced opposition to utility National Grid's proposal to partner with the City to build an EV charging station on city property, arguing that city taxpayers should not in any way subsidize fuel for private vehicle owners. "Just at first blush it looks like another sop to the green energy crowd, the tofu-eaters, the Birkenstock-wearers, the Volvo drivers, the *New York Times* readers, the people who wish they'd gone to Berkley instead of [Jefferson Community College]," Graham told upstate news outlet WWNY.[1]

A week after Mayor Graham made his opposition to electric cars known, Watertown City Attorney Robert Slye warned the City Council that Watertown would violate the state Constitution's bar on gifts of public funds to private individuals if it funded the charging station project. After hearing Slye's argument, the City Council voted down the charging station.

A few months later, similar concerns were raised in the nearby City of Ogdensburg, in St. Lawrence County, about locating an EV charging station there.[2] While many of Ogdensburg's officials voiced support for the project, the City Manager said he had contacted the New York State Comptroller's Office, which had echoed Watertown's concern—that the City would run afoul of the state Constitution's gifts prohibition if it agreed to supply the electricity at no cost to electric vehicle owners. Several news agencies have reported that the Comptroller's Office allegedly issued such an opinion, but it is not available on legal databases or the Comptroller's website. The opinion appears to have been given via a phone conversation between the Ogdensburg City Manager and someone in the Comptroller's office.

This issue is likely to challenge other recipients of New York State Energy Research and Development Authority (NYSERDA) EV charging station grants who had planned to locate stations on municipally owned properties, including a handful of municipalities awarded NYSERDA grants directly, such as the cities of White Plains and Rochester, and the Town of Haverstraw. But does the Constitution really prohibit EV stations, or is it merely a politically savvy move to use vague constitutional language to quash renewable development?

Here's a little background on where the problem started. In April 2013, Governor Andrew Cuomo rolled out the latest in his Charge NY Initiative: a plan to deploy over 360 EV charging stations throughout New York communities, which he hopes will encourage New Yorkers to put more than 40,000 electric and plug-in hybrid vehicles on our roads over the next five years.[3] To help make this possible, the New York Power Authority (NYPA) has released a request for proposals to locate 100 charging stations at 36 locations throughout the New York City metro area by 2014, and NYSERDA has released grant funding for charging station projects across the state.

This plan to bring plug-in service to the Empire State hit a constitutional snag when National Grid started approaching upstate communities about a public/private partnership to build charging stations on public lands that would provide free electricity to travelers or anyone else with an electric vehicle. National Grid wanted municipalities to pick up about 10 percent of the project installation costs and to pay for the cost of providing electricity at the stations once they were installed.[4]

National Grid and its partner Coulomb Technologies had received a $1 million NYSERDA grant in June 2012, to put 160 electric vehicle charging ports in New York communities, at least 80 percent of which would be located across the upstate region.[5] The grant was one of several awarded during a $4.4 million NYSERDA grant round—other grants were awarded to several groups, including NYPA ($989,000), the New York Port Authority ($720,000), the City of Rochester ($228,000), and Price Chopper parent company Golub Corp. ($325,000).

The state Constitution's gifts prohibition, Article VIII § 1, provides that "no county, city, town, village, or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association." Article VII § 8 of the Constitution provides a similar bar on gifts or loans of state money to individuals or private enterprise. These relatively straightforward provisions were passed to address corruption and the funneling of public monies to private interests, but they have been gradually eroded by the introduction of exceptions and the creation of public authorities to do what municipalities and the state cannot.[6] Thus, we end up with the somewhat strange result that while New York State can give hundreds of thousands of state dollars to private corporations via a state authority—in this case, NYSERDA—to build EV charging stations on private

property, municipalities may or may not be able to spend a few hundred dollars to do the same via a public/private partnership with utilities in their own communities.

Concerns that the Constitution's gifts provision may bar municipal EV charging stations may be valid, though, at least in Watertown, it seems they were primarily motivated by politics. If the electricity used to power an electric car is considered a "fuel" like gasoline and thus a type of "property," then the state Constitution would appear to prohibit a municipality from giving it away, and municipalities are right to ask the question before committing to do something that violates the law.

But electricity is often treated by New York State not as a tangible commodity, like gasoline or widgets, but as a service, like Internet or cable service. Municipalities, as well as New York State, are already in the habit of providing some free utility services on public property, such as wireless internet, water, and electricity, which taxpayers are at liberty to use—free of charge—at public parks and municipal buildings. State parks permitting travelers to plug in their recreational vehicles for electricity or sewer service would seem to be doing something very similar to what a municipality would do if it provided free EV charging services to tourists traveling in New York State. It is not entirely clear, based either on the plain language or purpose of the Constitution's gifts provision, that these types of activities are what the Constitution bars. And it certainly is not clear why one would be permitted while the other is barred.

At the time of this writing, neither the state Comptroller nor the state Attorney General has released an opinion on whether the state Constitution prohibits a municipality from creating an EV charging station on public land. Municipalities are certainly right to proceed with caution, as the text of the Constitution's gifts provision does not provide a clear answer. However, an interpretation that bars electric vehicle charging stations would raise some interesting and troublesome questions about what kinds of utility-like services municipalities can—and do—provide for free to the community, and why those are permitted while EV technology is proscribed.

Laura Bomyea

Endnotes

1. *Watertown Pulls Plug on Electric Car Chargers*, WWNYtv.com (Jan. 14, 2013), http://www.wwnytv.com/news/local/Watertown-Pulls-Plug-On-Electric--186822131.html (quote can be found beginning at 0:38 of the video).
2. Brian Kidwell, *Ogdensburg Chamber Endorses Electric Car Charging Stations Idea for City*, Watertown Daily Times (April 26, 2013), http://www.watertowndailytimes.com/article/20130426/NEWS05/704269871.
3. Press Release, Governor Andrew Cuomo, Governor Cuomo Announces the Installation of Hundreds of Electric Vehicle Charging Stations (April 11, 2013), http://www.governor.ny.gov/press/04112013-hundreds-of-electric-vehicle-charging-stations; Press Release, Governor Andrew Cuomo, Governor Cuomo Announces Deployment of 325 Electric Vehicle Charging Stations Across New York State (June 2, 2012), http://www.governor.ny.gov/press/06062012charging-stations.
4. Craig Fox, *Watertown City Council to Mull Electric Vehicle Charging Stations*, Watertown Daily Times (Jan. 7, 2013), http://www.watertowndailytimes.com/article/20130107/NEWS03/701079962.
5. *Coulomb to Deploy 160 EV Chargers, Part of $4.4m NYSERDA Award*, Environmental Leader (June 25, 2012), http://www.environmentalleader.com/2012/06/25/coulomb-to-deploy-160-ev-chargers-part-of-4-4m-nyserda-award/.
6. Peter J. Galie & Christopher Bopst, *Anything Goes: A History of New York's Gift and Loan Clauses*, 75 Alb. L. Rev. 2005 (2012).

EPA Update

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

I. Introduction

Chris Saporita

Marla E. Wieder

Joseph A. Siegel

As we have reported in our previous two articles for 2012, EPA has met the environmental and economic challenges of the last year head-on. And as the year came to a close, we continued to advance the mission of protecting America's health and natural resources despite ever greater fiscal constraints and political attacks, joined our fellow Northeasterners in weathering and responding to Hurricane Sandy, and said goodbye to Administrator Lisa Jackson. This article highlights just some of EPA's efforts in New York and beyond in the final months of 2012.

II. Superfund Update

A. Progress in New York

In November, EPA announced that a total of more than 1.3 million cubic yards of PCB-contaminated sediment has been removed from the Hudson River as of the close of the third dredging season. For those keeping track at home, that is nearly halfway toward the goal of removing 2.65 million cubic yards of contaminated sediment from a 40-mile stretch of the upper Hudson River. In addition to the environmental benefits achieved, the dredging project also created about 500 jobs and other economic benefits for the area. In the coming months EPA will determine what changes, if any, are needed for the next season of dredging set to begin in Spring 2013.[2] The Natural Resources Damage Assessment is progressing on a separate track. For more information about the dredging project, see: www.epa.gov/hudson and www.hudsondredgingdata.com.

In September, EPA proposed deleting the Hooker-Hyde Park Landfill Superfund site in Niagara Falls, New York from the National Priorities List (NPL). The 15-acre site was used from 1953 to 1975 to dispose of approximately 80,000 tons of chemical waste, including dioxin. As a result, the underlying groundwater and nearby waterways became contaminated with volatile organic compounds (VOCs) and semi-volatile organic compounds (SVOCs). Since the site was listed on the NPL in 1983, Occidental Chemical Corporation, the responsible party, has taken numerous actions, including landfill capping, operating a groundwater pump and treat system, and removing contaminated sediments from Bloody Run Creek, to remediate the site.[3] EPA has monitored all the cleanup work performed at the site to ensure that the actions remain protective of people's health and the environment. Groundwater is sampled quarterly and EPA reviews both quarterly and annual reports to determine that the cleanup goals have been met.

B. Cleanup Plans Released

In October, EPA proposed a plan to clean up contaminated river sediment at the Grasse River Superfund Site in Massena, New York. Past industrial activities have contaminated the river sediment with PCBs. The proposed plan requires dredging and capping of contaminated sediment in a 7.2-mile stretch of river. Approximately 109,000 cubic yards of PCB-contaminated sediment would be dredged from near-shore areas of the river and backfilled with clean material. Dredged sediment would be disposed of at a permitted, secure onsite landfill. In the river's main channel, approximately 59 acres of contaminated sediment would be covered with an armored cap and another approximately 225 acres of contaminated sediment would be capped with clean sand and gravel to isolate the contamination from the surrounding environment. The investigation and cleanup of the site is being conducted and paid for by Alcoa, Inc. with oversight by EPA. The estimated cost of the proposed cleanup is $243 million.[4]

The cleanup of the contamination at the Alcoa West facility property and upland areas is being conducted by Alcoa under a series of Consent Orders with the New York State Department of Environmental Conservation (NYSDEC). EPA and the state are overseeing the cleanup of the river and the state is overseeing the upland cleanup. For more of the history of the cleanup, see: http://www.epa.gov/region2/superfund/npl/aluminumcompany/.

On October 3rd, EPA finalized a plan to clean up contaminated soil and groundwater at the Diaz Chemical Corporation Superfund site in Holley, New York. As a result of the on-site manufacturing of specialty chemicals for the agricultural, pharmaceutical, photographic, color and dye and personal care products industries, the soil and groundwater were contaminated with both VOCs and SVOCs. In January 2002, a safety valve at the facility ruptured, causing a significant release of a chemical mixture into the neighboring residential area. Area residents experienced sore throats, headaches, eye irritation, nosebleeds and skin rashes and some residents voluntarily relocated to temporary housing with assistance from Diaz Chemical. In June 2003, Diaz Chemical filed for bankruptcy and abandoned the facility, leaving behind large volumes of chemicals in drums and tanks. EPA added the site to the NPL in 2004.[5]

EPA's cleanup plan involves treating the soil and groundwater in six areas using electrodes that will heat the soil and groundwater, causing the contaminants to evaporate and turn into vapor and steam. The vapor and steam will then be collected and treated. For contaminated groundwater outside of the six sources of contamination, EPA will rely on natural degradation processes. EPA has spent approximately $12 million to-date to clean up the site and the estimated total cost of the EPA's plan is $14.5 million. To review the cleanup plan for the site, please visit: http://www.epa.gov/region02/superfund/npl/diazchemical/.

On October 11th, EPA finalized a cleanup plan to clean up groundwater at the Liberty Industrial Finishing Site in Farmingdale, New York. Industrial operations at the site, including aircraft parts manufacturing during the Second World War and metal plating and fiberglass manufacturing in subsequent years, resulted in VOC groundwater contamination. In addition, nearby dry cleaning operations resulted in a second source of groundwater contamination. In 2002, EPA issued a plan to install two separate systems to treat the groundwater. The system to treat the industrial contamination is operational. In July 2012, EPA determined the second system was not necessary as the contamination levels have dropped significantly. Periodic groundwater sampling will be undertaken and managed by the New York State Department of Environmental Conservation (NYSDEC). EPA has overseen a comprehensive cleanup of the site that was performed and paid for by the responsible parties, at a cost of approximately $34 million, including cleanup of site soil, sediment at the Massapequa Preserve, and the ongoing cleanup of groundwater.[6] For a history of the cleanup, visit: http://www.epa.gov/region2/superfund/npl/libertyindustrial.

On October 16th, EPA finalized a cleanup plan to clean up contaminated groundwater at the Shenandoah Road Groundwater Contamination Site in East Fishkill New York. Past industrial activities contaminated the groundwater with tetrachloroethene, commonly known as PCE, a VOC that can cause serious health effects. The cleanup plan calls for the continued operation of a groundwater treatment system coupled with natural processes to reduce the contaminants in the groundwater. The groundwater will continue to be periodically sampled to measure the effectiveness of these measures. Land and groundwater use restrictions will also be required. In addition, certain vapor intrusion mitigation systems will be maintained and sampled. The cleanup of the site is expected to be performed by IBM with oversight by the EPA and its estimated cost is $2.7 million.[7] For more information on the Shenandoah Road Groundwater Contamination Superfund site, go to: http://www.epa.gov/region02/superfund/npl/shenandoah/.

On December 27th, EPA released the much-anticipated proposed cleanup plan for the Gowanus Canal Superfund Site in Brooklyn. The plan includes removing contaminated sediment from the canal, capping of dredged areas to control up-welling coal tar waste, and source controls to prevent on-going sources of contamination from compromising the cleanup. The cost of the cleanup plan is expected to be between $467 and $504 million.[8]

Completed in the mid-1800s, the canal was once a major industrial transportation route. Manufactured gas plants (MGPs), paper mills, tanneries and chemical plants are among the many facilities that operated along the canal. As a result of years of discharges, stormwater runoff and sewage overflows, the canal has become one of the nation's most seriously contaminated water bodies. In 2010, EPA added the canal to NPL. The remedial investigation report, released in January 2011, confirmed that an array of contaminants, including polycyclic aromatic hydrocarbons (PAHs), PCBs and heavy metals, including mercury, lead and copper, at high levels in the sediment

in the canal. The feasibility study, which evaluated the cleanup alternatives for the canal, was released in December 2011 and supplemented in December 2012.

Under EPA's proposed approach, the canal was divided into three segments that correspond to the upper, middle and lower portions of the canal. The first segment, which runs from the top of the canal to 3rd Street, and the second segment, which runs from 3rd Street to just south of the Hamilton Avenue Bridge, contain the most heavily contaminated sediment. In the third segment, which runs from the Hamilton Avenue Bridge to the mouth of the canal, the sediment is relatively less contaminated.

EPA is proposing to remove all of the contaminated sediment which has accumulated on the canal bottom since its construction. Due to its physical and chemical characteristics, this highly contaminated sediment will not naturally attenuate, would not structurally support a cap, and generally must be removed to permit remedial work as well as and provide sufficient depth below the cap for commercial navigation.

For the first and second segments of the canal, EPA is proposing to dredge approximately 307,000 cubic yards. Areas where the underlying native sediment is contaminated with liquid coal tar will be stabilized by mixing in concrete or similar materials. The stabilized areas would then be covered with a multi-layer cap, including an "active" layer designed to absorb PAH contamination that could well up from below, an isolation layer of sand and gravel that will ensure that the contaminants are not exposed, an "armor" layer of heavier gravel and stone to prevent erosion from boat traffic and currents, with a final clean sand layer for habitat. The plan also calls for removing contaminated material placed in the former 1st Street Turning Basin decades ago. For the third segment, the EPA is proposing to dredge 281,000 cubic yards of contaminated sediment and add the same cap but without the stabilized layer. The total proposed dredging volume is around the amount removed from the Hudson River PCBs Site during the 2012 dredging year.

The proposed plan includes various methods for managing the contaminated sediment after dredging, depending on the levels of contamination. The proposed methods include transporting the dredged sediment to an off-site permitted disposal facility, transporting it to a location where the sediment can be treated and the possible beneficial reuse of some of the sediment after treatment.

Contaminated land sites along the canal, including three former manufactured gas plants, are being addressed by the NYSDEC. Other potential sources of continuing contaminant discharges to the canal have been referred to the state of New York and will be investigated and addressed as appropriate.

In addition, the proposed plan calls for additional controls to significantly reduce combined sewer overflows to the upper reach of the canal, where the largest outfalls are present. These outfalls are not currently being addressed by New York City's on-going Clean Water Act improvements which are being performed under a NYSDEC compliance order. Solids in such overflows contain hazardous substances and tend to absorb them, both of which would contribute to the recontamination of the canal after its cleanup. EPA is proposing that combined sewer overflow discharges in the upper portion of the canal be outfitted with controls to reduce the total volume of discharges from those outfalls by 58% to 74%. During the recent Hurricane Sandy, testing did not show impacts from sediment disturbance, but flooding and large sewage overflows were an issue. A series of major commercial and residential redevelopment projects are underway and anticipated along the canal and throughout the Gowanus area.

To review the proposed plan or for more information on the Gowanus Canal site, visit http://www.epa.gov/region02/superfund/npl/gowanus/.

C. Brief Update on New Jersey Sites

On September 14, 2012, EPA added a dozen more sites to the NPL and proposed 8 more. New to the NPL is the Orange Valley Regional Groundwater Contamination in Orange/West Orange, New Jersey. The groundwater beneath this heavily populated area is contaminated with various chemical solvents, including tetrachloroethylene, trichloroethylene and cis-1,2-dichloroethylene. The groundwater pollution has impacted several public water supply wells, which have either been taken out of service or now require treatment. The search for the parties responsible for the contamination is ongoing.[9] The Matlack

Inc. Site, a former chemical transport business in Woolwich Township, N.J.,[10] and the Riverside Industrial Park, a former paint manufacturer in Newark, N.J.[11] were also proposed for listing. The W.R. Grace and Co. / Wayne Interim Storage Site in Wayne Township, New Jersey was removed from NPL later that month.[12]

In September and October EPA presented a number of cleanup plans for New Jersey Superfund Sites to the public. In September, EPA released proposed plans for the Raritan Bay Slag Superfund Site in Old Bridge and Sayreville,[13] part of the American Cyanamid Superfund Site in Bridgewater Township,[14] the White Chemical Corporation Superfund Site in Newark[15] and the Evor Phillips Superfund Site in Old Bridge, New Jersey.[16] In October, EPA finalized its plan to address contaminated groundwater at the Cornell-Dubilier Electronics Superfund Site in South Plainfield[17] and finalized its cleanup plan for the Scientific Chemical Processing Superfund Site in Carlstadt, New Jersey.[18]

III. RCRA

A. Hazardous Waste Electronic Manifest System

It looks like we can finally say goodbye to the carbon copy manifest system! On October 5, 2012, President Obama today signed S. 710, which directs EPA to establish an electronic manifest system. The legislation had broad bipartisan support and will significantly streamline the tracking of our nation's hazardous waste while saving EPA and the regulated industries several hundred million dollars per year. The Congressional Budget Office estimated that the new system's costs would be largely offset by user fees.[19]

IV. Brownfields 2013 Conference

The National Brownfields 2013 Conference was held in Atlanta, Georgia from May 15th through the17th. The conference, cosponsored by EPA, is the largest and most comprehensive forum for the examination of issues important to community revitalization and the assessment, cleanup and redevelopment of contaminated properties. For more information on the conference, see: www.brownfieldsconference.org/en/home.

V. Air and Climate Change

A. Vehicle-Related Air and Climate Developments

1. EPA and NHTSA Issue Groundbreaking Stringent Greenhouse Gas (GHG) and Efficiency Standards for Vehicles

On August 28, the Obama Administration finalized new greenhouse gas and fuel efficiency standards for model years 2017 to 2025.[20] The rule applies to light duty vehicles such as cars, SUVs, minivans and pick-up trucks and will result in average CO2 emissions of 163 grams/mile, equivalent to a fuel economy of 54.5 mpg, by 2025. This rule builds on an earlier rule finalized in 2010 for model years 2012-2016 that will achieve CO2 emissions of 250 grams/mile, equivalent to 35.5 mpg, by 2016. The two combined rules will nearly double the fuel efficiency of prior model years and will save consumers more than $1.7 trillion at the gas pump and reduce U.S. oil consumption by 12 billion barrels. Last year, 13 major automakers, which together account for more than 90 percent of all vehicles sold in the United States, announced their support for the new standards. According to Transportation Secretary Raymond LaHood, "today, automakers are seeing their more fuel-efficient vehicles climb in sales, while families already saving money under the Administration's first fuel economy efforts will save even more in the future, making this announcement a victory for everyone." For families purchasing a model Year 2025 vehicle, the net savings will be comparable to lowering the price of gasoline by approximately $1 per gallon.

Combined, the Administration's standards will cut greenhouse gas emissions from cars and light trucks in half by 2025, reducing emissions by 6 billion metric tons over the life of the program—more than the total amount of carbon dioxide emitted by the United States in 2010. These reductions can be achieved through a wide range of technologies that are already available, such as advanced gasoline engines and transmissions, vehicle weight reduction, lower tire rolling resistance, improvements in aerodynamics, diesel engines, more efficient accessories, and improvements in air conditioning systems. There are also incentives built into the program to encourage early introduction of advanced technologies such as incentives for electric, plug-in hybrid electric, fuel cells, and natural gas vehicles.[21]

2. EPA Denies Requests to Waive Renewable Fuel Requirements

On November 16, EPA denied state requests to waive its 2012-2013 renewable fuels requirements under the Clean Air Act and Energy Independence and Security Act.[22] The waiver requests were based on the economic impact of the 2012 drought. However, EPA determined that there wasn't sufficient economic impact to meet the statutory test. "We recognize that this year's drought has created hardship in some sectors of the economy, particularly for livestock producers," said Gina McCarthy, Assistant Administrator for EPA's Office of Air and Radiation. "But our extensive analysis makes clear that Congressional requirements for a waiver have not been met and that waiving the RFS will have little, if any, impact."

The Energy Policy Act of 2005 established a standard of "severe economic harm" in a state, region, or the United States before EPA can grant a waiver request. EPA conducted several economic analyses to determine

whether the standard was met. In collaboration with the U.S. Department of Agriculture, EPA conducted a study on the impacts of the Renewable Fuel Standard on the agriculture sector and found that waiving the requirements would reduce average corn prices by only about one percent. Another study done by EPA and the Department of Energy found that waiving the requirements would have no impact on household energy costs.[23] More information on EPA's decision is available at: www.epa.gov/otaq/fuels/renewablefuels/notices.htm.

3. Other Renewable Fuel Standard Developments: Biodiesel Volume Requirement and Lifecycle Analysis for Grain Sorghum Ethanol

EPA's decision on the fuel waiver petition was perhaps one of the more publicized developments on the renewable fuels program but EPA also issued two other rules on renewable fuels in the last few months. On September 14, 2012, EPA established the amount of bio-diesel products required to be included in diesel fuel markets for 2013. Bio-based diesel products are advanced bio-fuels that are derived from sources that include vegetable oils and wastes oils from renewable sources. EPA's action set the 2013 volume of bio-diesel fuels at 1.28 billion gallons under the Energy Independence and Security Act of 2007 (EISA). EISA mandates at least one billion gallons as a minimum volume requirement for the biomass-based diesel category for 2012 and beyond.[24] However, the statute provides for EPA to increase the volume requirements after consideration of environmental, market, and energy-related factors. EPA determined that biodiesel producers, the largest contributor to biomass-based diesel, have significantly greater production capacity than will be required by the final rule and many existing biodiesel facilities are currently underutilizing their capacity. Therefore, they can ramp up production relatively quickly.[25]

In another Renewable Fuel Standard development, EPA issued a final rule in November containing a lifecycle GHG analysis for grain sorghum ethanol and determined that the fuel qualifies as a renewable fuel under the Renewable Fuel Standard program.[26] Pursuant to EPA regulations promulgated under the Clean Air Act, as amended by the Energy Independence and Security Act, EPA conducts lifecycle analyses on potential renewable fuels to determine whether they emit fewer GHGs than conventional fuel. The lifecycle analysis incorporates consideration of global land use changes from production of the renewable fuel feedstock in the United States. EPA determined that, when compared to a baseline of conventional gasoline, grain sorghum ethanol produced at a dry mill powered by natural gas has a 20% or more GHG benefit, and therefore qualifies as a renewable fuel. EPA also determined that, when compared to conventional gasoline baseline, grain sorghum ethanol produced at a dry mill facility powered by certain forms of biogas qualifies as an advanced biofuel. When EPA finalized the revised Renewable Fuel Standard in March 2010, EPA's lifecycle analyses focused on fuels that were anticipated to contribute relatively large volumes of renewable fuel by 2022. Grain sorghum ethanol is among a number of additional fuels that EPA has studied since the 2010 final rule.[27] More information is available at: http://www.epa.gov/otaq/fuels/renewablefuels/regulations.htm and http://www.epa.gov/otaq/fuels/renewablefuels/index.htm.

B. Hurricane Sandy Response

1. Reformulated Gasoline Fuel Waivers for Hard Hit Areas

On October 31, two days after Hurricane Sandy hit New York, EPA, after consultation with DOE, waived the reformulated gasoline (RFG) requirement to address the fuel supply emergency created by the storm.[28] In its waiver, EPA cited the significant damage to petroleum storage facilities caused by widespread power outages and flooding from the storm and the related impact on petroleum pipeline operations and the petroleum distribution system. EPA projected that there would not be an adequate supply of RFG in the area. Administrator Lisa Jackson determined, pursuant to Section 211(c)(4)(C)(ii)(I) of the Clean Air Act, 42 U.S.C. §7545(c)(4)(C)(ii)(I), that an "extreme and unusual fuel supply circumstance" existed that prevented adequate supply and, therefore, a waiver was appropriate. The waiver applied in East Coast states, including New York, and allowed refiners and importers to sell conventional gasoline in those states. The Administrator also waived the prohibition on combining RFG blendstock for oxygenate blending with any other gasoline, blendstock, or oxygenate.[29] The waiver continued through November 20.

2. Ultra Low Sulfur Diesel Waiver for Emergency Vehicles

On November 1, one day after the RFG waiver, EPA waived the requirement for use of Ultra Low Sulfur Diesel in emergency response vehicles in New Jersey, and then extended this waiver to New York and Pennsylvania on November 2.[30] Regulations promulgated under the Clean Air Act require the use of Ultra Low Sulfur Diesel (ULSD) fuel with no more than 15 ppm sulfur in diesel-powered highway and nonroad vehicles and equipment. This waiver, made in consultation with DOE, allowed the use of heating oil in diesel-powered highway and nonroad vehicles and nonroad equipment involved in disaster recovery efforts in the New York metropolitan area and other areas affected by Hurricane Sandy where fuel shortages existed. Invoking the same provision of the Clean Air Act which served as the basis of the RFG waiver,[31] Administrator Jackson applied the waiver in New York to the five boroughs of New York City, and Nassau, Suffolk, Rockland and Westchester counties. The waiver continued through November 20 and was conditioned on a number of requirements including safeguards

to avoid misfueling in vehicles that could be damaged by the higher sulfur fuel.[32]

3. EPA Extends Waivers in Light of Continuing Fuel Shortages

On November 16, after consultation with DOE, Administrator Jackson extended both the RFG and ULSD waivers for New York and New Jersey to December 7.[33] She based her decision to extend the waivers on the significant damage to the electrical system and the petroleum storage and distribution facilities caused by the storm surge and flooding associated with Hurricane Sandy. The extension kept in place those conditions imposed by the original waivers. Additional information about the waivers is available at: http://epa.gov/enforcement/air/fuel-waivers.html.

4. EPA Monitors Fine Particle Emissions from Burning of Vegetative Debris from Hurricane Sandy

EPA is monitoring fine particle emissions around the perimeter of Floyd Bennett Field, where the Army Corps of Engineers, at the request of New York City, began testing the use of an air curtain incinerator on November 28 and 29. The air curtain incinerator is a self-contained system that reduces wood debris to ash and is being tested to burn vegetative debris, largely from downed trees, gathered in the cleanup from Hurricane Sandy. The air curtain incinerator is equipped with air blowers that circulate the air to improve combustion and minimize emissions of fine particles. EPA is comparing the results at eight monitors around Floyd Bennett Field to the established 24-hour health-based standard for fine particles. Over a 24-hour period of monitoring during the pilot burn at the air curtain incinerator, EPA's monitors showed no violations of the 35 micrograms per cubic meter (µg/m3) National Ambient Air Quality Standard. EPA also took air samples which are being analyzed for contaminants of concern.

The results of EPA's air monitoring and the locations of the monitors can be found at: http://www.epa.gov/sandy/pdf/results-11-2829-12.pdf and http://www.epa.gov/sandy/pdf/map-11-2829-12.pdf. The sampling for contaminants of concern will be analyzed in a laboratory and posted to the EPA website, http://www.epa.gov/sandy/response, as soon as they become available. More information about particulate matter (PM) air pollution can be found at http://www.epa.gov/airquality/particlepollution/.

C. Air Pollution and Climate Change Grants and Recognition

1. EPA Issues Grants for Indoor Air Quality

On October 10, EPA announced $1.2 million in grants to 32 state and local governments, tribes, and non-profit organizations to support indoor air quality projects.[34] The grants were primarily for education, training, and outreach projects in homes and schools. In its selection process, EPA was particularly interested in projects that assist low-income and minority families that are disproportionately impacted by poor indoor air quality. Among the recipients was a New York group, Community Foundation of Greater Buffalo, Inc. (CFGB), which proposed a project titled "Resident Education to Reduce Exposure to Indoor Air Pollution in Low-Income Homes in Buffalo, NY." In support of the 32 projects, Gina McCarthy, Assistant Administrator for EPA's Office of Air and Radiation, stated, "American communities face serious health and environmental challenges from air pollution. This effort gives us an opportunity to improve indoor air quality by increasing awareness of environmental health risks."[35]

More information about Indoor Air Assistance Agreements is available at: http://www.epa.gov/iaq/regional_funding.html.

2. EPA Provides Nearly $75,000 in Grants to Promote Air Monitoring by Citizen Scientists in New York City

EPA announced on September 27 that it is providing nearly $75,000 "citizen science" grants for three community groups in New York City.[36] The grants will help these organizations collect air data within their communities while training young scientist. "This funding will help inform local residents about the environmental conditions in their own backyards," said EPA Regional Administrator Judith Enck. The three awardees were: (1) Cypress Hills Local Development Corporation, which will train local students over a 24-week period to work with air quality sensors to monitor indoor air pollutants in Cypress Hills and East New York; (2) New York Harbor Foundation, which will educate New York City high school youth to monitor air (and water) quality throughout New York Harbor and conduct outreach about the importance of environmental monitoring; and (3) Sustainable South Bronx, which will engage South Bronx high school students and local residents to monitor air quality in their community via "AirCasting," a smart phone technology that captures real-time air quality information.[37] More information on EPA Region 2 grants can be found at: http://www.epa.gov/region2/grants/.

3. EPA Awards Climate Change Grants to Two New York Universities

EPA announced on September 18 a total of $1.5 million in grants to Columbia University and Cornell University to study the relationship between air pollution, weather and climate change. These grants are among fourteen that the Agency awarded to universities across the country to fund research on the effects of extreme weather triggered by climate change on air and water quality. "By gaining a better understanding of how extreme weather impacts our natural resources, we can allow communities to be in a better position to respond

to the effects of climate change," said EPA Regional Administrator Judith A. Enck. "The research Columbia and Cornell are performing in this area will help ensure better prepared communities."[38] For more information on these EPA research grants, visit: http://www.epa.gov/ncer/xevents/.

4. EPA Recognizes Achievements by New York Supermarkets Under Its GreenChill Program

On September 18, EPA presented Achievement Awards to New York supermarkets for reducing harmful chemicals used in refrigeration. The awardees in New York included Whole Foods and Weis Markets. They are both members of EPA's GreenChill Partnership, a voluntary program between EPA and nearly 8,000 supermarkets, which is designed to help supermarkets transition to less damaging refrigerants. Weis Markets and Whole Foods Market both won GreenChill's Superior Goal Achievement Award for exceeding their companies' annual target to reduce refrigerant emissions from their stores. EPA estimates that if supermarkets nationwide reduced their emissions to the GreenChill average emissions rate, the industry would eliminate the equivalent of 22 million metric tons of carbon dioxide per year, equal to removing more than 4.3 million passenger vehicles from the road. The industry would also reduce pollutants that deplete the earth's ozone layer.[39] For more on EPA's GreenChill Partnership, go to: http://www.epa.gov/greenchill/.

D. Other Clean Air Act Developments

1. EPA Proposes to Update the Mercury and Air Toxics Standards for New Power Plants

On November 16, EPA proposed to update emission limits for mercury, particulate matter (PM), acid gases and certain individual metals at new power plants under the Mercury and Air Toxics Standards (MATS).[40] The updated emission limits, if finalized, would apply to only new power plants; emission limits for existing plants would remain unchanged. EPA also proposed revisions that clarify requirements during periods of startup and shutdown under MATS and the Utility New Source Performance Standards (NSPS). The proposal was issued in response to numerous petitions for administrative reconsideration under Section 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. 7607(d)(7)(B) of a December 16, 2011 final rule titled "National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units."[41] In a July 20, 2012 letter responding to the petitions, EPA granted reconsideration, based largely on technical issues, for certain new sources covered by the rule.[42] The proposed updates include new limits that remain very low and are based on emission rates achieved by the best performing source. As a result, new power plants will use the same types of state-of-the-art control technologies to meet the proposed standards as they would have used under the previously finalized standards. No significant change in costs, emission reductions or health benefits are expected. EPA plans to issue a final reconsideration in March of 2013.[43]

2. EPA Finalizes More Protective PM2.5 Air Standard

On December 14, EPA revised its annual National Ambient Air Quality Standard (NAAQS) for fine particles (PM2.5) from 15.0 micrograms/m3 down to 12.0 micrograms/m3, while retaining its 24-hour PM2.5 and its PM10 standards.[44] Fine particles can penetrate deep into the lungs and are linked to premature death, heart attacks, strokes, acute bronchitis, and aggravated childhood asthma.[45] The final rule was issued after extensive public engagement with stakeholders and consideration of over 230,000 public comments. EPA cannot consider costs in setting the NAAQS. However, health benefits from the revised PM2.5 standard will range from $4 billion to over $9 billion per year, while costs are estimated to range from $53 million to $350 million. The new standard was issued pursuant to a court order following a petition asserting that EPA had missed the 5-year deadline for reviewing the NAAQS. The existing annual standard was set in 1997. EPA expects to make initial designations of attainment and nonattainment areas by December 2014 and states will have five years after the designations become effective to meet the new annual standard.[46]

VI. Water

A. Protection and Restoration

1. New EPA Tool Helps Estimate the Affordability of Water Pollution Control Requirements

In July of 2012, EPA released a new, web-based tool to help a variety of stakeholders evaluate the economic and social impacts of pollution controls needed to meet water quality standards set for specific uses for a waterbody, such as swimming or fishing. This tool could be used by states, territories, tribes, local governments, industry, municipalities and stormwater management districts. The tool will help stakeholders identify and organize the necessary information, and perform the calculations to evaluate the costs of pollution control requirements necessary to meet specific water quality standards. The tool prompts users to submit treatment technology information, alternative pollution reduction techniques and their costs and efficiencies, and financing information, as well as explain where that information can be found. For more information, visit: http://water.epa.gov/scitech/swguidance/standards/economics/.

2. A Function-Based Framework for Stream Assessment and Restoration Projects Available Online

In the same month, EPA released a new technical resource to improve stream assessment and restoration for

watershed practitioners. A Function-Based Framework for Stream Assessment and Restoration Projects lays out a framework for approaching stream assessment and restoration projects that focuses on understanding the suite of stream functions at a site in the context of what is happening in the watershed. The framework is an expansive resource covering watershed and river corridor processes, and the document provides several hypothetical examples and a detailed discussion of how the framework could be used to develop and assess stream restoration projects. For more information, visit: http://water.epa.gov/lawsregs/guidance/wetlands/wetlandsmitigation_index.cfm#technical.

3. New Urban Waters Outreach Toolkit

In August of 2012, EPA, through the Anacostia Watershed Outreach and Education Project, released a comprehensive toolkit that EPA regional offices, watershed organizations and others who promote green business can use to encourage homeowners to install rain barrels to prevent contamination in their local rivers. The toolkit includes details on the development of social marketing outreach to local residents, lessons learned and a summary of project accomplishments. Appendices include communication scripts for weathercasters, a detailed list of project partners, partnerships, and photos and screenshots of the messages used. For more information, visit: http://water.epa.gov/scitech/swguidance/standards/training.cfm.

4. EPA Awards $15 Million to Assist U.S. Small Drinking Water and Wastewater Systems

In September of 2012, EPA awarded nearly $15 million to provide training and technical assistance to small drinking and wastewater systems—those serving fewer than 10,000 people—and to private well owners. The funding will help provide training and tools to improve small system operations and management practices, promoting sustainability and supporting EPA's mission to protect public health and the environment. Awards include nearly $7 million to the National Rural Water Association and nearly $3 million to the Texas Engineering Extension Service, $2.5 million to the New Mexico Environmental Finance Center, $2 million to the Rural Community Assistance Partnership, and $500,000 to the Rural Community Assistance Partnership. Many small systems face challenges in providing reliable drinking water and wastewater services that meet federal and state regulations, including a lack of financial resources, aging infrastructure, management limitations and high staff turnover. For more information, visit: http://water.epa.gov/grants_funding/sdwa/smallsystemsrfa.cfm.

5. EPA Awards $1.5 Million to Universities for Sustainable Drinking Water Treatment Methods

Also in September, EPA announced almost $1.5 million in funding to four universities to develop sustainable drinking water treatment methods. The research grants are funded through EPA's Science to Achieve Results (STAR) program. These grants, which supplement last year's grants to eight other universities, are intended to provide innovative treatment methods to protect people's health by keeping harmful contaminants out of drinking water. The grantees are: University of Florida, Gainesville and University of South Florida, Tampa; Clarkson University, Potsdam, New York; and the University of Nevada, Reno. For information, visit: http://www.epa.gov/ncer/dwtreatment/.

6. More Than $1.6 Million Awarded for Community-Based Projects to Improve Health of Long Island Sound, Including More Than $900,000 for Projects in New York

In September, federal and state environmental officials announced 35 grants totaling $1.6 million to state and local government and community groups in New York and Connecticut to improve the health of Long Island Sound. When leveraged by an additional $3 million contributed by the recipients themselves, a total of $4.6 million will support conservation projects in both states. The projects, which are funded through the Long Island Sound Futures Fund, will open up 50 river miles for passage of fish, and restore 390 acres of critical fish and wildlife habitat including lakes, underwater grasses, woodlands, meadows, wetlands, beaches and rivers and parks along the waterfront. Fifteen grants, totaling $913,202, will be awarded to groups in New York, leveraged by $1.6 million from the grantees themselves.

The Long Island Sound Study initiated the Long Island Sound Futures Fund in 2005 through the EPA's Long Island Sound Office and National Fish and Wildlife Foundation ("NFWF"). This public-private grant program pools funds from the U.S. Environmental Protection Agency, NFWF, U.S. Fish and Wildlife Service, U.S. Department of Agriculture Natural Resources Conservation Service and Wells Fargo. To date, the program has invested $10.5 million in 261 projects in communities surrounding the Sound. With a grantee match of $23 million, the Long Island Sound Futures Fund has generated a total of almost $33.5 million for projects in both states.

For more information about the Fund, and full descriptions of the grants, visit: http://longislandsoundstudy.net/about/grants/lis-futures-fund/.

7. EPA Environmental Justice Grant Will Tackle Water Pollution in Peekskill, NY

On December 28, 2012, EPA announced that it has awarded nearly $25,000 to the Hudson River Sloop Clearwater to improve water quality in Peekskill, New York. The grant was awarded under the EPA's Environmental Justice Small Grants Program, which supports and empowers communities working on solutions to local environmental and public health issues. Since 1994, EPA's

environmental justice small grants program has supported projects to address environmental justice issues in more than 1,300 communities. The grants represent EPA's continued commitment to expand the conversation on environmentalism and advance environmental justice in communities across the nation.

Using the EPA grant, Hudson River Sloop Clearwater, Inc. will lead a collaborative, community-based watershed planning and protection initiative focused on the urban watershed of the city of Peekskill, which is used by people for fishing, swimming and boating. Through training, technical assistance and hands-on activities, the project will give members of the community the knowledge needed to better understand how to prevent water pollution. Residents will also learn about environmental hazards and health risks associated with polluted local waterways. The project will also include an Urban Watershed Steward program, which will be geared toward young people and will promote peer-to-peer learning and encourage neighborhood cleanup projects.

For more information on EPA's 2012 EJ Small Grant recipients and projects, visit: http://www.epa.gov/environmentaljustice/resources/publications/grants/ej-smgrants-recipients-2012.pdf.

8. EPA Provides New York State $218 Million for Clean Water Projects

In October of 2012, EPA announced its award of $218 million to New York State to help finance improvements to water projects that are essential to protecting public health and the environment. The funds will primarily be used to upgrade sewage plants and drinking water systems throughout the state. Since 1989, the EPA has awarded $4.9 billion to New York through these programs.

The Clean Water State Revolving Fund program, administrated by the New York State Department of Environmental Conservation and the New York State Environmental Facilities Corporation, received $157,205,222. The program provides low-interest loans for water quality protection projects to make improvements to wastewater treatment systems, control pollution from rain water runoff, and protect sensitive water bodies and estuaries.

The Drinking Water State Revolving Fund program, administrated by the New York State Department of Health, received $60,923,000. The program provides low-interest loans to finance improvements to drinking water systems, with a particular focus on providing funds to small and disadvantaged communities and to programs that encourage pollution prevention as a tool for ensuring safe drinking water.

For more information on the Clean Water State Revolving Fund program, visit: http://water.epa.gov/grants_funding/cwsrf/cwsrf_index.cfm.

9. New App Lets Users Check Health of Waterways Anywhere in the U.S.

Also in October, EPA launched a new app and website to help people find information on the condition of thousands of lakes, rivers and streams across the United States from their smart phone, tablet or desktop computer. The How's My Waterway app and website uses GPS technology or a user-entered zip code or city name to provide information about the quality of local water bodies. The app is available at http://www.epa.gov/mywaterway.

10. EPA Releases Interactive Map of Results from National Estuary Program Projects

EPA's National Estuary Program (NEP), a place-based program to protect and restore the water quality and ecological integrity of estuaries of national significance, released a first-ever interactive map, NEPmap, with more than a decade's worth of NEP habitat data. The simple static map, with contained descriptions of NEP habitat protection and yearly restoration projects, has been replaced with a large set of data layers to enable viewing of NEP habitat information in a wider environmental context. The NEPmap allows users to view water quality conditions in their estuary and surrounding watershed alongside NEP habitat projects. NEPmap users can also generate and print maps and reports, change map scales, turn on and off background layers and interact with information points to provide a greater level of detail than a traditional static map. For more information, visit: http://water.epa.gov/type/oceb/nep/index.cfm.

11. Updated Data Now Available through EPA's Nitrogen and Phosphorus Pollution Data Access Tool

EPA recently added updated data in the Nitrogen and Phosphorus Pollution Data Access Tool (NPDAT), a tool intended to help states develop effective nitrogen and phosphorus source reduction strategies. Specifically, the updates include the Facilities Likely to Discharge Nitrogen/Phosphorus (N/P) to Water data layer, which now provides information on nitrogen and phosphorus discharges from 2010 facility monitoring reports with corresponding nitrogen and phosphorus limits from EPA's Discharge Monitoring Report (DMR) Pollutant Loading Tool. Another update is the Waters Listed for N/P Impairments and Waters with N/P TMDLs data layers which now reflect data pulled from the Assessment TMDL Tracking and Implementation System (ATTAINS). These layers have been updated from information from 2008 and 2011, respectively. For more information, visit: http://water.epa.gov/scitech/swguidance/standards/criteria/nutrients/npdat_index.cfm.

12. EPA Website on Hurricane Sandy Response and Recovery Now Online

In early November, EPA launched a website on Hurricane Sandy Response and Recovery. To find information on the latest EPA updates and for answers to frequent questions on flooding, mold and drinking water, visit http://epa.gov/sandy/.

13. EPA Releases Support Guide for Water Utilities on Containment and Disposal of Large Amounts of Contaminated Water

Also in early November, EPA released the Containment and Disposal of Large Amounts of Contaminated Water: A Support Guide for Water Utilities. The guide serves as a reference document for the preparation and response to a contamination event when rapid decision making is needed. It provides recommendations primarily to drinking water, wastewater and stormwater utilities following an all-hazard chemical, biological, and radiological (CBR) contamination event. Secondary users of the guide are decision makers involved with planning and disposal at the federal, state, local and tribal levels. To view the guide, visit: http://water.epa.gov/infrastructure/watersecurity/emerplan/upload/epa817b12002.pdf.

14. EPA Releases Effective Utility Management and Lean Resource Guide for Water-Sector Utilities

On November 13, 2012, EPA released a Resource Guide to Effective Utility Management and Lean based on input and examples from several utilities. The guide explains how utilities can use these two important and complementary approaches to reduce waste and improve overall efficiency and effectiveness. Effective utility management provides a common management framework to help water and wastewater systems build and sustain the technical, managerial and financial capacity needed to ensure sustainable operations. While the focus is on outcomes water sector utilities should strive to achieve, there also is a need to demonstrate how other well-accepted tools can help utilities achieve these outcomes by improving efficiency, reducing waste in their operations, and improving other areas of performance. One set of tools involves the use of Lean techniques. Lean is a business improvement approach focused on eliminating non-value added activity or "waste" using practical, implementation-based methods. For more information, visit: http://water.epa.gov/infrastructure/sustain/sustainable_systems.cfm.

15. EPA Releases New 2012 Guidelines for Water Reuse

Water reclamation and reuse have taken on increasing importance in the water supply of communities in the U.S. and around the world to achieve efficient resource use, ensure protection of environmental and human health, and improve water management. In October, 2012, EPA released the Agency's 2012 guidelines for water reuse. The 2012 reuse guidelines update and build on the Agency's previous reuse guidelines issued in 2004, incorporating information on water reuse that has been developed since the 2004 document was issued. In addition to summarizing U.S. existing regulations, the document includes water reuse practices outside of the U.S., case studies, information on planning for future water reuse systems, and information on indirect potable reuse and industrial reuse. Disinfection and treatment technologies, emerging contaminants, and public involvement and acceptance are also discussed. For more information and to view a copy of the document, visit: http://www.waterreuseguidelines.org/.

16. Collaboration Toolkit for Protecting Drinking Water Sources Through Agricultural Conservation Practices Is Now Available Online

The collaboration toolkit Protecting Drinking Water Sources through Agricultural Conservation Practices is now available online. The toolkit offers effective steps that source water protection professionals working at the state level can take to build partnerships with USDA's Natural Resources Conservation Service (NRCS) to get more agricultural conservation practices on the ground to protect sources of drinking water. Developed by the Source Water Collaborative, a group composed of 23 organizations working together to protect sources of drinking water, with support from EPA and in consultation with NRCS, the toolkit includes insightful tips and highlights specific opportunities states can take advantage of immediately. In addition, the Source Water Collaborative is working with the National Association of Conservation Districts to develop a locally focused supplement to the toolkit to provide a step-by-step process for collaborating with conservation districts. For more information, visit: http://www.sourcewatercollaborative.org/swp-usda/.

17. Best Management Practices for Commercial and Institutional Facilities Available Online

In November, 2012, EPA's WaterSense program released WaterSense at Work: Best Management Practices for Commercial and Institutional Facilities, a compilation of best management practices to help commercial and institutional facilities better manage their water use through efficient practices and products. Building owners and managers can significantly reduce their water use, energy requirements, and operating costs by understanding how to use water more efficiently in their facilities. According to the U.S. Geological Survey, America's commercial and institutional facilities use 17 percent of the water provided by the nation's public water supplies. WaterSense at Work addresses water use in educational facilities, offices, restaurants, hotels, hospitals, laboratories, and other organizations and presents numerous tactics for businesses and

organizations to achieve water, energy, and operational savings, as well as case studies on different types of facilities that have achieved savings by using water efficiently. For more information, visit: http://www.epa.gov/watersense/commercial/bmps.html.

18. EPA Launches Online Training to Assist Tribes in Managing Water Systems

Also in November, in order to help tribes and Alaska Native Villages manage their drinking water and wastewater systems, EPA released a series of 10 online training modules covering an array of operation, maintenance, and system management issues at smaller drinking water and wastewater facilities. Training topics include information on managing and maintaining drinking water, sewer, lagoon, and decentralized infrastructure as well as information on sustainably managing water systems, including asset management and techniques for developing rate structures. The online training materials are geared toward operators and managers in tribal lands, but potentially could benefit anyone managing a small water or wastewater system. For more information, visit: http://water.epa.gov/type/watersheds/wastewater/smallsystemsoperatortraining.cfm.

19. EPA Releases Draft Section 319 Nonpoint Source Program and Grant Guidelines

On November 13, 2012, EPA released the draft Nonpoint Source Program and Grants Guidelines for States and Territories for review and comment. The revised guidelines provide states and territories with a framework to use section 319 Clean Water Act grant funds to effectively implement their state nonpoint source management programs. The guidelines provide updated program direction, an increased emphasis on watershed project implementation in watersheds with impaired waters, and increased accountability measures. They also emphasize the importance of states updating their nonpoint source management programs to ensure that section 319 funds are targeted to the highest priority activities. For more information, visit: http://water.epa.gov/polwaste/nps/cwact.cfm.

B. Regulation and Guidance

1. United States and Canada Sign Amended Great Lakes Water Quality Agreement

On September 7, 2012, EPA Administrator Lisa P. Jackson and Canada's Minister of the Environment Peter Kent signed the newly amended Great Lakes Water Quality Agreement. First signed in 1972 and last amended in 1987, the Great Lakes Water Quality Agreement is a model of binational cooperation to protect the world's largest surface freshwater system and the health of the surrounding communities. The revised agreement will facilitate United States and Canadian action on threats to Great Lakes water quality and includes strengthened measures to anticipate and prevent ecological harm. New provisions address aquatic invasive species, habitat degradation and the effects of climate change, and support continued work on existing threats to people's health and the environment in the Great Lakes Basin such as harmful algae, toxic chemicals, and discharges from vessels. To view the text of the agreement, visit: http://www.binational.net/home_e.html.

2. EPA Recommends New Recreational Water Quality Criteria to Better Protect Public Health

In November, 2012, pursuant to an order from a U.S. District Court, and as required by the Beaches Environmental Assessment and Coastal Health Act of 2000, EPA recommended new recreational water quality criteria for states that will help protect people's health during visits to beaches and waters year round. The science-based criteria provide information to help states improve public health protection by addressing a broader range of illness symptoms, better accounting for pollution after heavy rainfall, providing more protective recommendations for coastal waters, encouraging early alerts to beachgoers and promoting rapid water testing. The criteria released do not impose any new requirements; instead, they are a tool that states can choose to use in setting their own standards.

The new criteria are based on several recent health studies and use a broader definition of illness to recognize that symptoms may occur without a fever, including a number of stomach ailments. EPA also narrowed from 90 days to 30 days the time period over which the results of monitoring samples may be averaged. This produces a more accurate picture of the water quality for that given time, allowing for improved notification time about water quality to the public. This shortened time period especially accounts for heavy rainfall that can wash pollution into rivers, lakes or the ocean or cause sewer overflows.

The strengthened recommendations include:

- A short-term and long-term measure of bacteria levels that are to be used together to ensure that water quality is properly evaluated.
- Stronger recommendations for coastal water quality so public health is protected similarly in both coastal and fresh waters.
- A new rapid testing method that states can use to determine if water quality is safe within hours of water samples being taken.
- An early-alert approach for states to use to quickly issue swimming advisories for the public.
- Tools that allow states to predict water quality problems and identify sources of pollution, as well

as to develop criteria for specific beaches. More information, visit: http://water.epa.gov/scitech/swguidance/standards/criteria/health/recreation/index.cfm.

3. EPA Updates Rule for Pathogens in Drinking Water, Sets Limit for E. Coli

In December, EPA updated the rule for pathogens in drinking water, including setting a limit for the bacteria E. coli to better protect public health. The Revised Total Coliform Rule ensures that all of the approximately 155,000 public water systems in the United States, which provide drinking water to more than 310 million people, take steps to prevent exposure to pathogens like E. coli. Pathogens like E. coli can cause a variety of illnesses with symptoms such as acute abdominal discomfort or, in more extreme cases, kidney failure or hepatitis.

Under the revised rule, public drinking water systems are required to notify the public if a test exceeds the maximum contaminant level (MCL) for E. coli in drinking water. If E. coli or other indications of drinking water contamination are detected above a certain level, drinking water facilities must assess the system and fix potential sources and pathways of contamination. High-risk drinking water systems with a history of non-compliance must perform more frequent monitoring. The revised rule provides incentives for small drinking water systems that consistently meet certain measures of water quality and system performance.

The Safe Drinking Water Act requires that EPA review each National Primary Drinking Water Regulation, such as the Total Coliform Rule, at least once every six years. Public water systems and the state and local agencies that oversee them must comply with the requirements of the Revised Total Coliform Rule beginning April 1, 2016. Until then, public water systems and primacy agencies must continue to comply with the 1989 version of the rule.

For more information, visit: http://water.epa.gov/lawsregs/rulesregs/sdwa/tcr/regulation.cfm.

C. Compliance and Enforcement

1. EPA Enforcement in 2012 Protects Communities from Harmful Pollution

In January 2013, EPA released its fiscal year (FY) 2012 enforcement results. The results highlight EPA's civil and criminal enforcement efforts to address pollution problems that have the greatest impact on communities and public health, including a reduction of 1.7 billion pounds of pollution to the nation's air, water and land, 191,645 pounds of hazardous waste, and $34,876,733 million in civil/judicial and criminal penalties to deter violations of the law. In addition to achieving progress seen by such traditional measures, EPA has also made gains to reduce relatively smaller amounts of pollution that have substantial health impacts on communities, such as improvements in compliance with drinking water standards and efforts to reduce high toxic sources of air pollution.

FY 2012 results include:

- Sustained and focused enforcement attention on serious violators of clean drinking water standards has resulted in improvements in compliance. The number of systems with serious violations has declined by more than 60 percent nationwide in the past three years as a result of combined federal and state enforcement work, protecting people's health through safer drinking water.
- More than 67 percent of large combined sewer systems serving people across the country are implementing clean water solutions to reduce raw sewage and contaminated stormwater and more are under way. EPA is working with communities to design integrated solutions to these water quality problems, and incorporating innovative and cost effective green infrastructure to save money and achieve multiple community benefits.
- EPA is bringing criminal prosecutions where criminal activity threatens public health, such as sending untreated and contaminated wastewater to municipal wastewater treatment plants.
- EPA is taking enforcement actions against violators of environmental regulations in environmental justice communities.
- EPA is increasing transparency to use the power of public accountability to help improve environmental compliance. EPA's 2012 enforcement actions map provides information about violators in communities. EPA's state dashboards and Clean Water Act pollutant loading tool provide the public with information about local pollution that may affect them and allows the public to take a closer look at how government is responding to pollution problems.

a. EPA Region 2

In 2012, EPA Region 2 (covering New Jersey, New York, Puerto Rico, and the U.S. Virgin Islands), initiated 463 civil enforcement cases and concluded 464, and these enforcement actions have achieved the following results:

- Estimated pollution reduced, treated or eliminated (Pounds) = 65,098,791
- Estimated hazardous waste treated, minimized, or properly disposed of (Pounds) = 226,400,209
- Estimated contaminated soil and water to be cleaned up (Cubic Yards) = 18,567,108

More information about EPA's FY 2012 enforcement results, visit: http://www.epa.gov/enforcement/data/eoy2012/index.html.

2. EPA Issues Administrative Complaint Against Labelle Farm, Inc. and Bella Poultry, Inc. for Violations of the NPDES General Permit for Concentrated Animal Feed Operations

On September 5, 2012, EPA Region 2 issued an Administrative Complaint against LaBelle Farm, Inc. and Bella Poultry, Inc., for violations of the Clean Water Act and the New York State CAFO General Permit in the operation of its farm in Ferndale, Livingston Manor, and Liberty, New York. Respondents own and/or operate four farmsteads for which coverage was obtained under one permit, and the Complaint alleges that Respondent's facility discharges stormwater associated with agricultural waste from a CAFO point source into a navigable water of the U.S., as well as additional permit violations, and proposed to assess a civil penalty of $22,500.

3. EPA Issues Administrative Complaint Against the Town of Brookhaven for Violations of Its Storm Water Permit

On September 7, 2012, EPA issued an Administrative Complaint against the Town of Brookhaven for violations of the Clean Water Act and New York's SPDES Municipal Separate Storm Sewer System General Permit. During an inspection of the system, EPA identified numerous violations, including: failure to fully evaluate its program compliance, appropriateness of its identified Best Management Practices ("BMPs"), and progress toward achieving its identified measurable goals, including reduction of pollutant discharges of pollutants to the Maximum Extent Practical ("MEP"); failure to timely submit annual reports; failure to include justification for changes made to measurable goals in the annual report; failure to present draft annual reports to the public prior to submission to the New York State Department of Environmental Conservation ("NYSDEC"); failure to develop, implement and enforce a construction site storm water program; and failure to develop and implement an adequate pollution prevention and good housekeeping program. The Complaint proposes a penalty of $19,500.

4. EPA Settles Clean Water Act Administrative Penalty Action Against Lafarge Building Materials, Inc.

On September 12, EPA issued a Consent Agreement and Final Order resolving the Class 2 Clean Water Act Administrative Complaint issued to Lafarge's Ravena Cement Plant on October 31, 2011. The Complaint alleged persistent numeric effluent violations of Lafarge's SPDES Permit between 2004 and 2011. The CA/FO requires Lafarge to pay a penalty of $120,000.

5. EPA Issues Administrative Complaint Against Burton F. Clark, Inc. for Discharging Pollutants into Waters of U.S. Without a Permit

On September 18, 2012, EPA issued an Administrative Complaint against Burton F. Clark, Inc. for violations of the Clean Water Act. Pursuant to an EPA inspection, Respondent was found to be in violation of Sections 301 and 402 of the CWA for discharging pollutants by a point source into waters of the U.S. without a permit. Respondent is an operator of the crushed stone and gravel facility located in Norwich, New York. The complaint follows EPA's issuance of an Administrative Order to the facility on November 1, 2011. Pursuant to that Order, Respondent obtained permit coverage. The Complaint proposes a penalty of $32,000.

6. EPA Settles Clean Water Act Administrative Penalty Action Against the City of Rensselaer

On September 28, 2012, EPA issued a Consent Agreement and Final Order ("CA/FO") resolving its complaint against the City of Rensselaer, New York, for its alleged violations of the Clean Water Act in the operation of its municipal separate storm sewer system. EPA alleged that the city failed to provide adequate resources to timely implement its stormwater management plan ("SWMP"), failed to properly maintain numerous required records, failed to timely submit annual reports, failed to explain changes made to municipal operations selected, failed to develop and implement a proper program to detect and address non-stormwater discharges, failed to develop, implement and enforce a construction site stormwater runoff control program and failed to develop and implement an adequate pollution prevention and good housekeeping program. The CA/FO requires the City to pay a penalty of $10,500 and perform a green infrastructure supplemental environmental project that will cost $38,200 and have the capacity to absorb up to 1,050 cubic feet of stormwater per storm event, preventing the discharge of sediment and other pollutants to tributaries of the Hudson River.

7. EPA Settles Clean Water Act SPCC Violations by Montefiore Medical Center of New York

Also on September 28, 2012, Region 2 issued a Consent Agreement and Final Order in settlement of an enforcement action brought against Montefiore Medical Center for its violations of the Spill Prevention Control and Countermeasure ("SPCC") Regulation and the Oil Pollution Prevention Regulation, both implementing Section 311(j) of the Clean Water Act. Montefiore Medical Center is located in the Bronx, New York, and owns and operates a non-transportation-related oil storage facility on its premises that is subject to the SPCC Regulations. EPA had alleged that Respondent had failed to prepare, implement or amend a SPCC Plan for its oil storage facility. Under the terms of the CA/FO, Montefiore agreed to

perform a voluntary supplemental environmental project ("SEP") valued at no less than $252,115 to replace several underground storage tanks with above-ground tanks, and agreed to pay a civil penalty of $20,000.

8. EPA Issues Administrative Compliance Order to Concentrated Feeding Operation to Remedy Clean Water Act Violations

On November 23, 2012, EPA Region 2 issued an Administrative Compliance Order ("Order") to Glenn Winsor, d/b/a Winsor Acres, Inc., for numerous violations of the Clean Water Act and the New York State Pollutant Discharge Elimination System General Permit for Concentrated Animal Feeding Operations ("CAFO General Permit") in the operation of his large concentrated animal feeding operation located in Harpursville, New York, in the Chesapeake Bay watershed. During an inspection on May 15-16, 2012, EPA observed an illegal discharge of polluted runoff to a tributary of the Susquehanna River, the failure to properly operate and maintain a vegetated treatment area, the failure to properly operate and maintain three manure storage lagoons, the failure to exclude clean water from several concentrated waste areas, and the failure to properly operate and maintain mortality compost piles.

VII. Pollution Prevention Resources

- Use the EPA's Household Emissions Calculator to estimate your personal greenhouse gas emissions. http://www.epa.gov/climatechange/ghgemissions/ind-calculator.html.
- Get tips from ENERGY STAR® on reducing the amount of energy you use at home. http://www.energystar.gov/index.cfm?c=products.es_at_home_tips.
- Learn how to conserve water by visiting the WaterSense® website. http://www.energystar.gov/watersense.
- Discover the benefits of reducing the amount of waste generated during daily activities. http://www.energystar.gov/epawaste/index.htm.

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. EPA Press Release, Third and Most Successful Season of Hudson River Dredging Ends Today; More Than 1.3 Million Cubic Yards of PCB-Contaminated Sediment Removed Since 2009 Dredging Start, Nov. 30, 2012.
3. EPA Press Release, EPA Proposes to Delete Hooker-Hyde Park Landfill in Niagara Falls, N.Y. from Superfund List After Cleanup, Sept. 12, 2012.
4. EPA Press Release, EPA Releases Plan to Address PCB Contamination in the Grasse River in Massena, New York; Public Urged to Submit Comments No Later Than Nov. 15, Oct. 1, 2012.
5. For a history of the cleanup at the Diaz Chemical Site, see: http://www.epa.gov/region02/superfund/npl/diazchemical/.
6. EPA Press Release, EPA Finalizes Change to Cleanup Plan for Liberty Industrial Finishing Superfund Site in Farmingdale, New York, Oct. 11, 2012.
7. EPA Press Release, EPA Finalizes Cleanup Plan for Shenandoah Road Superfund Site in East Fishkill, New York, Oct. 16, 2012.
8. EPA Press Release, EPA Proposes Plan for Cleaning Up Gowanus Canal; Multi-million Dollar Cleanup to Revitalize Polluted Brooklyn Waterway, Dec. 27, 2012.
9. EPA Press Release, EPA Adds Areas of Orange and West Orange, N.J. to the Superfund List, Sept. 14, 2012.
10. EPA Press Release, EPA Proposes to Add the Matlack, Inc. Site in Woolwich Township, NJ to the Superfund List; EPA Encourages the Public to Comment, Sept. 14, 2012.
11. EPA Press Release, EPA Proposes to Add the Riverside Industrial Park in Newark, NJ to the Superfund List; EPA Encourages the Public to Comment, Sept. 14, 2012.
12. EPA Press Release, W.R. Grace and Co. / Wayne Interim Storage Site Removed From Superfund List after Cleanup, Sept. 25, 2012.
13. EPA Press Release, EPA Releases Plan to Remove Lead at Raritan Bay Superfund Site in Old Bridge and Sayreville, New Jersey; Public Hearing to Take Place Oct. 17 in Old Bridge, Sept. 28, 2012.
14. EPA Press Release, EPA Announces Remediation Plan for a Part of American Cyanamid Superfund Site in Bridgewater Township, N.J., Sept. 28, 2012.
15. EPA Press Release, EPA Finalizes Cleanup Plan for the White Chemical Corporation Superfund Site in Newark, New Jersey, Sept. 27, 2012.
16. EPA Press Release, EPA Finalizes Cleanup Plan for Evor Phillips Superfund Site in Old Bridge, New Jersey, Sept. 26, 2012.
17. EPA Press Release, EPA Changes Cleanup Plan for Polluted Groundwater at Superfund Site in South Plainfield, New Jersey Responds to Input from Public, Oct. 11, 2012.
18. EPA Press Release, EPA Finalizes Cleanup Plan for Scientific Chemical Processing Superfund Site in Carlstadt, New Jersey, Oct. 4, 2012.
19. *Hazardous Waste: Obama signs e-manifest bill*, Jeremy P. Jacobs, Greenwire, Oct. 5, 2012.
20. EPA Press Release, Obama Administration Finalizes Historic 54.5 mpg Fuel Efficiency Standards/ Consumer Savings Comparable to Lowering Price of Gasoline by $1 Per Gallon by 2025, Aug. 28, 2012.
21. *Id.*
22. EPA Press Release, EPA Keeps Renewable Fuels Levels in Place After Considering State Requests, Nov. 16, 2012.
23. *Id.*
24. EPA Press Release, EPA Sets Bio-based Diesel Volumes for 2013, Sept. 14, 2012.
25. EPA Fact Sheet, EPA Finalizes Biomass-Based Diesel Volume (Sept. 27, 2012), available at http://www.epa.gov/otaq/fuels/renewablefuels/documents/420f12059.pdf.
26. EPA Fact Sheet, EPA Issues Supplemental Determination for Renewable Fuels Produced under the Final RFS2 Program from Grain Sorghum (Nov. 2012), available at http://www.epa.gov/otaq/fuels/renewablefuels/documents/420f12078.pdf.
27. *Id.*
28. Letter from EPA Administrator Lisa P. Jackson to The Honorable Dan Malloy, et al. (Oct. 31, 2012), available at http://epa.gov/enforcement/air/documents/fuelwaivers/multistate-fuelwaiver103112.pdf.
29. *Id.*

30. Letter from EPA Administrator Lisa P. Jackson to The Honorable Andrew Cuomo and The Honorable Tom Corbett (Nov. 2, 2012), available at http://epa.gov/enforcement/air/documents/fuelwaivers/nypa-fuelwaiver110212.pdf.
31. 42 U.S.C. § 7475(c)(4)(C)(ii)(I).
32. Letter from EPA Administrator Lisa P. Jackson to The Honorable Andrew Cuomo and The Honorable Tom Corbett (Nov. 2, 2012), available at http://epa.gov/enforcement/air/documents/fuelwaivers/nypa-fuelwaiver110212.pdf.
33. Letter from EPA Administrator Lisa P. Jackson to The Honorable Christopher Christie and The Honorable Andrew Cuomo (Nov. 16, 2012), available at http://epa.gov/enforcement/air/documents/fuelwaivers/nynj-fuelwaiver111612.pdf.
34. EPA Press Release, EPA Awards $1.2 Million to Improve Indoor Air Quality, Oct. 10, 2012.
35. *Id.*
36. EPA Press Release, EPA Provides Grants to Help New York City Residents Monitor Air and Water Pollution in their Communities; Smart Phones will Track Air Pollution in The Bronx, Students Surveying Water Pollution in New York Harbor are Some of the Projects, Sept. 27, 2012.
37. *Id.*
38. EPA Press Release, EPA Awards Columbia University and Cornell University Climate Change Grants; Columbia and Cornell Universities to Receive a Combined $1.5 Million, Sept. 18, 2012.
39. EPA Press Release, New Jersey and New York Supermarkets Recognized for Environmental Achievement by EPA GreenChill Program; Weis Markets, ACM, and Whole Foods Take Action to Reduce Harmful Emissions from Chemicals Used for Refrigeration, Sept. 18, 2012.
40. EPA Fact Sheet, PROPOSED UPDATES OF THE LIMITS FOR NEW POWER PLANTS UNDER THE MERCURY AND AIR TOXICS STANDARDS (MATS) ACTION (Nov. 16, 2012), available at http://epa.gov/mats/pdfs/20121116factsheet.pdf.
41. 77 Fed. Reg. 9304 (Feb. 16, 2012).
42. Letter from Gina McCarthy, Assistant Administrator, EPA, to Patricia T. Barmeyer, King & Spalding, LLC (July 20, 2012), available at http://www.epa.gov/mats/pdfs/20120720letter.pdf.
43. EPA Fact Sheet, PROPOSED UPDATES OF THE LIMITS FOR NEW POWER PLANTS UNDER THE MERCURY AND AIR TOXICS STANDARDS (MATS) ACTION (Nov. 16, 2012), available at http://epa.gov/mats/pdfs/20121116factsheet.pdf.
44. EPA Press Release, EPA Announces Next Round of Clean Air Standards to Reduce Harmful Soot Pollution, Dec. 14, 2012.
45. EPA Fact Sheet, Overview of EPA's Revisions to the Air Quality Standards for Particle Pollution (Particulate Matter) (Dec. 14, 2012), available at http://www.epa.gov/pm/2012/decfsoverview.pdf.
46. *Id.*

Marla E. Wieder is an Assistant Regional Counsel with the United States Environmental Protection Agency, Region 2, New York/Caribbean Superfund Program; Joe Siegel is an Assistant Regional Counsel with the Air Branch and an Alternative Dispute Resolution Specialist and Chris Saporita is Assistant Regional Counsel with the Water and General Law Branch.

DEC Update

By Randall C. Young

Disaster Response

The Department of Environmental Conservation remains engaged in responding to the aftermath of hurricane Sandy. In the immediate response to the storm, staff from the Department's Office of Public Protection, Division of Operations, and Division of Environmental Remediation worked with other agencies to help assure public safety. As the area works to recover the Department is helping to address challenges including removal and disposition of woody debris, disposal of construction and demolition materials, and rehabilitation of shoreline areas.

Draft Audit and Incentive Policy

The Department has released a draft Environmental Audit Incentives policy to encourage self-audits and implementation of environmental management systems. When adopted, the draft policy will supersede the current "Small Business Self-Disclosure Policy" which was issued in August 1999.

Perhaps the most significant change will be a broadening of the eligibility criteria for penalty reductions. The existing policy limits penalty mitigation to self-reported violations discovered through a "…qualifying audit program…" or participation in a compliance assistance program. Qualifying audit programs are defined as either:

> (i) an environmental audit that is "systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements, or (ii) a documented, systematic procedure or practice which is an element of an appropriate due diligence program for preventing, detecting and correcting violations."[1]

The draft policy broadens the criteria for eligibility to include violations: "discovered…through an environmental audit, or discovered by the Department, its contractors, or other state, federal or local government agencies during pollution prevention or compliance assistance."

Rather than limit eligibility to formal continuing audit programs, the draft policy states that acceptable audits include: "…formal, third-party audits and informal, internal reviews of a regulated entity's operations and processes to determine compliance with environmental regulations."[2]

The draft policy also includes incentives for regulated entities to commit to compliance assistance, environmental audit agreements, and to reduce the adverse environmental effects from their activities by using environmental management systems and pollution prevention.

To see the draft policy visit: www.dec.ny.gov/docs/legal_protection_pdf/drftenvtlauditplcy.pdf.

Water Withdrawal Regulations

Amended regulations governing water withdrawals within the state became effective April 1, 2013, and can be found at 6 NYCRR Part 601 et seq. On August 15, 2011, Governor Cuomo signed bill A.5318-A/S.3798 amending title 15 of ECL Article 15 to create a comprehensive water withdrawal law for New York. Previously, the Department had authority to review only the taking of water sources for public water supply systems serving five or more users.[3] With specific exceptions, title 15 of Article 15 now requires a permit for water withdrawals that exceed 100,000 gallons per day for non-agricultural purposes based on the maximum capacity of the system.[4] The permitting threshold for agricultural purposes is an average withdrawal exceeding 100,000 gallons per day in any consecutive thirty-day period.[5] The new provisions of 6 NYCRR Part 601 establish: (a) minimum standards for operation and new construction of water withdrawal systems; (b) monitoring, reporting and record keeping requirements; and (c) protections for present and future needs for sources of potable water supply.

For additional information, see www.dec.ny.gov/regulations/78258.html.

Personnel Changes

Steven Russo resigned the position of Deputy Commissioner and General Counsel to join Greenberg Traurig, LLP, in March 2013. Mr. Russo joined the Department as General Counsel in March 2011.

Edward McTiernan succeeded Mr. Russo as Deputy Commissioner and General Counsel. Mr. McTiernan joined the Department as Deputy General Counsel in August 2011. Before joining the Department, Mr. McTiernan practiced environmental law for seventeen years in New York and New Jersey and led the environmental practice group at Gibbons, P.C. He has a master's degree from the State University of New York College of Environmental Science and Forestry and received his J.D. from Seton Hall University School of Law.

Thomas Berkman has filled the position of Deputy General Counsel vacated by Mr. McTiernan's promotion. Mr. Berkman was previously the Bureau Chief for the Water and Natural Resources Bureau in the Department's Office of General Counsel.

Zackary Knaub has succeeded John Parker as the Regional Attorney for Region 3.[6] Mr. Knaub graduated cum laude from Benjamin Cardozo School of Law in 2003. Upon graduation, he served as a law clerk in the Staff Attorney's Office of the United States Court of Appeals for the Second Circuit. Afterward, he was an associate with Beveridge and Diamond in New York City where he specialized in environmental law and litigation. Most recently, he worked as an attorney for the Shlansky Law Group in Vergennes, Vermont.

Ann Lapinski, Esq. has been named Director of DEC's Office of Internal Audit and Investigation where she had served as acting director since January 2011. Ms. Lapinski oversees the agency's internal audits and investigations, and acts as liaison with the Office of the Inspector General, the Office of the State Comptroller and federal agencies that have audit authority. Ms. Lapinski worked the Department's Region 4 office for 17 years before becoming Ethics Counsel and attorney for the Department's offices of Employee Relations and Personnel.

Robyn Adair, Esq., of the Department's office of General Counsel has been appointed by the Governor's Office to work on the prestigious Moreland Commission charged by the Governor with investigating the activities and responses of various utilities and power companies in response to Superstorm Sandy and other significant weather-related issues. The Department expects Ms. Adair to return after her work with the Moreland Commission has been completed. During her absence, inquiries that would have been directed to Ms. Adair should be sent to Scott Crisafulli.

Stuart Brody, Esq. has joined the Department as counsel for ethics, employee relations and personnel matters. Mr. Brody has extensive private and public sector experience in labor, employment and ethics issues. He lectures nationally on issues of ethics and public integrity, has written articles on the subject, and serves as an adjunct professor of Ethics and Integrity in the Business School at SUNY New Paltz.

George Stiefel, Esq. has joined the Department's Office of General Counsel in Albany where he will be responsible for Freedom of Information Law compliance. Mr. Stiefel is a Graduate of the State University at Buffalo Law School and Clarkson University. He has clerked for both the Appellate Division and the Court of Appeals.

Dudley Loew, Esq. succeeded James Bradley as an Assistant Regional Attorney in Region 8.[7] Mr. Lowe is a graduate of Carleton College and Vermont Law School. Prior to joining the Region 8 office, Mr. Low interned the Department's Region 2 office and worked for South Brooklyn Legal Services.

James Mahoney, Esq. has also joined the Region 8 office as an Assistant Regional Attorney. Mr. Mahoney received his B.A. in Philosophy from the State University at Buffalo and earned his J.D. from the University at Buffalo Law School. He was the Editor-in-Chief of the *Buffalo Environmental Law Journal* and a Publications Editor for the *Buffalo Law Review*. He was admitted to the New York State Bar in 2007 and has practiced environmental law in the private sector, where he focused on land use, zoning, SEQRA, environmental permitting, and cost recovery in petroleum remediation matters.

Scott Bassinson, Esq. was appointed Counsel to the Department's Office of Hearings and Mediation Services (OHMS), effective January 31, 2013. In this capacity, he will be assisting the Commissioner and the Assistant Commissioner for OHMS with respect to final decisions and orders in Department administrative enforcement and permit application hearings. Mr. Bassinson served for two years as law clerk to Judge Con G. Cholakis of the U.S. District Court for the Northern District of New York. In addition, he was in private practice in Albany, New York, and also served, from 1999 to 2005, as an assistant attorney general / senior investigative counsel with the Environmental Protection Bureau of the New York State Department of Law.

Endnotes

1. CP-19 ¶III.2
2. Draft Environmental Audit Incentive Policy ¶V.B.
3. L. 1972 ch. 664; amended L 1979 ch. 233.
4. See ECL §§15-1501(1) and 15-1502(14).
5. *Id.*
6. Region 3 includes Sullivan, Ulster, Dutchess, Orange, Putnam, Rockland, and Westchester counties.
7. Region 8 includes the counties of Wayne, Monroe, Orleans, Genesee, Livingston, Ontario, Seneca, Yates, Steuben, Schuyler, and Chemung.

This update is the work of the author and was not published by or on behalf of the New York State Department of Environmental Conservation.

Member Profiles

Long-Time Member: Professor Emeritus Nicholas Robinson

It is difficult to imagine a friend and colleague more worthy of recognition than Nicholas Robinson. Nick served as the second chair of the Environmental Law Section of the NYSBA and can be credited with influencing the character of both the Section and environmental law in this state.

After speaking with Nick at length about this Member Bio, it occurred to me that I had three words to describe his character and importance: humble; catalytic; passionate.

Humble. To hear him tell it, you would think that Nick was lost and stumbled into service to the community and the legal profession. Of course, his humility masks an unmatched intensity of purpose and effort. As a law student at Columbia, Nick did not benefit from a full curriculum of environmental law courses. He formed an environmental law society that had as a primary goal the facilitation of a self-directed education in the laws that were relevant to environmental protection. His efforts were acknowledged, and as a law student he was invited to the first Airlie House convention to envision environmental law and to serve on the Legal Advisory Committee of the President's Council on Environmental Quality (CEQ).

Unfortunately, a full catalogue of Nick's accomplishments must be found elsewhere. It is worth noting nonetheless that environmental law owes a debt of gratitude to Nick's sustained efforts. Nick presently serves as the University Professor on the Environment, the Gilbert and Sarah Kerlin Distinguished Professor of Environmental Law, and Co-Director of the Center for Environmental Legal Studies at Pace Law School. Nick drafted many of New York's environmental laws and served as the first chairman of both the statutory Freshwater Wetlands Appeals Board and Greenway Heritage Conservancy for the Hudson River Valley. He chaired the Commission on Environmental Law of the International Union for the Conservation of Nature and Natural Resources (IUCN). He founded Pace's environmental law program and has authored several important books and articles on environmental protection. And, most importantly for our purposes, Nick served as the chair of the former NYSBA Standing Committee (first chaired by Arthur Savage) that was charged with proposing the creation of an Environmental Law Section.

Catalytic. Although, as noted above, we do not have enough space to catalogue Nick's many accomplishments in the law, we can say that Nick was aware—even as a law student—that environmental law would not take off without significant effort. For that reason he made it a rule that he publish an article on environmental law every month once he entered private practice in the early 70s. He experimented with the enforcement of new environmental laws. He searched for opportunities to trigger significant regulatory moments and facilitate achievement in the law and in his peers. He drafted environmental laws and advisory reports, established committees, and imposed his own brand of persistence on the bureaucratic machine.

Although he is proud of the accomplishments of this Section, Nick pointed out that a host of unanswered questions remain. In this regard, he continues to set a progressive agenda for the Section's efforts: "we need to draft state and local laws to address climate change; we need to resolve the challenges between animal law and wildlife conservation; we need to finally address the hazards of chemical exposure; we need to face the realities of the loss of the marine environment in Long Island Sound; and we need to inspire our law students to take the helm. There is no reason to wait for Congress to act. There is every reason for us to do something."

Passionate. At the close of our conversation, I asked Nick about the importance of preparing law students to push innovation in the law. He responded, "It happened in the late 60s because the problems were acute; we had reached a crisis point. I think we are back to that point again. Law students are far more concerned about climate change than the general public or even Congress." What is needed, Nick observed, is an affirmative effort by this Section to "prime the pump" and drive students to realize their role and importance to the progress of environmental law. Nick predicted that "the acute need for adaptation will galvanize students to meet the challenge of climate change."

Professor Robinson is an inspiration and an asset to the NYSBA. We celebrate his efforts and involvement and look forward to many more years of service.

—Keith Hirokawa

* * *

New Member: Charles Malcomb

For this issue's New Member Profile, we are turning our sights to Buffalo. Charles Malcomb graduated from SUNY Buffalo Law School in 2009, and became a member of both the bar and the Environmental Law Section of the NYSBA the following year. Charles currently practices at Hodgson Russ, focusing on environmental and municipal law.

Prior to law school, Charles worked in the real estate industry as a mortgage loan officer. Charles did not go to law school planning to become an environmental law and land use attorney, but stumbled into a toxic torts case as a summer associate and was excited by the field. Since then, he has worked on a variety of environmental and municipal law matters.

Charles is particularly interested in compliance work and has already developed experience working with both private and public clients on issues involving state and federal environmental statutes. He also assists municipalities with a wide range of legal issues, including land use and zoning. This also necessarily involves guiding municipalities through the complexities of environmental review requirements mandated by the National Environmental Policy Act (NEPA) and New York State's Environmental Quality Review Act (SEQRA). He has experience working through the SEQRA process from the point of view of both the agency and the applicant.

Charles most enjoys his work on renewable energy projects. An emerging force in his firm's CleanTech business, Charles works on cases that combine water and fuel, including those that convert clean waste to energy. He represents landowners and developers working on leases for large-scale wind energy projects across the state. This involves SEQRA review and permitting. As renewable energy projects are just in the initial stages in New York, Charles has the opportunity to work with developers from the beginning of a project all the way through to final project approval. One of the continual struggles he has faced in this work has been addressing the concerns of the community. For example, a NIMBY mentality may lead to neighborhood opposition to wind turbines. Charles has enjoyed traveling to watch the wind turbines go up, describing them as "an impressive feat of engineering.… Science all over the place." He enjoys the opportunity environmental lawyers have to work with scientists, engineers, and other consultants.

Although only a recent graduate himself, Charles also has been supporting his alma mater. He regularly volunteers to help prepare law students to bridge the gap between law school and practice. For example, this past year he helped prepare the SUNY Buffalo Law School team for the National Environmental Moot Court Competition. Charles is an active member of the Environmental Law Institute and has worked substantively with the Municipal Law Section, including presenting CLEs and speaking at conferences and meetings. Charles looks forward to becoming a more active member of the Environmental Law Section.

—Jessica Owley

Member News

Janice Dean, Section Chief, Toxics and Cost Recovery Section of the Office of the New York State Attorney General, Environmental Protection Bureau, was awarded the ABA Section of Environment, Energy, and Resources Distinguished Environmental Advocate "Rising Star" award in Salt Lake City. Janice was the only awardee from New York. Congratulations, Janice!

Laurie Silberfeld (right) Secretary to the Section, accepted an award on behalf of the Section at the NYSBA's Section Leaders program on May 9, 2013. The ELS was named a Section Diversity Champion in the NYSBA 2013 Diversity Challenge. Congratulations to **all of our members**.

It is with great sadness that we report the passing of ELS member and our friend **Louis Evans** on July 12, 2013. In addition to being a Section member, Lou also co-chaired or worked in several committees over the years including the Corporate Counsel Committee and most recently the LSP Task Force. He also was integral in organizing our 2002 Fall Program in Cooperstown. He had been in private practice over the past two decades although many will remember him as one of the first NYSDEC superfund attorneys through the 1980s and early 90s. He leaves his wife Zina, sons Jason and Ben, his Mom and several siblings. Lou will be missed.

In Memoriam
Drayton Grant

(1948-2012)

Drayton Grant, an early and dedicated protector of the environment and practitioner of environmental law for more than 30 years, died October 31, 2012 after a fierce battle with lung cancer. Drayton was born June 11, 1948 in Philadelphia, Pennsylvania, the first child of Dr. Joseph L. and Mary Drayton Grant. As a very young child she accompanied her parents to postwar Germany and occupied Vienna. Drayton grew up in Hanover, New Hampshire and Norwich, Vermont. She was a graduate of the Westover School in Middlebury, Connecticut, Smith College, and Brooklyn Law School, where she was an editor of the *Law Review*. Drayton started her career as a lawyer in 1975 at the New York City law firm of Donovan Leisure Newton & Irvine. After Donovan Leisure, she served as an attorney with the New York State Department of Environmental Conservation, and from 1983 until 1987 she served as a Deputy Commissioner of the Department of Environmental Conservation with responsibility for New York State-wide land use and conservation programs. From 1988 until recently she practiced environmental and land use law throughout the Hudson Valley from her offices in Rhinebeck, New York with the firm of Grant & Lyons LLP.

John Lyons, who had been Drayton's friend for 20 years and her law partner at Grant & Lyons, the firm she co-founded, said: "Drayton was an extraordinary person and in the course of her life was an inspiration to many. Her tremendous capacity to love her fellow men and women, her rock solid integrity and character, her easy sense of humor and boundless joie de vivre, her intelligence and indomitable spirit were known by all. Her positive impact on those she knew and loved and on her community will be a lasting testament to her spirit and her life. She left her friends, her community, and our world so much better than she found them."

Drayton had a long professional and personal interest in the environment and was a recognized expert in environmental and land use matters. Among her many interests, Drayton served on the Boards of Dutchess County institutions Hudson River Heritage, Winnakee Land Trust, Hudsonia, the Sloop Clearwater and Northern Dutchess Hospital. She was also a longtime and devoted member of Rotary. She also served on the Board of the Westover School in Middlebury, Connecticut in the mid-1980s and as a trustee of St. John the Evangelist in Barrytown, New York for many years. She was a principal mover in the creation of Burger Hill Park in Rhinebeck, New York, a 76 acre privately owned park.

Drayton loved to ski and was an avid golfer and great proponent of teeing off forward of fairway hazards. Drayton was also a member of the Northeast Harbor Golf Club and the Edgewood Club of Tivoli, and a longtime Patron of the Metropolitan Opera.

Drayton was a direct descendent of Benjamin Rush, a signer of the Declaration of Independence, and John Drayton, a president of the Insurance Company of North America. She was also a direct descendent of the pioneer neurosurgeon, Francis Grant, and a founder of the international law firm, Morgan Lewis and Bockius, Francis Draper Lewis.

Drayton made her home in Rhinebeck, New York for more than 29 years and summered all her life in Seal Cove, Maine. Drayton is survived by her husband of 30 years, Wayne Baden, her two sons, Samuel Grant Baden and Nathaniel Rush Baden, her sisters, Barbara Grant of Shelburne, VT and Priscilla Grant of Cleveland, Ohio, and her brother, Charles Grant of Tacoma, Wa., and her mother, Mary Drayton Grant of Shelburne, VT.

In Memoriam
Arthur Savage

(1926-2012)

Arthur V. Savage, died on December 26, 2012. He was born in New York City in 1926 and lived in Pelham, N.Y. After graduating from Phillips Exeter Academy (1944), he served in the U.S. Naval Reserve from 1944 to 1946, and was stationed in Japan as part of the post-war occupation. He received a B.A. from Princeton University (1948) and a J.D. from Harvard Law School (1952). Mr. Savage practiced law in New York City for over 60 years. Apart from private practice, he was an Assistant U.S. Attorney in the U.S. Attorney's Office for the Southern District of New York from 1957 to 1961, serving as Assistant Chief of its Civil Division from 1959 to 1961. Among his professional activities, Mr. Savage was First Chair of the New York State Bar Association's Special Committee on Environmental Law; once the Association's Section on Environmental Law was established, he served on its Executive Committee. At the time of his death he was of counsel to Patton, Eakins, Lipsett, Martin & Savage. For more than half a century Mr. Savage served on many public and private organizations that helped shape environmental and conservation policies and practices in New York: the Association for the Protection of the Adirondacks; the Adirondack Mountain Reserve; the Adirondack Museum at Blue Mountain Lake, of which he was a founding trustee in 1952; the Adirondack Nature Conservancy, which he co-founded in 1973; the Adirondack Park Agency, Commissioner from 1979 to 1997 (by appointment of the Governor); SUNY's College of Environmental Science and Forestry, trustee from 1978 to 1997 (by appointment of the Governor); and Parks & Trails N.Y. Mr. Savage also served for many years as a trustee or manager of charitable, educational or religious organizations, including: the Havens Relief Fund Society; the Bruce L. Crary Foundation; the Princeton-Blairstown Center; Darrow School; the George W. Perkins Memorial Foundation; the Walbridge Fund; the New York Theological Seminary; and the Board of Foreign Parishes. He is survived by his wife of 54 years, Harriet Boyd Hawes; his four children, Richard Savage, Elizabeth Wright, Sarah Christie, and Katherine Schulze; nine grandchildren; and his sisters, Susan Speers and Serena Baum.

Professor Nicholas Robinson remembers Art Savage:

"Art was devoted to the Adirondacks and the environment of the State of New York. He was a life-long supporter of the Au Sable Club and the Adirondack Park, a leader of Environmental Advocates and the New York State Parks & Trails organization. He orchestrated the donation of much of the lands in the High Peaks around the Au Sable Club to the New York State Forest Preserve. He served ably as a Member of the Adirondack Park Agency. He chaired the Special Committee of the NYSBA on Environmental Law before the NYSBA authorized the creation of a full Section, and strongly supported my efforts to have a new Section created in the mid-1970s, becoming its first chair when the Section was established. He supported the Section in many ways, both public and private. May Art's cheerful enthusiasm for the law, for Learned Hand and Art's kinship with this legendary judge, and for the bright future that Art felt environmental law would bring for us all, remain strong in our spirits. He is deeply missed."

The 2013 Environmental Law Section Annual Meeting

New York, NY • January 25, 2013

Photo at left: Carl Howard and Barry Kogut present the Section Award to The Wild Center of the Adirondacks for providing a venue where the young can learn the wild world of the Adirondacks and the old can renew their memories and in so doing, providing a foundation of affection for the wilderness called the Adirondacks that will allow it to be preserved. Stephanie Ratcliffe, Executive Director of The Wild Center, accepted the award on behalf of The Wild Center.

Carl Howard and Barry Kogut present a Section Award to Janice Dean.

NYSBA

New York State Bar Association
Environmental Law Section

2013

Presents this award to

Janice A. Dean, Esq.

In recognition of her tireless efforts and dedicated diligence during her term as Co-Chair of the Section's Membership Committee in attracting new, young, and diverse members to the Section.

Carl R. Howard, Chair

The certificate presented to Janice Dean, winner of a Section Award.

NYSBA

New York State Bar Association
Environmental Law Section

2013

Presents this award to

J. Cullen Howe, Esq.

In recognition of his distinguished service to the Environmental Law Section in developing and serving as administrator of the Section's environmental blog "Envirosphere" since its inception in 2009, and carrying on the Section's tradition of high quality publications by earning a place for the blog in the LexisNexis Environmental Law & Climate Change Community Top 50 Blogs for 2011.

Carl R. Howard, Chair

The certificate presented to J. Cullen Howe, winner of a Section Award.

Carl Howard and Barry Kogut present a Section Award to J. Cullen Howe.

NYSBA

CERTIFICATE OF FELLOWSHIP AWARD

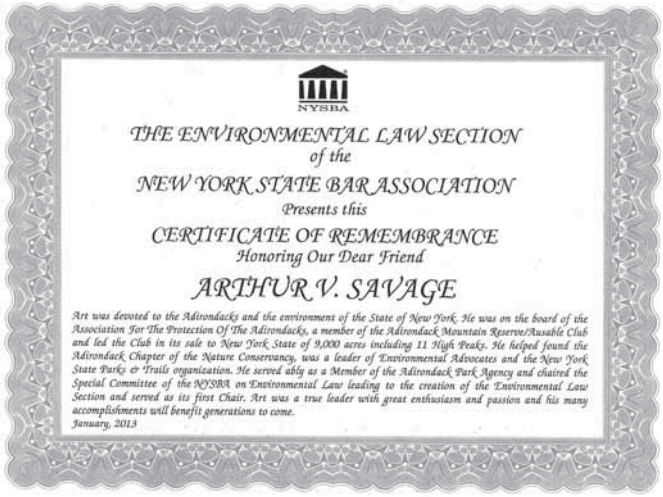
The Environmental Law Section of the New York State Bar Association is pleased to bestow Zaheer H. Tajani with a Minority Fellowship in Environmental Law for 2013, and hereby presents this Certificate of Fellowship Award in recognition thereof.

Carl R. Howard
Chair, Environmental Law Section
Peter M. Casper, Yelann L. Momot
And Walter E. Mugdan, Co-Chairs
Committee on Environmental Justice
New York State Bar Association
24th day of January, 2013

The certificate presented to Zaheer H. Tajani, winner of the 2013 Minority Fellowship in Environmental Law Award.

Carl Howard and Walter Mugdan present the 2013 Minority Fellowship in Environmental Law Award to Zaheer H. Tajani.

Carl Howard presents to Harriet "Hattie" Savage a Certificate of Remembrance honoring our dear friend Arthur Savage.

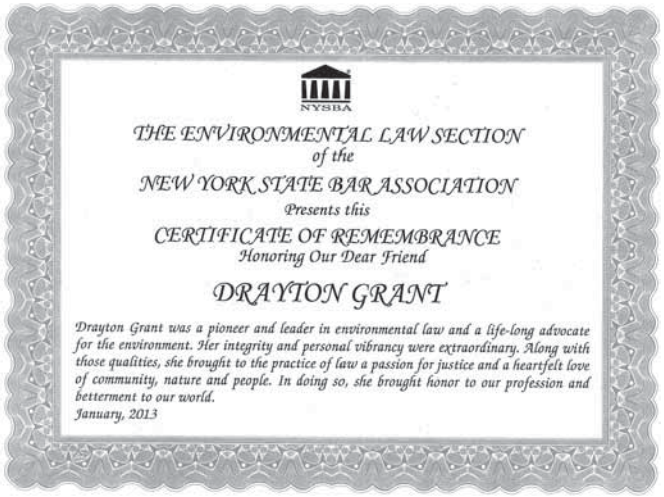


NYSBA

THE ENVIRONMENTAL LAW SECTION
of the
NEW YORK STATE BAR ASSOCIATION
Presents this
CERTIFICATE OF REMEMBRANCE
Honoring Our Dear Friend
ARTHUR V. SAVAGE

Art was devoted to the Adirondacks and the environment of the State of New York. He was on the board of the Association For The Protection Of The Adirondacks, a member of the Adirondack Mountain Reserve/Ausable Club and led the Club in its sale to New York State of 9,000 acres including 11 High Peaks. He helped found the Adirondack Chapter of the Nature Conservancy, was a leader of Environmental Advocates and the New York State Parks & Trails organization. He served ably as a Member of the Adirondack Park Agency and chaired the Special Committee of the NYSBA on Environmental Law leading to the creation of the Environmental Law Section and served as its first Chair. Art was a true leader with great enthusiasm and passion and his many accomplishments will benefit generations to come.
January, 2013

The Certificate of Remembrance honoring Arthur Savage.



NYSBA

THE ENVIRONMENTAL LAW SECTION
of the
NEW YORK STATE BAR ASSOCIATION
Presents this
CERTIFICATE OF REMEMBRANCE
Honoring Our Dear Friend
DRAYTON GRANT

Drayton Grant was a pioneer and leader in environmental law and a life-long advocate for the environment. Her integrity and personal vibrancy were extraordinary. Along with those qualities, she brought to the practice of law a passion for justice and a heartfelt love of community, nature and people. In doing so, she brought honor to our profession and betterment to our world.
January, 2013

The Certificate of Remembrance honoring Drayton Grant.

Carl Howard presents to Sam Baden a Certificate of Remembrance honoring our dear friend Drayton Grant.

What Exactly Are Exactions?

By Jessica Owley

This is going to be an exciting year for takings jurisprudence. The Supreme Court has appeared eager to take up cases involving Fifth Amendment Takings claims in a variety of contexts. One of these cases in particular, *Koontz v. St. John's River Water Management District*, could have significant implications for New York law.

I. Takings Jurisprudence

Historically, takings jurisprudence involved instances where governments encroached on or occupied private land without providing just compensation. In 1922, however, the Supreme Court recognized that governmental regulations that "go[] too far" in restricting property use can qualify as a taking even where the government has not physically seized the parcel.[1] Since the 1922 case of *Pennsylvania Coal Company v. Mahon*, the Supreme Court has struggled to articulate when a regulation has "gone too far" such that landowners must be compensated for the regulation's deleterious effects. Most acknowledge that this has been a tricky and not altogether successful endeavor. Where a regulation deprives a parcel of "all economically viable use," courts find little difference between regulating and physical occupation of the property, declaring the regulation a taking which requires either just compensation or an invalidation of the regulation.[2]

Generally, courts look to the balancing test established in *Penn Central Transportation Company v. City of New York*[3] to determine if there has been a taking. The *Penn Central* factors instruct courts to examine "the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-back expectations and the character of the government action."[4] Courts depart from this *Penn Central* balancing test, however, when the regulatory action is an exaction. Exactions are a special category of regulatory behavior that the Supreme Court has deemed to merit a different level of analysis as spelled out in two important cases: *Nollan v. California Coastal Commission*[5] and *Dolan v. City of Tigard*.[6]

Nollan and *Dolan* set forth specific rules for assessing when an exaction is impermissible under the Fifth Amendment's prohibition of taking property without just compensation. In *Nollan*, the Supreme Court explained that the land-use restriction must be tied to the harm the restriction seeks to cure. In the words of the Court, the exaction must have an "essential nexus" with the public harm sought to be alleviated.[7] In that case, the Court found that the government-mandated public access did not have an essential nexus with the purported harm of obstructed ocean views and a psychological barrier, created by a developed shorefront that prevented beach use.[8] Thus, the exaction did not work to cure the harm caused by the proposed development project. The Court noted that other land-use restrictions, such as height limitations or width restrictions, might have been valid, as they would have been tailored to address the problem of visual impediments to the beach.[9]

In *Dolan*, the Court further described the contours of permissible exactions by declaring that the exaction must be roughly proportional to the harm imposed.[10] Once a government entity meets the *Nollan* requirement and demonstrates that the exaction is linked to the harm caused, it also needs to show that the level of the exaction does not outstrip the level of harm caused by the project in question. The *Dolan* Court declared that the exaction must be "roughly proportional" to the impact of the proposed activity. Based on this theory, the Court invalidated requirements that a landowner dedicate portions of her property for storm drainage and a pedestrian and bicycle path. The Court found a nexus between the development and the exactions because the development would increase impervious surfaces (affected storm drainage) and increase vehicular traffic. However, the Court concluded that the City of Tigard failed to demonstrate that the proposed construction's impacts on flood control and traffic merited the proposed dedications, requiring "some sort of individualized determination that the required dedication is related in both the nature and extent to the impacts of the proposed development."[11]

In the wake of *Nollan* and *Dolan*, scholars and courts delved into the significant nexus and rough proportionality tests in attempts to assess what levels of exaction might be permissible. The Court limited the reach of these tests in *City of Monterrey v. Del Monte Dunes at Monterey, Ltd.*, where it explained that the "rough proportionality" test does not apply beyond the unique circumstances of cases involving exactions.

II. Exactions in New York

Faced with these instructions from the Supreme Court, New York has grappled with how to apply the *Nollan* and *Dolan* tests, usually limiting the use of these tests by defining what qualifies as an exaction. There is some variation in the definition of exaction, but generally exactions are requirements placed on a landowner seeking to obtain a development permit. At the most basic, we can think of exactions as permit conditions, although some argue for more limited definitions.

Exactions most commonly take the form of contributions of money or dedications of land.[12] Exactions enable local governments to transfer the costs associated with

new development to the developers and future residents of the projects.[13] Exactions for streets, sidewalks, and utilities within a subdivision are common examples.

The Supreme Court has validated the use of exactions as an implementation of a zoning authority's police power, as long as the condition substantially furthers governmental purposes that could justify denial of a building permit. The federal takings jurisprudence requires an assessment of whether the proposed exaction is roughly proportional and bears an essential nexus with the expected impacts of the project. The discussion hinges on our view of property rights. The Fifth Amendment prohibits the taking of property without just compensation; however, it is sometimes difficult to evaluate what constitutes property for Fifth Amendment purposes. Some might argue that every limitation on a landowner's freedom of action should be a compensable property right. Thus, a *Nollan* / *Dolan* analysis would be required for laws regarding actions as diverse as requiring a landowner to dedicate a portion of her land to a public footpath or requiring her to paint her house a color that blends in with the landscape. While most courts agree turning a portion of private land over to the public (or restricting a landowner's right to exclude) qualifies as an exaction, courts are less comfortable with invalidating a restriction on the ability to paint a house hot pink for its infringement on a compensable property right. Where should the line be drawn?

In *Smith v. Town of Mendon*,[14] the New York Court of Appeals avoided evaluating a permit condition on *Nollan* and *Dolan* grounds by finding that it was not an exaction. In *Smith*, the court held that what would generally be termed an "exacted conservation easement"[15] was not an exaction. It reached this conclusion by limiting the definition of exaction to requiring a dedication of property for public use.

Paul and Janet Smith owned a 9.7-acre lot in the Town of Mendon, located along a protected waterway. Their lot was described as including "several environmentally sensitive parcels" and falling with the Honeyoe Creek's 100-year flood plain. In particular, steep slopes on the property created concerns for erosion. The Mendon Town Code established environmental protection overlay districts (EPODs),[16] with four different EPODs that limited the Smiths' use of their property. Landowners can acquire development permits for projects within EPODs if they can show that their proposed activities will not cause undue harm, for example. by destabilizing soil and causing erosion. Permit applicants must make a specific showing that the proposed activity will not injure the environmentally sensitive features of the property.

In December 2001, the Smiths applied to the Town Planning Board for site plan approval to construct a single-family home in the non-EPOD portion of their property. In July 2002, the Board issued a final site plan approval, concluding that the Smiths' proposal was not likely to result in any adverse environmental impacts as long as there was no development in the EPOD portions of the site. The Planning Board also conditioned final site plan approval on the Smiths' filing a conservation restriction on any development within the mapped EPODs and amending the final site plan map accordingly. The Board characterized these restrictions as putting the EPOD requirements into the deed and thereby "put[ting] subsequent buyers on notice that the property contains constraints which may limit development."[17] The proposed conservation restrictions closely mapped the limitations established by the EPOD regulations and did not require the Smiths to open up their property to public access.

The Town argued that the conservation restriction did not take any property right from the Smiths, because it merely repeated already existing regulatory restrictions. The difference, however, was that the conservation restrictions would operate in perpetuity, while the Town of Mendon could amend its EPOD ordinance at any time. Additionally, putting the land-use restrictions in the deed gave the Town an additional enforcement mechanism. If the Smiths or a subsequent landowner violated the terms of the conservation restriction (which again were the same as the terms of the EPOD), the Town could seek equitable relief in court. Thus, for the same violation, the Town could both get injunctive relief based on the deed restriction and issue a citation for violating the EPOD.

If the conservation restriction constitutes an exaction, the Fifth Amendment takings analysis would involve application of the *Nollan* and *Dolan* inquiries into the essential nexus and rough proportionality of the exaction. If the restriction is not an exaction, only the *Penn Central* balancing test—which is generally considered more favorable to the regulators—applies. The court was persuaded by the Attorney General's amicus brief asserting that conservation restrictions of this type do not constitute exactions because they do not involve the dedication of property to public use. The New York Court of Appeals reviewed the federal exaction cases and found that they all involved dedications of real property that limit the landowner's ability to exclude the public from her property. Where the right to exclude is not involved, there is no exaction. Thus, although the Smiths were required to place a limitation on their property rights, this limitation did not rise to the level of an exaction, because there was no requirement to allow public access to the site. The *Smith* court narrowly interpreted "public use" to only involve actual presence on the land by members of the public. Thus, in New York, only possessory rights or affirmative public easements constitute exactions.

Perhaps because it was already bound by precedent, the *Smith* court also noted that a "fee imposed in lieu of a physical dedication of property to public use" also qualifies as an exaction for the purpose of takings jurisprudence.[18] It is unclear how the court reconciled these two holdings. The *Smith* Court explained that the paramount

stick in the property rights bundle for assessing whether something is an exaction is whether the right to exclude others has been taken. This analysis does not support the holding that in lieu fees should constitute exactions. This creates a strange juxtaposition where New York has both a narrower and broader view of exactions than other states. For example, in California, requiring a landowner to place a conservation easement on her property is considered an exaction while requiring her to pay an in lieu fee is not.[19] In fact, many courts are conflicted on the issue of fees but find little debate about conservation easements or similar restrictions.

Smith v. Town of Mendon may need revisiting pending the result of *Koontz v. St. Johns River Water Management District*. The Supreme Court heard oral argument of the case in January[20] and an opinion is expected this summer.

III. Supreme Court Revisits Exactions

Koontz involved a Florida landowner's claim that he is owed just compensation for an exaction that never actually occurred.[21] Coy Koontz, Sr. owned land in Orange County, Florida. He wanted to develop 3.7 acres but was restricted by the St. John's River Water Management District ("the District") that controlled a habitat protection zone encompassing those acres. Koontz applied for two permits in 1993 and 1994 that would have destroyed 3.4 acres of wetland and 0.3 acres of protected uplands. In return for the permits, Koontz volunteered to place 11 other acres of his property into a conservation easement. The district deemed the 11 acres to be inadequate mitigation and suggested additional mitigation including the option of paying for improving wetlands on land owned by the district. Koontz refused the deal, and his permit application was denied.

Koontz (who died in 2000 and has been succeeded in this matter by his son Coy Koontz, Jr.) filed suit, claiming the proposed exactions would have been invalid under the Fifth Amendment takings jurisprudence. Essentially, Koontz asserted that the proposed exaction was excessive and would fail *Dolan*'s requirement of rough proportionality.

This case raises major questions about the right of government agencies to impose conditions in return for permit approval. These conditions (which some might term exactions…but not us New Yorkers) can take many forms, including "money, services, labor or any other type of personal property."[22] Koontz's circumstance differs from that in *Nollan*, *Dolan*, and *Smith*, because the landowner was not only being asked to limit action on his own property but also provide payments for offsite wetland restoration and rehabilitation. It is not clear whether either of these requirements (had they actually been imposed) would constitute exactions in New York because, under *Smith*, conservation easements are not exactions unless they involve public access and this one did not. Furthermore, it is not clear that these types of payments would even be considered exactions in New York. While the New York Court of Appeals held payments to be exactions in *Twin Lakes Development Corp. v. Town of Monroe*, it limited its holding to fees imposed in lieu of a physical dedication. Mitigation fees do not appear to meet that definition.

The Supreme Court has not yet determined whether exactions include fees or partial property rights where public access is not involved. However, there is nothing in the language of *Nollan* / *Dolan* suggesting such a limitation.

The Koontz oral argument offers some indications as to how the Supreme Court Justices view and define exactions. For example, both Justice Kennedy and Chief Justice Roberts pushed the attorneys to evaluate whether exactions change nature when offsite or onsite, but both argued offsite and onsite mitigation should be treated in a similar manner. In Koontz's view, this means viewing offsite mitigation as an exaction, while in the District's view, it means subjecting the condition to a *Penn Central* analysis (i.e., not treating it as an exaction). Justice Breyer seemed to find the location of the permit condition important, pointing out that the District had given Koontz several options (beyond the offsite mitigation fees) to mitigate the impacts of his proposed development, many of which were on his own property. Thus, at least three of the justices are interested in where the permit condition occurs when determining whether the condition qualifies as an exaction, meriting *Nollan* / *Dolan* analysis.

The District argued in its brief that a takings analysis (neither *Nollan* / *Dolan* or *Penn Central*) should not be applied when a permitting agency imposes conditions that require a developer to spend some money for a public project, but the court seemed to have trouble accepting that argument. The District argued that by extending the takings concept to monetary obligations, there would be no logical stopping point. Again, it was not clear that the justices agreed. Justice Kagan inquired into whether all permit conditions are takings. Koontz argued that anytime a permitting authority asks for any property (including money), there is an exaction. Justice Scalia agreed, and several other justices appeared to agree, that if the permitting authority required payments of money, there would be an exaction appropriately subject to *Nollan* / *Dolan* analysis. If the Supreme Court addresses these issues in its opinion, and thereby broadens the scope of permit conditions that it defines as exactions (or subjects to exaction-like analysis), New York law will be out of step with federal requirements. Whether you characterize the move as extending the definition of exaction or just applying the *Nollan* / *Dolan* analysis to additional categories of permit conditions, New York State will end up with more takings cases and a heavier burden on public agencies to justify their environmental protection permitting schemes.

Endnotes

1. *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).
2. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).
3. 438 U.S. 104 (1978).
4. *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).
5. 483 U.S. 825 (1987).
6. 512 U.S. 374 (1994).
7. *Nollan*, 483 U.S. at 837.
8. *Id.* at 835.
9. *Id.* at 836.
10. *Dolan*, 512 U.S. at 391.
11. *Id.*
12. *See* Elaine Spencer, *A Developer's Perspective on Government Exactions in the Wake of* English Church v. Los Angeles *and* Nollan v. California Coastal Commission, C356 A.L.I.-A.B.A. 449, 453 (1988).
13. Donald L. Connors & Michael E. High, *The Expanding Circle of Exactions: From Dedication to Linkage*, 50 LAW & CONTEMP. PROBS. 68, 69 (1987); John P. O'Connor, Jr., Note, *Extortion Loses a Synonym Thanks to Court Ordered Accountability in Land Use Exaction Programs:* Nollan v. California Coastal Commission, *107 S. Ct. 3141 (1987)*, 57 U. CIN. L. REV. 397 (1988).
14. *Smith v. Town of Mendon*, 822 N.E.2d 1214 (N.Y. 2004).
15. *See generally*, Jessica Owley, *The Emergence of Exacted Conservation Easements*, 84 NEBRASKA L. REV. 1043 (2006).
16. Mendon Town Code section 200-23.
17. *Id.* at 1216.
18. *Id.* at 1219 (citing *Twin Lakes Development Corp. v. Town of Monroe*, 801 N.E.2d 821 (2003)).
19. *Building Industry Ass'n v. Stanislaus County*, 190 Cal. App.4th 582 (2010); *see also* Jessica Owley, *Exacting Conservation Easements in California*, 21 ENVTL L. NEWS 3 (Winter 2012).
20. *Koontz v. St. John's River Water Management*, The Oyez Project at IIT Chicago-Kent College of Law, *http://www.oyez.org/cases/2010-2019/2012/2012_11_1447* (last visited March 3, 2013).
21. One of the key elements of this case is whether a constitutional violation can occur when the government never actually issues a permit. That issue could end up being the crux of the case and leave us without an answer regarding the Supreme Court's view of fees and other conditions as exactions. For a thorough and engaging discussion of proposed exactions as takings, *see* Timothy Mulvaney, *Proposed Exactions*, 26 J. LAND USE & ENVTL. L. 279 (2011).
22. Petition for Writ of Certiorari, *Koontz v. St. Johns River Water Management Dist*. (No. 11-1447), 2012 WL 1961402.

Jessica Owley is an Associate Professor at SUNY Buffalo Law School.

Do Good to Get Barred: The New Empire State Pro Bono Requirement and Its Potential Impact on Environmental Law Practitioners

By Kim Diana Connolly

> From the start, these responsibilities of the profession must be a part of every lawyer's DNA—to support the values of justice, equality and the rule of law that make this state and this country great.[1]

Aspiring attorneys sitting for the New York State bar examination in the summer of 2014 or thereafter will be required to affirm they have completed 50 hours (or more) of pro bono legal work before they will be admitted to practice.[2] The subject of much discussion,[3] this new mandate, issued in 2012 by New York Chief Judge Jonathan Lippman,[4] is intended to benefit the profession by increasing access to legal services while providing aspiring attorneys with both experience and exposure to social justice issues.[5] The mandate can be satisfied only by "law-related" work[6] that is "performed under the supervision" a law school faculty member (full time or adjunct), an admitted attorney in the jurisdiction where the work is performed, or (for clerkships) a judge or an attorney employed by the court system.[7]

Students interested in pro bono service in the environmental area will have opportunities to serve, but given the specialized nature of such practice and the parameters of the new rule, these opportunities may require investment in creating or modifying opportunities by both those seeking the credit and the licensed attorneys or other approved persons supervising them. Nevertheless, under this new rule, attorneys in agencies, public interest and private practice may have occasion to get involved in meaningful pro bono projects with law students over the years ahead.

This article begins by noting the history of pro bono work in the legal profession, and briefly explores its current place among legal practitioners and law students. It then surveys New York's new mandatory pro bono rule itself. The article closes with some observations and predictions about this new mandate for those who might seek to complete that work performing pro bono environmental law and related matters.

Pro Bono in History and Context

As law librarian Marlene Coir has noted, "the debate over which kind of legal aid and how much access to justice should be provided for those who cannot afford legal representation has continued for decades."[8] Indeed, things are little changed from 1991, when Justice Sandra Day O'Connor remarked:

> While lawyers have much we can be proud of, we also have a great deal to be ashamed of in terms of how we are responding to the needs of people who can't afford to pay our services. On the one hand, there is probably more innovative pro bono work being done right now than at any time in our history; on the other hand, there has probably never been a wider gulf between the need for legal services and the availability of legal services.[9]

Recent data-backed analyses of access to civil legal services demonstrate that poor and middle-income people lose out when it comes to lawyers. As the Legal Services Corporation's 2009 report titled *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* stated, "[t]here is now a substantial body of knowledge demonstrating that only a fraction of the legal problems experienced by low-income individuals is addressed with the help of an attorney."[10] Likewise, the Consortium on Access to Justice's *Access to Justice: An Agenda for Legal Education and Research* states that "[f]or decades, bar studies have consistently estimated that over four fifths of the individual legal needs of the poor and a majority of the needs of middle-income individual[] Americans remain unmet."[11] Chief Judge Lippman intends that this new requirement address some of those needs.[12]

Scholars view motivations for pro bono service in different ways. In an interesting analysis of the evolution of pro bono work, Professor Russell Pearce concluded that while traditional concepts of lawyering meant attorneys "always placed the good above self-interest…[t]he pro bono lawyer serves the public primarily in her pro bono work. Otherwise, she is a hired gun for her clients. This distinction mirrors the shift in ideology among elite lawyers in the past generation."[13] Professor Deborah Rhode has for years called for a re-visioning of pro bono, stating that a:

> [T]rue commitment to pro bono service implies much more than the modest contributions of funds or time that are at issue in most bar ethical debates. The profession not only must support workplace and educational initiatives that will encourage charitable efforts, it must also direct some of those efforts to broader reforms in the delivery of legal services.[14]

Regardless of the motivation, however, pro bono is now mandatory for those who want to be admitted to practice law in the State of New York.

Although a number of critics suggest that pre-admission is not good timing in terms of a pro bono experience,[15] given the current professional market and the time it takes to start a successful practice, the choice to limit pro bono work early in one's career might be wise for some attorneys. As Gerald Goldberg suggests, it might be "important to be settled into one's career before undertaking the pro bono commitment. Once you start, you can't drop the ball. It is important to have your professional affairs in order so that you can give your pro bono case or cases full attention, just like the fee-paying cases."[16] Of course, well-organized newly admitted attorneys may still be able to find time for pro bono work.

There are those who believe exposure to pre-admission pro bono work is vital to the future of the legal profession:

> It is not excessively dramatic to say that a full appreciation of [community legal service] in all elements of our society may well be necessary to achieve the kind of stability and fairness that we all want. Professionalism among lawyers can properly be asked to lead us in that direction, and to be active about it.[17]

This sentiment is in line with the Chief Judge's Advisory Committee's observations about the new requirement presenting:

> [A] great opportunity for the legal profession, organized bar, legal services providers, and all those devoted to improving the access to justice to work with law schools and their students to participate in a statewide initiative to imbue future generations of lawyers admitted to practice in New York State with the commitment to pro bono and public service work.[18]

As explored above, commitment to pro bono service has been a mantra of the legal profession for a long time. But it is also a modern view held by practicing lawyers. The American Bar Association's Model Rule 6.1 directs that "[e]very lawyer has a professional responsibility to provide legal services to those unable to pay."[19] As adopted locally in 2005,[20] New York elected to substitute aspirational, rather than mandatory, language, and to set the suggested hours at 20 per year.[21] The ABA's model rule suggests 50 hours per year, and defines pro bono to include "…individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means."[22]

New York's rule has a slightly modified definition of pro bono for those already admitted to practice:

> (1) professional services rendered in civil matters, and in those criminal matters for which the government is not obliged to provide funds for legal representation, to persons who are financially unable to compensate counsel;
>
> (2) activities related to improving the administration of justice by simplifying the legal process for, or increasing the availability and quality of legal services to, poor persons; and
>
> (3) professional services to charitable, religious, civic and educational organizations in matters designed predominantly to address the needs of poor persons.[23]

As discussed below, the work encompassed by the new pre-admission pro bono rule is even broader. It envisions many types of opportunities designed to expose future lawyers to meaningful work while also making achievement of the mandate more feasible for bar applicants.[24]

The New Pro Bono Rule

In January 2013, Section 520.16 was added to Part 520 of the Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law.[25] Titled *Pro Bono Requirement for Bar Admission*, this new requirement directs that "every applicant admitted to the New York State bar on or after January 1, 2015…shall complete at least 50 hours of qualifying pro bono service prior to filing an application for admission with the appropriate Appellate Division department of the Supreme Court."[26] Applicants will be required to submit affidavits showing compliance with the requirement.[27]

In September 2012, the Advisory Committee on New York State Pro Bono Bar Admission Requirements issued its *Report to the Chief Judge of the State of New York and the Presiding Justices of the Four Appellate Division Departments*.[28] The Advisory Committee issued a series of recommendations[29] that shaped the final rule:

A. Qualifying work must be law-related;

B. Law-related work can be performed in law school or in an employment setting so long as completed before application for bar admission;

C. Requirement is effective now for first- and second-year law students;

D. Qualifying work can be performed outside New York;

E. Mandatory supervision is essential; and,

F. Qualifying work is an essential part of education and should not be deferred until after admission.

The definition of "qualifying pro bono work" starts with work "performed in the service of low-income or disadvantaged individuals who cannot afford counsel and whose unmet legal needs prevent their access to justice" or involves working for non-profits organizations or "the court system or federal, state or local government agencies or legislative bodies."[30] The court has identified law-school-sponsored clinics "that provide legal assistance to those who cannot afford representation," certain externships or internship placements,[31] and a limited number of other opportunities as appropriate for fulfilling the requirement.[32]

There are, of course, unanswered questions about this new requirement. In addition to a thorough "Frequently Asked Questions" document issued by the court,[33] many New York law schools have responded with helpful documents and websites for students and others.[34] Likewise, legal research providers have indicated a willingness to allow students to use their services for free to complete the pro bono requirement, even over summers or after graduating from law school.[35] While it will doubtless take some time to iron out the kinks, the new pro bono rule as designed should not overburden the justice system and should provide some helpful legal resources in most cases.

Completing the Pro Bono Requirement Doing Environmental Law Work

In seeking to meet the new pro bono requirement, some law students or new graduates may seek to do environmental and related work. Environmental law is a multifaceted, dynamic and complex area of practice.[36] It is highly politicized,[37] and in many cases involves distinct "sides."[38] Its nature, therefore, makes the practice rife with opportunities to make mistakes.[39]

This might explain why generalized sites that focus on pro bono opportunities tend not to list "environmental" as a primary practice area and offer few, if any, environmentally focused activities.[40] But the nature of environmental law does not mean that meaningful pro bono work in the environmental arena is not available.

Most private firms with an environmental law practice focus attorney pro bono work outside traditional practice realms. For example, one of the largest national environmental law firms, Beveridge and Diamond, focuses its work in areas such as AIDS, migrant workers, and political asylum, and other non-environmental work.[41] There is, nevertheless, precedent for attorneys doing some significant environmentally focused pro bono work while in private practice. For example, Don Baur and associates in the energy, environment and natural resources practice area at the law firm Perkins Coie helped secure the domestic and international permitting necessary to the release of the famous whale Keiko,[42] featured in "Free Willy."[43]

The reality is that actual, perceived or potential conflicts are likely to arise in many environmental practices,[44] so pro bono matters in such a setting must be carefully chosen. This is also true for those who practice as government attorneys, though John Cruden (currently President of the Environmental Law Institute),[45] who prioritized government pro bono when he was president of the D.C. Bar and deputy assistant attorney general of the Department of Justice's Environment and Natural Resources Division in 2005, remarked that "we still need to break through the myth that government attorneys cannot participate in pro bono work."[46]

There are also challenges on the other "side" of environmental practice. Few public interest environmental organizations have in-house counsel, so those seeking pro bono hours would need to recruit a qualified supervisor to help them if they wanted to satisfy the pro bono requirement in such a setting. There may be ways that environmental groups can facilitate connections, such as the model for connecting environmental lawyers with community groups seeking pro bono work presented by the Massachusetts Environmental Justice Assistance Network.[47]

In fact, during the height of the activity on environmental justice, a coalition of groups including several sections of the American Bar Association issued a Directory of Pro Bono Legal Services Providers for Environmental Justice.[48] The directory provided "information about law school programs (including clinics), non-profit organizations, law firms and individual lawyers, and Legal Services offices…" who had indicated willingness and ability to provide pro bono assistance on environmental justice matters.[49] Such clearinghouse operations will likely expand in New York, as will centralized locations to help encourage and direct pro bono, such as that run by Legal Services of NYC.[50] There are existing clearinghouses for information on pro bono opportunities statewide, such as the one run by a coalition including the New York Bar Association,[51] but they tend not to have an environmental focus. This could change if lawyers and others with interest in supporting environmental pro bono were to invest time and resources in forming such opportunities.

Conclusion: "Good Lawyering and Lawyering for the Good"

Change is often challenging. The changes imposed by the new pro bono requirement will, of course, take some time to become part of the normal course of things in becoming an admitted attorney in the State of New York.

Engaging those already in practice could help move the process along. As Nelson P. Miller writes in the introduction to his 2012 book BUILDING YOUR PRACTICE WITH PRO BONO, "[p]ro bono practice challenges lawyers to build new skills, use new tools, and form new relationships with new service communities."[52]

If there is sufficient engagement from the entire bar, more quickly than some might anticipate, this new requirement could come to benefit all stakeholders: those in need of legal services, those seeking to become good lawyers, and others in the profession. In other words, as research on mandatory pro bono in law schools suggests, there are "distinct narratives of the meaning of pro bono: good lawyering and lawyering for the good."[53] Both can, and I hope will, be achieved in the years ahead in New York.

Endnotes

1. Chief Judge Jonathan Lippman, *Law Day 2012*, *available at* http://www.nycourts.gov/whatsnew/Transcript-of-LawDay-Speech-May1-2012.pdf.
2. *See generally* NYCourts.gov, *Pro Bono Bar Admission Requirements*, http://www.nycourts.gov/attorneys/probono/baradmissionreqs.shtml. For a media account announcing this new requirement, see Anne Barnard, *Top Judge Makes Free Legal Work Mandatory for Joining State Bar*, N.Y. TIMES, May 1, 2012, *available at* http://www.nytimes.com/2012/05/02/nyregion/new-lawyers-in-new-york-to-be-required-to-do-some-work-free.html?_r=0.
3. *See, e.g.*, Staci Zaretsky, *New York's Pro Bono Requirement Unlikely To Close The 'Justice Gap'*, Above the Law, Oct. 15, 2012, http://abovethelaw.com/2012/10/new-yorks-pro-bono-requirement-unlikely-to-close-the-justice-gap/ ("Although the rule that we'll now dub 'Lippman's Law' was originally expected to add as much as 500,000 new hours of pro bono service each year, law school officials are now saying that it's unlikely to deliver on that lofty goal, specifically due to the fact that the rule's definition of 'pro bono work' is so broad."); Gina DelChiaro, New York State Adopts Pro Bono Requirement, Human Rights First Blog, Sept. 28, 2012, http://www.humanrightsfirst.org/2012/09/28/new-york-state-adopts-pro-bono-requirement/ ("Human Rights First welcomes the recent announcement that applicants to the New York State bar will be required to complete 50 hours of pro bono service before they will be admitted to practice law."); Matt Leichter, *New York's New Mandatory Pro Bono Requirements a Step in the Wrong Direction*, THE AM LAW DAILY, Sept. 26, 2012, http://www.americanlawyer.com/PubArticleALD.jsp?id=1202572739617&New_Yorks_New_Mandatory_Pro_Bono_Requirements_a_Step_in_the_Wrong_Direction&slreturn=20130224231234, ("…New York's pro bono rule is a bellwether for the direction the state's judiciary thinks law licensing should go: more arbitrary rules and barriers for law students to meet. Other states might adopt their own pro bono requirements, and because New York is a destination state for many law graduates who did not go to law school there—especially those from elite law schools—it's possible that the rule will cause a cascade of changes to how many law schools operate.").
4. Court of Appeals, State of New York, Chief Judge Jonathan Lippman, http://www.nycourts.gov/ctapps/jlippman.htm.
5. The "Frequently Asked Questions" document published by the NY State Bar quotes Chief Judge Lippman as saying "[t]he new pro bono service requirement for admission to the New York bar serves to address the state's urgent access to justice gap, at the same time helping prospective attorneys build valuable skills and imbuing in them the ideal of working toward the greater good. It is so important that the next generation of lawyers in New York embraces the core values of our profession that so fundamentally include pro bono legal assistance." New York State Bar Admission: Pro Bono Requirement FAQs (Oct. 1, 2012 rev.), *available at* http://www.nycourts.gov/attorneys/probono/FAQsBarAdmission.pdf. Judge Lippman has further opined that the requirement makes sense "for new lawyers, for the profession as a whole, for the legal services providers, [and] for the judges," Joel Stashenko and Christine Simmon, *Lippman Unveils Rule Detailing Bar Admission Pro Bono Mandate*, N.Y. LAW JOURNAL, Sept. 20, 2012.
6. The Pro Bono Requirement FAQ document states that:

   > [w]ith adequate training and supervision, some examples of eligible activities include: helping a low-income person complete court forms; assisting an attorney with trial preparation; helping litigants prepare for court appearances; engaging in witness interviewing and investigation; participating in a community legal education project; drafting court or transactional documents; or engaging in legal research. You may also perform law-related assignments or make court appearances that are authorized under student practice orders issued by the Appellate Division of the New York Supreme Court for the specific program in which you are performing pro bono work.
   >
   > Keep in mind that the purpose of the Pro Bono Requirement is to enhance the provision of legal resources available to persons who would otherwise not be able to access or afford legal assistance. Toward this objective, you should seek pro bono work with programs or entities that aim to improve access to justice, are engaged in the representation of low-income or disadvantaged individuals or provide government services in furtherance of these objectives.

   Pro Bono Requirement FAQ, *available at* http://www.nycourts.gov/attorneys/probono/FAQsBarAdmission.pdf.
7. 22 NYCRR § 520.16(c).
8. Marlene Coir, *Pro Bono and Access to Justice in America: A Few Historical Markers*, MICH. BAR. J. 54 (Oct. 2011), *available at* http://www.michbar.org/journal/pdf/pdf4article1916.pdf.
9. Justice Sandra Day O'Connor, *Pro Bono Work—Good News and Bad News* remarks at Pro Bono Awards Assembly Luncheon of the American Bar Association, Aug 12, 1991 (unpublished), quoted in Kelsey M. Russell, *The Plight of the Poor in America's Legal System: A Study of the Incentives at Work in the Legal Representation of Indigent Clients in America*, Economics Senior Thesis, University of Puget Sound, May 8, 2006, *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CDUQFjAB&url=http%3A%2F%2Fwww.pugetsound.edu%2Ffiles%2Fresources%2F1359_ThePlightofthePoorinAmerica.doc&ei=tcdPUb7aDqPk4AOcqYHYCg&usg=AFQjCNHJ7yrhp_YKe7ZQuNAKQM_rJD_TGg&sig2=6_WdAI0dXmb8CZ0eu2ixCA&bvm=bv.44158598,d.dmg.
10. Legal Services Corporation, *Documenting the Justice Gap In America: The Current Unmet Civil Legal Needs of Low-Income Americans* 27 (Sept. 2009), *available at* http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf. The report also notes that "state studies, sponsored by equal justice commissions, state bar associations and legal aid programs, have drawn this conclusion, contribute to a body of work building since 1994, and reinforce a key finding of the 2005 Justice Gap Report. Nationally, on average, only one legal aid attorney is available to serve 6,415 low-income people. In comparison, there is one private attorney providing personal legal services for every 429 individuals in the general population." *Id.*
11. Deborah L. Rhode for the Consortium on Access to Justice, *Access to Justice: An Agenda for Legal Education and Research* 1, *available at* http://www.law.harvard.edu/programs/plp/pdf/Access_to_Justice.pdf. *See also* AMERICAN BAR ASSOCIATION, LEGAL NEEDS AND

CIVIL JUSTICE: A SURVEY OF AMERICANS, MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, 1994, *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/legalneedstudy.authcheckdam.pdf.

12. *See* Law Day 2012, *supra* n. 1 at 4.

13. Russell G. Pearce, *The Lawyer and Public Service*, 9 AMERICAN UNIV. J. OF GENDER SOCIAL POLICY & LAW 171, 175 (2001).

14. Deborah Rhode, *Pro Bono in Principle and Practice*, June 2003, Stanford Law School, Public Law Working Paper No. 66 (June 2003), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=458360.

15. *See, e.g.*, the suggestion by the author of the Law School Tuition Bubble blog that proclaiming "poverty should be eased by throwing a lump of work-hours by soon-to-be lawyers supervised by paid lawyers at the problem is a political statement, and not a very noble one," Matt Leichter, *New York's New Mandatory Pro Bono Requirements a Step in the Wrong Direction*, THE AM LAW DAILY, Sept. 26, 2012, http://www.americanlawyer.com/PubArticleALD.jsp?id=1202572739617&New_Yorks_New_Mandatory_Pro_Bono_Requirements_a_Step_in_the_Wrong_Direction&slretu rn=20130226191153.

16. GERALD G. GOLDBERG, PRACTICAL LAWYERING: THE SKILLS YOU DID NOT LEARN IN LAW SCHOOL 97 (2009).

17. Donald W. Hoagland, *Community Service Makes Better Lawyers*, in THE LAW FIRM AND THE PUBLIC GOOD 123 (Ed. Robert A. Katzmann, 1995).

18. Advisory Comm. on N.Y. State Pro Bono Bar Admission Requirements, *Report to the Chief Judge of the State of New York and the Presiding Justices of the Four Appellate Division Departments*, 2, Sept. 2012, *available at* http://www.nycourts.gov/attorneys/probono/ProBonoBarAdmissionReport.pdf.

19. ABA Model Rule 6.1 goes on to say that:

> In fulfilling this responsibility, the lawyer should:
>
> (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:
>
> (1) persons of limited means or
>
> (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and
>
> (b) provide any additional services through:
>
> (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
>
> (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
>
> (3) participation in activities for improving the law, the legal system or the legal profession.

20. A helpful summary of the state pro bono rule by the New York State Bar Association is available at http://www.nysba.org/Content/ContentFolders/CommitteeonStandardsofAttorneyConduct2/Rule6.1.pdf.

21. The actual language reads:

> Lawyers are strongly encouraged to provide pro bono legal services to benefit poor persons.
>
> (a) Every lawyer should aspire to:
>
> (1) provide at least 20 hours of pro bono legal services each year to poor persons; and
>
> (2) contribute financially to organizations that provide legal services to poor persons.

http://www.nycourts.gov/attorneys/probono/Rule6.1.pdf.

22. *Id.* The ABA goes on to note that "[t]he variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law."

23. 22 NYCRR Part 1200, Rule 6.1(b).

24. As the ABA Journal describes it, "The new rule broadly defines pro bono service to include work performed for people of limited means, not-for-profit organizations, and other individuals or groups seeking to promote access to justice. Legal assistance work performed through law school legal clinics or government entities also would qualify." James Podgerts, *New York's new rule requires bar applicants to perform 50 hours of pro bono*, ABA J., Mar. 2012, available at http://www.abajournal.com/mobile/mag_article/new_yorks_new_rule_requires_bar_applicants_to_perform_50_hours_of_pro_bono.

25. 22 NYCRR Part 520.

26. § 520.16 Pro Bono Requirement for Bar Admission (a) Fifty-hour pro bono requirement. Note that "applicants for admission without examination pursuant to section 520.10 of this Part" are exempt. *Id.*

27. The Form Affidavit of Compliance can be found at http://www.nycourts.gov/attorneys/probono/AppForAdmission_Pro-BonoReq_Fillable.pdf. Note that applicants should likely also simultaneously fill out the Form Affidavit as to Applicant's Law-Related Employment or/or Solo Practice: http://www.nycourts.gov/courts/ad4/Clerk/AttyMttrs/employment.pdf.

28. See *Report to the Chief Judge of the State of New York and the Presiding Justices of the Four Appellate Division Departments*, *supra* n. 18. The Committee members are Hon.Victoria A. Graffeo, Associate Judge, Court of Appeals of the State of New York (co-chair); Alan Levine, Esq., Partner, Cooley LLP (co-chair); Steven Banks, Esq., Attorney-in-Chief, Legal Aid Society; Helaine M. Barnett,Esq., Chair, Task Force to Expand Access to Civil Legal Services in New York; Hon. Betty W. Ellerin, Former Presiding Justice, Appellate Division, First Department, Senior Counsel, Alston & Bird LLP; John D. Feerick, Esq., Norris Professor of Law and Founder and Director of the Feerick Center for Social Justice, Fordham University School of Law; Hon. Fern A. Fisher, Deputy Chief Administrative Judge for New York City Courts and Director, New York State Courts Access to Justice Program; Sharon Katz, Esq., Special Counsel for Pro Bono, Davis Polk & Wardwell LLP; Hon. George H. Lowe, Co-Chair, New York State Bar Association, President's Committee on Access to Justice, Bond, Schoeneck & King, PLLC; Dean Makau W. Mutua, SUNY Buffalo Law School; Lillian M. Moy, Esq., Executive Director, Legal Aid Society of Northeastern New York; Jerold R. Ruderman, Esq., Of Counsel, Wilson Elser Moskowitz Edelman & Dicker LLP; William M. Savino, Esq., Managing Partner, Rivkin Radler LLP; Samuel W. Seymour, Esq., Partner, Sullivan & Cromwell LLP; and, Stephen P. Younger, Esq., Partner, Patterson Belknap Webb & Tyler LLP.

29. *Id.* at 5-8.

30. Pro Bono Requirement FAQs, *supra* n. 5, *available at* http://www.nycourts.gov/attorneys/probono/FAQsBarAdmission.pdf.

31. *Id.* The list of qualifying externships is:

> i. not-for-profit provider of legal services for the poor and low-income individuals;
>
> ii. law firm, only if the work is performed for a pro bono matter being handled by that firm and the pro bono client is not paying a fee;
>
> iii. not-for-profit organization, only if the work is related to a legal matter for which no fee is being paid;

iv. judge or a court system;

v. Legal Aid, a civil or criminal legal services organization that serves low-income clients, a Public Defender, a Conflict Defender, a U.S. Attorney, a District Attorney or a State Attorney General; or

vi. federal, state or local government agency or a legislative body.

32. These additional opportunities include:

Law school sponsored projects or programs that serve the poor or disadvantaged, provided the work is law-related and supervised in compliance with the Pro Bono Requirement.

d. Law-related work for a not-for-profit organization qualifying as tax exempt under Internal Revenue Code § 501(c)(3) and

i. providing free civil legal services for low-income individuals;

ii. providing criminal legal services for the indigent; or

iii. serving the poor or disadvantaged or otherwise promoting access to justice.

e. Law-related work in connection with a pro bono matter undertaken by a member of a law school faculty, including adjunct faculty, or an instructor employed by a law school. *Id.*

33. *See id.*

34. *See, e.g.*, SUNY Buffalo Law School, Pro Bono Requirements, http://www.law.buffalo.edu/current/pro-bono.html#background.

35. Rules for Use of Selected Online Resources while Fulfilling New York's Pro Bono Requirement, http://lawlib.buffalo.libguides.com/content.php?pid=438782.

36. *See generally* RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW (2004). For a list of various laws, agencies, see Environmental Protection Agency, *Law and Executive Orders*, http://www.epa.gov/lawsregs/laws/index.html, EcoEmploy, *Federal Environmental Government Agencies: Part I*, and Global Legal Resources, http://www.ecoemploy.com/agency.html, *Environment Law - Environmental and Natural Resources Law*, http://www.hg.org/environ.html. For an excellent exploration of international environmental law, see Tseming Yang & Robert V. Percival, *The Emergence of Global Environmental Law*, 36 ECOLOGY L.Q. 615 (2009).

37. Zygmunt J.B. Plater, *Environmental Law in the Political Ecosystem—Coping with the Reality of Politics*, 19 Pace Envtl. L. Rev. 423 (2002).

38. *See generally* John E. Bonine, *The Divergent Paths of Environmental Law Practice: A Reply to Professor Manaster*, 28 PACE ENVTL. L. REV. 265 (2010).

39. J.B. Ruhl, *Malpractice and Environmental Law: Should Environmental Law "Specialists" Be Worried?*, 33 HOUS. L. REV. 173, 175 (1996).

40. *See, e.g.*, http://www.probono.net/ny/.

41. *See* Beveridge & Diamond, *Pro Bono*, http://www.bdlaw.com/practices-probono.html.

42. *See* FindLaw, *Baur, Donald*, http://pview.findlaw.com/view/1283246_1.

43. Free Willy (1993), http://www.imdb.com/title/tt0106965/.

44. Christopher Davis, *The Challenges and Rewards of Environmental Pro Bono Work*, American College of Envtl. Lawyers, Dec.10, 2009:

One problem, particularly in a large law firm, is conflicts.In addition to the obvious ethical prohibition on handling matters directly adverse to a firm's clients, proposed environmental pro bono work often raises "issue conflicts" where the proposed representation would involve representing an organization or position that might be considered generally adverse to the interests of the firm's current or prospective clients (e.g., real estate developers, power companies or manufacturers), have the potential to create an adverse precedent for an important industry, or involve representation of interests and positions that some clients (or partners) do not like. In theory, pro bono clients and representations should be subject to the same ethical and conflicts standards as work for paying clients, but in practice this can be difficult to achieve given the politics and economics involved.

45. *See* http://www.eli.org/About/Board/cruden_john.cfm.

46. Kathyrn Alfisi, *Government Attorneys and Pro Bono: An Untapped Resource*, WASHINGTON LAWYER (Dec. 2005), *available at* http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/december_2005/govtprobono.cfm.

47. BostonBar, *ACE Makes the Case for Environmental Pro Bono Work*, The Sustainability Network, (Mar. 14, 2012), http://thesustainablelawyer.wordpress.com/2012/03/14/ace-makes-the-case-for-environmental-pro-bono-work/.

48. Elissa C. Lichtenstein, ed., DIRECTORY OF PRO BONO LEGAL SERVICES PROVIDERS FOR ENVIRONMENTAL JUSTICE (AMERICAN BAR ASSOCIATION, Standing Committee on Environmental Law, Section of Litigation, and Section on Natural Resources, Energy and Environmental, Center on Race, Poverty and the Environment, California Rural Legal Assistance Foundation, 1996).

49. *Id.* at iii.

50. *See* Legal Services of NYC, *Pro Bono* and Volunteer Service, *available at* http://www.legalservicesnyc.org/index.php?option=com_content&task=view&id=55&Itemid=84.

51. *See* New York Pro Bono Opportunities Guide, *available at* http://www.probono.net/ny/nylj_oppsguide/.

52. NELSON P. MILLER, BUILDING YOUR PRACTICE WITH PRO BONO 6 (2012).

53. Robert Granfield and Philip Veliz, *Good Lawyering and Lawyering for the Good: Lawyer's Reflections on Mandatory Pro Bono in Law School*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 67 (Robert Granfield and Lynn Mather, eds., 2009).

Professor Kim Diana Connolly works at SUNY Buffalo Law School and serves as Vice Dean for Legal Skills and Director of Clinical Legal Education. Her office is responsible for coordinating access to opportunities to fulfill the pro bono requirement for the SUNY Buffalo Law School students who will be applying for admission to the New York bar. Professor Connolly can be reached at kimconno@buffalo.edu. She appreciates research assistance for this article from Faculty Services Librarian Christine George and Director & Vice Dean for Legal Information Services Elizabeth Adelman.

Testing the Waters of New York: Innovative Information Gathering at the DEC

By Charles Gottlieb, Keith H. Hirokawa, and Kristin Keehan

I. Introduction

A successful regime of environmental governance requires accurate information, and lots of it. To know how human activities will impact the environment, regulators need a working understanding of levels and types of sensitivities that are characteristic of relevant species. Regulators must grasp the interdependencies that promote ecosystem health in a particular region. Regulators should inventory ecological assets and challenges in their region, including the baseline conditions needed to maintain ecological integrity.

The allocation of rights to use the environment (whether for discharge of pollution, extraction of resources, and so on) has long been challenged by inadequate and often inaccessible information. We find judicial opinions—surprisingly recent ones—in which judges shuddered at the thought of actually having to understand groundwater in order to allocate rights to draw water from a well.[1] In retrospect, some of the information and attitudes forming the basis for environmental regulation have proven to be short-sighted. For instance, not long ago, courts encouraged programs to eradicate swamps and bogs because of the pests that were bred therein.[2] Although law adapts, informational deficiencies should be considered a significant cause of poor environmental decision making.

Our environmental regulatory system continues to suffer from a lack of information about the conditions of our water. Thousands of miles of flowing water have yet to be inventoried and assessed (under any of a multitude of standards), and there presently is no reasonable prospect of finding public funding to complete the task.[3] Regulators are, therefore, compelled either to accept the inadequate status of information (which questions the validity of our laws) or find other means of data acquisition.

New York is piloting a program to facilitate information-gathering about water quality on a large scale. Under the program—WAVE: Wadeable Assessment of Volunteer Evaluators—the New York Department of Environmental Conservation (DEC) is combining 1) the efficiency of using ecological conditions as indictors of water quality with 2) the resources of volunteer, citizen monitors to assess and monitor the health of New York's streams.[4] This article introduces DEC's WAVE efforts and outlines the legal framework in which WAVE will produce data on stream health in New York. Although the DEC's program has only been piloted in the Hudson Valley and has not yet produced data, the structure of the program and needs that it satisfies are reasons to expect it will succeed.

II. Surrogates, Proxies, and Ecological Indicators

An environmental surrogate, also known as proxy, environmental indicator, or ecological indicator "is an element, process, or property of the ecosystem that for some reason (logistical, budgetary, technological) cannot be measured in a more direct way."[5] Observation of surrogates can enable agencies to estimate environmental conditions by observing other circumstances that are interdependent or bear some close correlative relationship.[6] As such, surrogates can provide cost-effective and early warnings of environmental changes, insights into causes of environmental change, and a framework for environmental assessment over time.[7] Moreover, the use of ecological surrogates can be preferable to a direct study of an environmental condition, such as in the assessment of an endangered or threatened species. An analysis of proxy conditions could be simpler, where we have enough information on these endangered species' habitat needs, while avoiding harassment of a species already in decline that may have characteristics that are not easy to identify.

Ecological indicators have been used in the context of the federal Endangered Species Act. Although there is some environmental agency familiarity with the ESA and the use of indicators or surrogates, agencies that use them to regulate have faced challenges.[8]

The standard of review employed by the courts to decide whether to overrule agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.[9] Under this standard, agency decision making is scrutinized only to assess "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[10] This standard is very deferential to agency decisions.[11]

In *Oregon Natural Desert Association (ONDA) v. Tidwell*, the federal district court in Oregon developed a vague standard for review of environmental monitoring programs.[12] At issue was a Biological Opinion (BioOp) prepared by the National Marine Fisheries Service (NMFS) in the preparation of an incidental take statement (ITS) for steelhead whereby stream bank alternations acted as an indictors for the "take" of steelhead.[13] During its review of the agency's use of indicators for assessing levels of take, the court stated that:

> where it is difficult or impossible to measure the number of a species harmed by an action, "the use of ecological conditions as a surrogate for defining the amount or extent of incidental take is reasonable so long as these conditions are linked to the take of the protected species." When establishing a habitat proxy for take in an ITS, the NMFS need not "demonstrate[ ] a specific number of takings" but "must establish a link between the activity and the taking of species before setting forth specific conditions."[14]

The court was clear that when the use of a surrogate is being applied in these situations there must be a link between the surrogate (in this case stream bank alterations) and the taking of a species. The fact that the agency is not able to determine the exact number of steelhead harmed by a specific level of bank alternation does not negate the presence of a connection between the two.

Similarly, in *Miccosukee Tribe of Indians of Florida*, the plaintiffs argued that an ITS issued by the Fish and Wildlife Service was invalid because of its reliance on a habitat marker (the surrogate) instead of a numerical trigger for three endangered species in the Everglades.[15] The Southern District of Florida held that when an agency seeks to use a non-numerical trigger, such as an ecological surrogate, the agency must meet two standards. First, the agency must demonstrate that a numerical value was not practical to obtain.[16] Second, the ecological surrogate must actually be relevant to the population of the species of concern, which may be met by showing the linkage between the proposed surrogate and injury to the protected species.[17] The court articulated three factors for assessing whether a numerical value meets the practicality factor:

> 1) the availability and quality of actual or estimated population figures; 2) the ability to measure incidental take; and 3) the ability to determine the extent to which incidental take is attributable to the action prompting the biological opinion and the incidental take statement.[18]

In the end, the court deferred to the agency's assertion that the use of a numerical trigger was impractical for two of the three species studied.[19] However, the court was not willing to defer to the agency's judgment when it came to the surrogate used for a sparrow because the agency did not provide sufficient reasons as to why a numerical trigger could not be used over a habitat marker.[20] The court found that that the agency's decision to use a surrogate for sparrows was arbitrary and capricious.[21]

Examining ecological surrogates outside of the endangered species context, the Eastern District of Virginia recently ruled that the Environmental Protection Agency (EPA) could not regulate the flow rate of stormwater in its Total Maximum Daily Loads (TMDL) allocation, which was designed to regulate the amount of sediment in the impaired creek at issue.[22] The EPA used the flow of stormwater as a proxy, or surrogate, for regulating the amount of sediment that was harming the Accotink Creek.[23] The Virginia Department of Transportation challenged the TDMLs, arguing the Clean Water Act does not allow the EPA to regulate a pollutant in a water body by setting a TDML for a its nonpollutant surrogate.[24]

The court held that the Clean Water Act only allows the state to set TMDLs of impaired waters for *pollutants* as defined under the act.[25] The court applied the two-part *Chevron*[26] analysis to determine whether the EPA had the authority to use stormwater, a nonpollutant, as a surrogate for the regulations of sediments, a pollutant.[27] Under *Chevron*, the first question is whether statutory ambiguity exists.[28] If no ambiguity exists the court shall not defer to the agency.[29] However, if Congress's statutory directive is ambiguous the court will defer to a reasonable interpretation of the statute.[30]

The court recognized the general notion that the use of environmental surrogates is not unlawful *per se*: "[i]t is well recognized that the EPA can use pollution parameters that are not harmful in themselves, but act as indicators of harm."[31] However, the Eastern District of Virginia distinguished prior decisions on grounds that in other cases, the non-harmful pollution parameters the EPA sought to regulate were actually a part of the harmful effluent.[32] Under those circumstances, the nonharmful pollution was in fact effluent itself and therefore able to be regulated.[33] Here, Congress was clear: the EPA cannot set TDMLs to regulate a non-pollutant.[34] Even with the EPA framing the stormwater limit as a surrogate for sediment, showing research indicating "[sediment] load in Accotink Creek is a function of the amount of stormwater runoff generated within the watershed," the court held that the use of a surrogate in this instance was an inappropriate agency action.[35]

Virginia Department of Transportation v. EPA represents an obstacle for the use of surrogates, proxies, and indictor species programs and signifies that the courts are not going to simply rubber stamp these programs. It is with these cases in mind that surrogate and indicator species programs shall be established and examined. One such program is New York's WAVE program where the marriage of indicator species and citizen monitoring allows the State of New York to increase its ability to gather important ecological baseline information regarding the health of its previously unevaluated streams. DEC hopes to use the information gathered by citizens through the WAVE program for regulating water quality. The following section describes the WAVE program and illustrates its interplay with environmental surrogate concerns.

III. Citizen Monitoring of the Environment

The insight of volunteer monitoring programs is that, although environmental science can be technical, complex, and sophisticated, anyone can observe the way the world works. Some disciplines have grasped this more effectively than others: amateur bird watching, for instance, produces volumes of information on avian trends, population, migrations, and habitat persistence that might otherwise be difficult to obtain.[36] In some circumstances, volunteer monitoring projects[37] may be able to fill information gaps that are targeted by regulating agencies as significant obstructions to effective regulation of environmental quality and conservation.

Volunteer monitoring programs are not without challenges. Even energetic volunteer monitors may be seen as poor substitutes for experts with extensive education and training, leading to concerns regarding data quality. As such, governmental agencies relying on volunteer monitoring programs for the accumulation of data must develop quality assurance plans for the collection and interpretation of the ecological data. Quality assurance plans are intended to increase the likelihood that the results of the citizen monitoring will be reliable and accurate and could be held to the same standards of expert monitoring.

All volunteer monitoring programs face challenges regarding the competency and impartiality of the results; the public, and in particular the regulated public, may believe that individual monitoring groups have agendas that in turn impact the validity of the data collected.[38] Because volunteer monitor programs make use of private individuals who are not bound by public duties of obligation to public offices, the programs may be vulnerable to claims of agency capture and agency favoritism.

The quality assurance controls of the New York State WAVE program demonstrate the necessary components for effective use of environmental surrogates. Also, these controls take advantage of the economic benefits of volunteer environmental monitoring, while at the same time producing statistically valid and reliable data. Other states have employed the use of citizen monitors and indictors species in similar programs. For example, Virginia and Connecticut each have launched programs that rely on macroinvertebrates as indicator species of stream quality and employ a variety of quality assurances to improve the reliability of the data collected.[39]

A. New York DEC's WAVE Program

Initially, in 1972, DEC implemented a biological monitoring program for the state's waters.[40] The federal Clean Water Act mandated the biological assessment of the state's water resources, which New York sought to accomplish through the collection and analysis of macroinvertebrate species as indicators of ecological conditions.[41] DEC biologists conducted the biological monitoring program, a luxury that does not exist in today's era of smaller state governments with fewer resources.[42]

New York has now implemented the WAVE program, where citizen volunteer monitors collect macroinvertebrates from the state's streams to gather baseline impairment information. To complete this task of identifying impaired streams around the state, the WAVE program has established a set of metrics, which include the use of macroinvertebrates as indicators for the health of the subject stream.[43] Due to both the concern over the use of non-expert citizen monitors and the reliability of using macroinvertebrate indicators, the DEC has created a quality assurance project plan (QAPP) that outlines the standards that govern WAVE's implementation.

The QAPP addresses stream site selection, citizen volunteer training, and the reliability of the indicator metrics.[44] The WAVE process requires the citizen monitors to collect macroinvertebrate samples from selected streams.[45] The citizen monitors must then identify, sort, record, and preserve the macroinvertebrates to submit samples to the DEC.[46] To ensure that the monitor is able to perform these tasks, namely the collection and identification of the macroinvertebrates, each monitor must attend a training session.[47] The training sessions provide monitors with an education on the collection process, as well as how to properly identify the various species of macroinvertebrates and sort them. It is vital for the citizen monitor to be properly trained because the metrics for determining stream quality are based on varying macroinvertebrate species present in the stream. Therefore, reliable data requires accurate collection, identification, recording, and sample preservation.

The WAVE metrics define the "Most Wanted" and "Least Wanted" macroinvertebrates.[48] As you can imagine, Most Wanted species indicate that a stream is in good health because they have a lower tolerance for pollution. As a general rule, the DEC will designate a stream unimpaired if four or more "Most Wanted" species have been collected and properly identified.[49] An unimpaired stream is defined by the DEC as a stream that has the capacity to "fully support aquatic life and include waterbodies with no known impacts, threatened waterbodies and water with minor impacts."[50] Conversely, "Least Wanted" species have a higher tolerance for pollution and therefore are indicators of impaired streams.[51] If four or more Least Wanted macroinvertebrates are identified, the stream will be designated as impaired and marked for further investigation by the DEC.[52]

In addition to these macroinvertebrate metrics for stream health, WAVE requires the citizen monitors to complete a "user perception" survey for each stream segment.[53] The survey engages the citizen monitors in a more subjective analysis—evaluating the visual and recreational qualities at the site.[54] The survey asks citizen

monitors to report on water clarity, levels of phytoplankton, periphyton, and macrophyte cover, as well as the existence of odor, trash, and discharge pipes.[55] In addition the survey asks the monitors whether they would be willing to use the water to swim or fish.[56]

B. The Challenges of WAVE

The process used by the WAVE program, the use of both indicator species and citizens monitors, brings with it certain challenges. These challenges call into question the use of citizen monitors to collect scientific data that must be valid and reliable because it is being used for regulatory purposes. These concerns are legitimate. In response, the QAPP addressed these concerns to alleviate the fear of illegitimate data being used in the regulatory process.

The QAPP provides statistical research on the reliability of the Most Wanted and Least Wanted impairment metrics. When deciding to classify unimpaired streams as those containing four or more Most Wanted species the DEC examined approximately 6,000 professionally assessed sites within the DEC's Stream Biomonitoring database.[57] From these professionally tested sites, 1,857 sites had four or more Most Wanted macroinvertibrates. Of the 1,857 sites 99.4% were correctly identified as unimpaired.[58] Therefore, the DEC determined that because this false positive is so low, the four or more Most Wanted metric for unimpaired streams is reliable.

In contrast, the statistics show that the metric of impaired streams has a high level of false positives. Out of 570 professionally assessed sites that had four or more Least Wanted species, only 61% were actually impaired sites.[59] In response to this problematic analysis, the QAPP includes a plan to mitigate this accuracy concern: all streams designated impaired under the WAVE program will be re-inspected by the DEC.[60] These statistics and mitigation measures ensure that using macroinvertebrates as the surrogate or indictor is stream health is reliable and capable of consistency.

Aside from the quality assurance concerns dealing with the metrics, the ability for citizen monitors, although trained, to follow the collection and identification methods proscribed may be troubling. Even with the low risk of false positive for unimpaired streams, the human error factor must be overcome. To guard against errors on behalf of the citizen monitors, the DEC's External Data Coordinator examines the results recorded by the citizen monitor with the contents of the preserved sample to make certain they match. If a species is recorded but not identified by the External Data Coordinator in the submitted samples, it will not be counted.[61] Likewise, if the External Data Coordinator finds a species in the preserved samples but not marked by the citizen monitor, the Coordinator will add the species to the data sheet.[62]

To secure the legitimacy of the citizen monitoring programs, the External Data Coordinator randomly selects stream sites and performs an independent assessment.[63] The independent assessment will be conducted within two weeks of when the stream is sampled by the citizen monitor and the results of each will be compared.[64] This process is designed to make certain that the citizen monitor program is working effectively and is another avenue to quality assurance controls to be implemented.[65]

Lastly, the WAVE pilot project has a zero tolerance policy for any citizen monitor that produces falsified data.[66] For example, if a citizen monitor has intentionally mislabeled sample contents with different locations or provided false data on user perception surveys the data will be excluded from the study.[67] One of the many roles of the External Data Coordinator is a safeguard against unreliable data. If for any reason the standards of the QAPP are not met, the External Data Coordinator has the ability to reject all data.[68]

IV. Conclusion

The mission of gathering baseline ecological data concerning the health of streams is becoming more elusive due to a lack of resources at the state level. The WAVE program piloted by the New York DEC is a good example of a citizen monitoring program that has the capability of gathering this important ecological data in an efficient and cost effective manner. Through the use of indicator species and citizen monitoring, New York will have new information about its state streams that will help guide future regulatory decisions.

The WAVE program has employed an efficient process by learning from the history of using macroinvertebrates as stream health indicators and combining it with citizen monitoring to create an effective and reliable program. While the WAVE program is in its pilot stage and is subject to improvement, the use of tested practices during the pilot year suggests that the WAVE program is a reasonable and pragmatic solution to the need for more baseline ecological information concerning New York streams.

At the time of this publication, a summary report of the data produced by the initial year of the WAVE program is being compiled. The report will summarize the results from each testing location and the quality to the data received. Most importantly, the report will discuss the success of the WAVE program and its potential ability to fill the information gaps that exist regarding New York's water quality. The many quality assurances set in place throughout the WAVE program suggest that WAVE will be capable of properly producing the reliable data that New York needs to gain a comprehensive understanding of the state's water quality.

Endnotes

1. *See, e.g., Frazier v. Brown*, 12 Ohio St. 294, 311 (1861), *overruled on other grounds by Cline v. Am. Aggregates Corp.*, 474 N.E.2d 324, 327 (Ohio 1984).
2. *See, e.g., Leovy v. United States*, 177 U.S. 621, 636 (1900) ("If there is any fact which may be supposed to be known by everybody, and therefore by courts, it is that swamps and stagnant waters are the cause of malarial and malignant fevers, and that the police power is never more legitimately exercised than in removing such nuisances.").
3. *See* U.S. General Accounting Office, Water Quality: Key EPA and State Decisions Limited by Inconsistent and Incomplete Data (2000), *available at* http://www.gao.gov/new.items/rc00054.pdf.
4. N.Y. Dep't of Envtl. Conserv., Quality Assurance Project Plan: WAVE (Wadeable Assessments by Volunteer Evaluators) (June 11, 2012) (on file with author).
5. Vincent Carignan and Marc-Andre Villard, *Selecting Indicator Species to Monitor Ecological Integrity: A Review*, 78 Env. Mon. and Ass. 45, 49 (2002).
6. *See generally*, James M. McElfish, Jr. and Lyle M. Varnell, *Designing Environmental Indicator Systems for Public Decisions*, 31 COLUM. J. ENVTL. L. 45 (2006).
7. *Id.* at 48-49.
8. Virginia H. Dale & Suzanne C. Beyeler, Challenges in the Development and Use of Ecological Indicators, 1 Ecological Indicators 3, 5 (2001) (discussing problems associated with use of ecological indicators in facilitating narrow, oversimplified management programs); Vincent Carignan & Marc-André Villard, Selecting Indicator Species to Monitor Ecological Integrity: A Review, 78 Envtl. Monitoring & Assessment 45, 50-52 (2002) (reviewing problems associated with the use of indicator species to monitor ecological integrity).
9. Government Organization and Employees Act § 706(2)(A); 5 U.S.C. § 706(2)(A).
10. *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
11. *In Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957 (2002) (the Forest Service employed a "proxy on proxy" approach to meeting the requirement of maintenance of the species in the area: "By monitoring the health of the pileated woodpecker population, the health of a wide range of other species which use similar habitat would be monitored as well." The Court struck down the Forest Service's indicator species program because the Forest Service's own monitoring report found that the approach using the old growth habitat of the woodpecker for monitoring was invalid and inadequately implemented considering that the Forest Plan identified land as containing old growth which did not actually contain old growth).
12. 716 F. Supp. 2d 982 (D. Or. 2012).
13. The Endangered Species Act requires a biological opinion to assess the threat of adverse impacts or takes of certain species. As such, applicants may seek permission to cause such an impact under incidental take permits. *See* 16 U.S.C. § 1539(a)(1).
14. *ONDA*, at 999 (internal citations omitted).
15. *Miccosukee Tribe of Indians of Fla v. United States*, 697 F. Supp. 2d 1324, 1329 (S.D. Fla. 2010).
16. *Id.* at 1331 (quoting *Ariz. Cattle Growers Ass'n v. U.S. Fish and Wildlife*, 273 F.3d 1229, 1250 (9th Cir. 2001)).
17. *Id.*
18. *Id.* at 1321.
19. *Id.* at 1341, 1344, 1346.
20. *Id.* at 1341.
21. *Id.*
22. *Virginia Dep't of Transp.v. U.S. EPA*, 2013 WL 53741, *5 (E.D. Va. 2013).
23. *Id.* at *1.
24. *Id.* at *2.
25. *Id.* at *5.
26. *Chevron, USA v. NRDC*, 467 U.S. 837 (1984).
27. *Virginia Dep't of Transp.*, 2013 WL 5374 1at *2.
28. *Chevron*, 467 U.S. at 842-43.
29. *Id.* at 842.
30. *Id.* at 843.
31. *Virginia Dep't of Transp.*, 2013 WL 53741 at *3 (citing *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1022 n.6 (D.C. Cir 1978)).
32. *Id.* at *3.
33. *Id.*
34. *Id.* at *4.
35. *Id.* at *3.
36. See The Cornell Lab of Ornithology, Citizen Science, *available at* http://www.birds.cornell.edu/page.aspx?pid=1664 (2012)("Each day, bird watchers report tens of thousands of bird observations to citizen-science projects at the Cornell Lab of Ornithology, contributing to the world's most dynamic and powerful source of information on birds."). *See also How Christmas Bird Count Helps Protect Species and Their Habitat*, NTL. AUDOBON SOCIETY BIRDS, http://birds.audubon.org/how-christmas-bird-count-helps-birds (last visited May 5, 2013) (discussing how the data collected by citizen monitors during the annual Christmas Bird Count has helped "researchers, conservation biologists, and other interested individuals to study the long-term health and status of bird populations across North America." The data collected also helps scientists to identify environmental issues, for example, "local trends in bird populations can indicate habitat fragmentation or signal an immediate environmental threat, such as groundwater contamination.").
37. Volunteer monitors may be associated with a governmental program at the state, local or federal level, or they may answer to independently run organizations. *See* EPA, The Volunteer Monitor's Guide to Quality Assurance Project Plans 1 (1996), *available at* http://www.epa.gov/owow/monitoring/volunteer/qapp/vol_qapp.pdf.
38. Eric Biber, *The Problem of Environmental Monitoring*, 53 U. Col. L. Rev. 1, 23 (2011).
39. *See* VA SOS Policy on Data Use, Virginia Save Our Streams, http://www.vasos.org/component/content/article/5-whats-new/14-va-sos-policy-on-data-use-.html; *see also* State of Connecticut, Dep't of Envtl. Prot., Rapid Bioassessment in Wadeable Streams & Rivers by Volunteer Monitors, Program Description (2009), *available at* http://www.ct.gov/dep/lib/dep/water/volunteer_monitoring/rbvpt1.pdf.
40. *See* New York State Dep't of Envtl. Conserv., Division of Water, Standard Operating Procedure: Biological Monitoring of Surface Waters in New York State, 4 (2012), *available at* http://www.dec.ny.gov/docs/water_pdf/sbusop2012.pdf.
41. *See id.*
42. *See id.* at 8.
43. In addition to the biological monitoring program, the results of the WAVE project will be used for various DEC activities and requirements. Unimpaired sites identified by citizen monitors will be included for Waterbody Inventory and Clean Water Act 305(b) reporting. In addition, the data will guide trend monitoring reports, rotating integrated basin studies, and provide basic background information for water quality for DEC personnel working on non-point source discharges.

44. N.Y. Dep't of Envtl. Conserv., Quality Assurance Project Plan: WAVE (Wadeable Assessments by Volunteer Evaluators) 6-8 (June 11, 2012) (on file with author).
45. *Id.* at 12.
46. *Id.* at 11-12.
47. *Id.* at 13.
48. *Id.* at 10.
49. *Id.*
50. *Id.* at 7.
51. *Id.*
52. *Id.* at 8.
53. *Id.*
54. *See* WAVE Assessment of Recreational Use Perception (on file with author).
55. *See id.*
56. *See id.*
57. Quality Assurance Project Plan: WAVE at 9.
58. *Id.*
59. *Id.* at 10.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 12.
64. *Id.*
65. *Id.*
66. *Id.* at 16.
67. *Id.*
68. *Id.* at 13.

Charles Gottlieb is a Staff Attorney in the Government Law Center of Albany Law School. Mr. Gottlieb received his J.D. from Albany Law School.

Keith Hirokawa is an Associate Professor at Albany Law School. He received his J.D. and M.A. from the University of Connecticut, and his LL.M. from Lewis and Clark School of Law.

Kristin Keehan is a J.D. Candidate, Albany Law School, 2014.

The authors would like to thank Margaret Novak and Alene Onion, both of whom have been instrumental in developing and implementing the pilot WAVE program in New York.

Creatures of the State: A Hard Look at the Supersession of Municipal Power in New York's Mineral Resources Law

By Patrick Siler

I. Introduction

Municipalities are regarded as "creatures of the state," able to exercise only such powers as the state confers on them by law.[1] Because municipalities form the level of government most directly in contact with the people, these powers often have a more profound impact on citizens than many state laws. Inevitably, situations arise that pit state interests and local interests against one another. Where the legislatures that confer power on municipalities can anticipate such conflicts, they can choose either to preempt local authority expressly or reserve to municipalities the authority to act as they see fit. Where unanticipated conflicts arise, courts are likely to be called on to determine whether state law impliedly preempts local authority.[2] Unresolved preemption issues saddle regulated parties and citizens with considerable uncertainty, potentially discouraging trade and development until that uncertainty is resolved.

Local governments are uniquely equipped to provide certain vital services that require more sensitivity to local issues than a distant bureaucracy could hope to provide.[3] They have increased familiarity with the geographic area and individuals most directly affected by any law, and they are directly answerable to the local constituency for any perceived success or failure. Local governments are also more likely to lack the resources and expertise to deal with large-scale or highly technical issues. Their perspective in dealing with issues of this sort is likely to be narrow, limited in scope to the issue's effect on local interests. Local governments do not necessarily consider "big picture" items such as long-term planning or the social, economic, and political interests of other communities across the state and the nation.

State governments, by contrast, are more likely to have a grasp of the big picture but can easily become detached from the repercussions of a law or regulation's effects on the local community. Generally, states have more resources and expertise to apply to issues of significant scale or technicality. They are also somewhat more insulated from any potential backlash by voters, and therefore more able to make decisions that, however necessary, may prove to be politically unpopular.

Recently, the development of New York's energy resources presented just the sort of problem that pits state interests against those of municipalities. New York sits atop a section of the Marcellus Shale play, a geological formation that contains vast reserves of previously unrecoverable natural gas. That gas may now be recoverable using a controversial method known as hydraulic fracturing. Supporters of hydraulic fracturing note that natural gas development could provide a cheap, clean source of energy for decades to come and would likely give a desperately needed economic boost to a chronically depressed region within a state suffering from historic budget shortfalls.[4] Opponents of the practice express significant doubts about its safety, pointing out significant potential risks of environmental and health hazards.[5]

This article examines New York's regulation of the practice of hydraulic fracturing as a representative example of an issue implicating both state and local interests. It compares the Oil, Gas, and Solution Mining Law's preemption provision—§ 23-0303—with supersession clauses in two other statutes. First, it examines the language of the supersession clause in the Mined Land Reclamation Act and the Court of Appeals cases interpreting that provision. Second, it compares the supersession clause in New York's oil and gas statute with Pennsylvania's, recently construed in a case decided by that state's high court. It then analyzes the two recent New York cases in which trial courts have attempted to apply those principles to the supersession provision of § 23-0303, and concludes by proposing its own construction of that statute.

II. NY's Oil, Gas, and Solution Mining Law: A Case Study of Supersession

A. Overview

Regulation of hydraulic fracturing in New York is governed by the Oil, Gas, and Solution Mining Law ("OGSML"), codified in Article 23 of the Environmental Conservation Law ("ECL").[6] The OGSML expressly limits the power of local governments, stating that "[t]he provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas[,] and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law."[7] In effect, the provision assigns the bulk of regulatory power to the Department of Environmental Conservation ("DEC"), the state regulator, while expressly reserving municipal jurisdiction over two discrete, enumerated areas.

A brief examination of the statutory language reveals some ambiguity in the supersession clause. The statute fails to provide an explicit definition of the term "regulation." Without a clear definition of how that term is to be

read in the context of this statute, whether a particular law or ordinance "relates to" the regulation of mining industries is difficult to determine with certainty. Reserving some powers to local governments without clearly defining the scope of which actions are superseded virtually guarantees that localities will challenge the limits to their authority imposed by the statute.[8] Such challenges will require courts to determine how to resolve the statute's ambiguities.[9]

By the time of this writing, two such challenges had already been heard by New York's lower courts. Attempting to construe the OGSML's supersession clause properly, those lower courts relied largely on the reasoning used by the high courts of New York and Pennsylvania in recent cases requiring the resolution of similar ambiguities in different statutes. As background for its critique of the analysis the lower courts employed in construing the OGSML, this article first explores the high court cases on which the lower courts relied.

B. Supersession in other statutes and jurisdictions

i. NY's MLRL

New York's Mined Land Reclamation Law ("MLRL"), codified in Article 23's Title 27, authorizes the DEC to establish criteria for "the operation of mining"[10] and for the "acceptable reclamation of affected lands."[11] The statute then empowers the DEC to approve land-use plans, "including mining and reclamation plans."[12] The MLRL defines "mining" as "the extraction of…minerals from the earth,"[13] and the word "mineral," as used in that title, to mean "any naturally formed, usually inorganic, *solid material* located on or below the surface of the earth."[14] The scope of the MLRL, then, is limited to the particular subset of mineral resources defined in Title 27: coal, stone, and other solid materials.

Like the OGSML, the MLRL expressly supersedes local laws, subject to certain exceptions. The MLRL's supersession clause reads:

> [T]his title shall supersede all other state and local laws relating to the extractive mining industry; provided, however, that nothing in this title shall be construed to prevent any local government from… enacting or enforcing local zoning ordinances or laws which determine permissible uses in zoning districts.[15]

New York courts quickly had to resolve the issue of how much power local authorities retained when local laws came into conflict with state-issued mining permits.

a. *Frew Run*

The plaintiff in *Frew Run Gravel Products v. Town of Carroll*[16] received a permit from the DEC to operate a sand and gravel business in the AR-2 district of the Town of Carroll. The town's zoning ordinance disallowed any such operations within AR-2, though it allowed them in other districts by special permit.[17] The town informed the operator that its business was prohibited, and the operator brought suit under the MLRL to enjoin enforcement of the ordinance.[18]

To resolve the issue of whether the zoning ordinance in question was the sort of local law the legislature meant to supersede by statute, the Court looked first "to the plain meaning of the phrase 'relating to the extractive mining industry' as one part of the entire [MLRL], to the relevant legislative history, and to the underlying purpose of the supersession clause as part of the statutory scheme."[19] The Court held that the statutory language's plain meaning did not indicate an intent to supersede the zoning ordinance because that ordinance was not related to the extractive mining industry. Rather, it was related to the purpose of "'regulating the location, construction and use of buildings, structures, and the use of land'" in the town.[20] The Court conceded that such an ordinance would inevitably exert "incidental control" over particular industries, but that such incidental control "result[ed] from the municipality's exercise of its right to regulate land use through zoning," and was therefore not within the scope of the statute's supersession clause.[21] This interpretation was supported both by the statute's legislative history and its stated purposes.[22] Indeed, any contrary interpretation would run counter to the latter part of the supersession provision—which explicitly reserves to local governments the power to "enact[] or enforc[e] local zoning ordinances"[23]—because it would "drastically curtail the town's power to adopt zoning regulations" granted by the state's Statute of Local Governments.[24]

b. *Gernatt*

Almost a decade after *Frew Run*, the Court was again confronted with a conflict implicating the MLRL's supersession provision. In *Matter of Gernatt Asphalt Products, Inc. v. Town of Sardinia*,[25] the Court faced the question of whether a local government could use a zoning ordinance to eliminate mining as a permitted use in *all* of its districts, effectively banning the practice within the town's jurisdiction.[26] The Court expanded its holding in *Frew Run* and upheld the town's zoning-based prohibition. The Court recognized that, through the MLRL, the legislature sought to achieve the statute's stated policies by "replacing the existing patchwork of local regulatory ordinances with 'standard and uniform restrictions and regulations,'"[27] but it nevertheless found that general regulations of land use, like zoning ordinances, "are not the *type* of regulatory provision the Legislature foresaw as preempted…; the distinction is between ordinances that regulate property uses and ordinances that regulate mining activities."[28] The Court went on to say that:

> A municipality is not obliged to permit the exploitation of any and all natural resources within the town as a permitted use if limiting that use is a reasonable

> exercise of its police powers to prevent damage to the rights of others and to promote the interests of the community as a whole.[29]

In so holding, the Court relied on well-settled principles of zoning and land use law,[30] appropriate because the clause at issue expressly stated that it did not supersede municipal zoning powers.

ii. Pennsylvania: the *Huntley* Case

In nearby Pennsylvania, also home to the Marcellus Shale, that state's Supreme Court has confronted the precise question of how much power local governments retain in the face of state regulation of hydraulic fracturing by the oil and gas industry. In *Huntley & Huntley v. Borough of Oakmont*,[31] a Pennsylvania municipality enjoined a driller who had received a permit from the state Department of Environmental Protection ("DEP") from proceeding with operations on a parcel zoned as residential.[32] The driller countered that, to the extent the municipality's zoning ordinances restricted the location of drilling approved by DEP permits, they were superseded by the state's Oil and Gas Act.[33] The supersession clause of that Act read:

> Except with respect to ordinances adopted pursuant to the…Municipalities Planning Code [("MPC")], and the… Flood Plain Management Act, all local ordinances and enactments purporting to regulate oil and gas well operations regulated by this act are hereby superseded. *No ordinances or enactments adopted pursuant to the aforementioned acts shall contain provisions which impose conditions, requirements or limitations on the same features of oil and gas well operations regulated by this act or that accomplish the same purposes as set forth in this act.* The Commonwealth, by this enactment, hereby preempts *and supersedes* the regulation of oil and gas wells as herein defined.[34]

The municipality argued that the only regulations superseded by the act were those imposed on the "technical features" of oil and gas operations, urging the Court to adopt a "how-versus-where" distinction.[35] The municipality recognized that the Act contained certain provisions relating to the location of wells—required setbacks, for example—but contended that those requirements were intended only as "a minimum level of protection for…environmentally sensitive areas."[36] The DEP agreed with the municipality's stance, stating that the Oil and Gas Act "simply intended to foreclose municipalities from legislating on the technical aspects of well operations" such as safety devices, casing requirements, and performance standards.[37]

The driller maintained that because the Act regulated where natural gas wells may be situated, its terms, if given their plain meaning, must preempt any local regulation of well placement.[38] Additionally, the driller pointed out that the Act limited local power to enact ordinances that *either* imposed conditions on the same features of oil and gas operations *or* accomplished the same purposes as the Act. Thus, even if the Court were to determine that a well's location was not a regulated "feature," the local ordinance would still be superseded because it interfered with the stated purpose of the Act's permitting process: the DEP's "development of the Commonwealth's oil and gas resources consistent with the protection of the health, safety, environment, and property of its citizens."[39]

The Court began its analysis by noting that, because municipalities are "creatures of the state[,]…local legislation cannot permit what a state statute or regulation forbids [n]or prohibit what state enactments allow."[40] Although the state had here specified that ordinances adopted under the MPC were excepted from preemption, the latter part of the supersession clause nevertheless indicated that even those ordinances were preempted if they conflicted with either the features regulated by or the purposes set forth in the Act.[41]

The Court held that the statute's reference to "features of oil and gas wells" pertained only to technical aspects of a well's function, not its location.[42] To answer whether the provision conflicted with the Act's purposes, the Court examined the purposes enumerated in the Act itself. It found that the zoning ordinance was "both broader and narrower in scope" than the Act—narrower in that it did not "relate to matters of statewide concern," but broader in that it dealt with "an overall statement of community objectives that is not limited solely to energy development."[43] Recognizing that there was indeed some overlap between the ordinance and the Act's purposes, the Court nevertheless found that the ordinance's "most salient objective" was the preservation of the character of residential neighborhoods and upheld the restriction.[44] It noted that excepting local laws under the MPC indicated a recognition by the state of "the unique expertise of municipal governing bodies to designate where different uses should be permitted in a manner that accounts for the community's development objectives, its character, and the suitabilities and special nature of *particular parts* of the community."[45] The Court's language indicates that, although it upheld a zoning ordinance restricting drilling activities in a residential area, it did not contemplate the application of this reasoning to instances where zoning was used to effect the complete prohibition of a state-regulated practice within a particular municipal jurisdiction.

C. Municipal Challenges to § 23-0303

This section examines two cases tried in early 2012 in which local governments sought effectively to ban the practice of gas drilling within their respective jurisdictions by amending their zoning ordinances to exclude

drilling as a permitted land use. It criticizes the opinions of both trial courts and specifies the instances of error in the courts' analyses.

i. *Anschutz Exploration Corp. v. Town of Dryden*[46]

The Town of Dryden, located in the Marcellus Shale region, amended its zoning ordinance in August of 2011 "to ban all activities related to the exploration for, and production or storage of, natural gas."[47] Prior to the amendment of the ordinance, the plaintiff extractor had acquired gas leases covering over 20,000 acres within the town.[48] The plaintiff brought suit claiming that the amended zoning ordinance was preempted by § 23-0303 of the OGSML.[49]

Though the court in *Dryden* recognized that the issue of whether § 23-0303 preempted a town's ban of natural gas extraction was one of first impression, it nevertheless found that "[i]n light of the similarities between the OGSML and the MLRL [as analyzed in *Frew Run*], the court is constrained to follow that precedent in this case."[50] Specifically, the *Dryden* court focused on what it called "[t]he primary language" of both supersession clauses, and held that because "both statutes preempt only local regulations 'relating to' the applicable industry, they must be afforded the same plain meaning—that they do not expressly preempt local regulation of land use, but only regulations dealing with operations."[51] The court thus upheld the zoning ordinance, holding that, like the MLRL and the Pennsylvania Oil and Gas law, the OGSML's supersession clause preempts only laws enacted by local governments that regulate a well's *function*, not its location.[52]

The plaintiff directed the *Dryden* court's attention to the numerous differences between the OGSML and the MLRL.[53] First, the language used in the two clauses is different: the MLRL only expressly supersedes "local laws," whereas the OGSML expressly supersedes both "local laws and ordinances."[54] Second, the two statutes contain different exceptions: the MLRL provides an express exception for local zoning ordinances,[55] but the OGSML does not—it excepts only "local government jurisdiction over local roads or the rights of local governments under the real property tax law."[56] Finally, the two provisions of the statute serve two different purposes. Most notably, the terms of the MLRL's purpose clause expressly strike a balance between industry development and environmental concerns, whereas the OGSML neither makes such an express statement nor implies by its terms that legislators intended to strike such a balance.[57] Nevertheless, the court dismissed each of these differences between the two statutes as not "meaningful."[58]

Finally, the court bolstered its conclusion by relying on cases from Pennsylvania and Colorado construing those states' respective Oil and Gas statutes. In *Huntley & Huntley*[59] and *Bowen/Edwards Associates v. Commissioners of La Plata County*,[60] the state laws of Pennsylvania and Colorado were found not to preempt local zoning ordinances limiting drilling to certain districts.[61] The *Dryden* court pointed to no specific similarity between either state's statute and the OGSML, but rather baldly asserted that the statutes' language was "similar to the supersedure provisions of the OGSML and the MLRL, which both preempt only those local laws which regulate operations."[62]

a. *Dryden*'s Analytical Error

The *Dryden* court's failure to credit the demonstrable differences between the MLRL and the OGSML was a clear error. The court should have presumed that the legislature's use of distinct language in different parts of the Mineral Resources Law was "both intentional and meaningful."[63] When it erroneously failed to apply the presumption of meaningful variation to this case of first impression, the *Dryden* court discarded a valuable interpretive tool. To discern whether the legislature intended the OGSML's supersession clause to preclude towns from banning natural gas drilling through a zoning ordinance, the court should have construed the statute in a way that gave appropriate weight to the notable differences between it and the MLRL.

First, the *Dryden* court should have applied the principle of meaningful variation to the distinctive language in what it called the statutes' "primary language."[64] The court focused its comparison of the two statutes on the fact that both contain the phrase "relating to," finding that this two-word similarity renders the two clauses "nearly identical." It held that the distinction between the MLRL's reference to "local laws" and the OGSML's to "local laws or ordinances" was "not significant," pointing out that these terms are "often used interchangeably." In so doing, the court neglected to address why, if the two words have an identical meaning, the legislature chose to use both of them in the OGSML but only one in the MLRL.[65] By construing the words "laws" and "ordinances" to be interchangeable, the *Dryden* court violated the well settled rule in New York that "[a] construction rendering statutory language superfluous is to be avoided."[66] Under this rule, courts should construe each word in the statute as having its own meaning. By referring to "local laws *or ordinances*" in the OGSML, the court should have inferred that the legislature meant for the scope of local laws preempted by § 23-0303 to be broader than those preempted by the MLRL. Moreover, while the MLRL states that it supersedes local laws "relating to the mining industry,"[67] the OGSML supersedes local laws "relating to the *regulation* of the oil, gas[,] and solution mining industries," not the industries themselves.[68] This difference in the wording of the two clauses should also have alerted the court to a difference in legislative intent.

The *Dryden* court also failed to apply the meaningful variation principle to the different exceptions contained in the respective supersession clauses of the MLRL and OGSML. Unlike the MLRL, the OGSML contains no express exception for local zoning ordinances. Its exceptions

extend only to a municipality's jurisdiction "over local roads or…under the real property tax law."[69] The appropriate inquiry, then, would seem to be whether the town's prohibition of hydraulic fracturing stemmed from either its jurisdiction over local roads or its rights under the real property tax law. But rather than relate its analysis to the language of the OGSML, the court determined only that the exception for jurisdiction over local roads was in keeping with the MLRL's how-versus-where distinction. The court made no mention of the absence of an exception for zoning in the statute at issue.[70]

The court also found no "meaningful" difference in the purposes of the two laws.[71] The court engaged in a cursory review of the OGSML's purpose clause, which states that the law's purpose is:

> [T]o regulate the development, production and utilization of natural resources of oil and gas in this state in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be had, and that the correlative rights of all owners and the rights of all persons including landowners and the general public may be fully protected.[72]

By contrast, the MLRL includes in its purpose:

> [T]he orderly development of domestic mineral resources and reserves necessary to assure satisfaction of economic needs compatible with sound environmental management practices[;]…reclamation of affected lands; to encourage productive use including…the planting of forests…; to prevent pollution;…[and] to protect the health, safety and general welfare of the people, as well as the natural beauty and aesthetic values in the affected areas of the state.[73]

The court broadly analogized the purposes of the two statutes, finding that "both provide for statewide regulation of operations with the primary goal of encouraging efficient use of a resource."[74] The court's comparison of the two statutes is accurate only at the most generalized level of abstraction. A more detailed analysis of the OGSML's purpose clause as it compares with the MLRL reveals much more support for the plaintiff's position.

The statute defines its use of the word "waste" to mean "[p]hysical waste" and waste which, through inefficiency, results in the loss of oil and gas that would otherwise be recoverable.[75] Article 23's enforcement provision lists as its chief offense, quite succinctly, that "[i]t shall be unlawful for any person to: 1. Waste oil or gas."[76] This focus on the physical waste of gas, coupled with the second declared policy aim—to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be had—illustrates a policy chiefly concerned with greatly increasing, if not maximizing, the amount of oil and gas recoverable in New York.

Furthermore, unlike the MLRL, the purpose clause of the OGSML makes no mention of "sound environmental management practices[,] the protection and enhancement of wildlife," the "use of all the natural resources of such areas for compatible multiple purposes," pollution prevention, or "natural beauty and aesthetic values."[77] Each of these indicates that the legislature, in passing the MLRL, meant to strike a balance between industry development and environmental concerns. The specific reference to "use…for compatible multiple purposes"[78] strongly suggests that the legislature intended to reserve to local governments some power over decisions relating to the location of mining projects. Those governments are more likely to be in tune with the "multiple purposes" for which a resource might be suited and whether such purposes are indeed "compatible." This language, combined with the express reservation of zoning authority to local governments in the supersession clause, confirms that the MLRL does in fact empower municipalities to prohibit certain mining activities through zoning. *Frew Run* and *Gernatt* were rightly decided. But the OGSML's purpose clause does not appear to strike the same sort of balance. By simply applying the holding of *Frew Run* and *Gernatt* to the OGSML, the *Dryden* court failed to give appropriate weight to the critical distinctions between the purposes of that statute and the MLRL.

Finally, the *Dryden* court's reliance on the decisions of the Pennsylvania Supreme Court in *Huntley* and the Colorado Supreme Court in *Bowen/Edwards* was misplaced. First and foremost, another state's statutes have no probative relevance to the proper construction of the OGSML beyond, perhaps, outlining a basic analytical framework. Even then, that framework would warrant scrutiny only to the extent that the language of the statute being examined resembles the statutory language at issue or if clear evidence indicated that the New York legislature modeled its policy on those states. In fact, there is virtually no similarity between the different states' provisions and no evidence that New York intended to follow them when it enacted the OGSML. The Colorado statute does not contain an express supersession clause at all.[79] Pennsylvania's statute expressly *empowers* municipalities to enact zoning provisions, so long as they do not impose "conditions, requirements or limitations on the same features of oil and gas well operations regulated by this act or that accomplish the same purposes as set forth in this act."[80] The OGSML, by contrast, expressly *preempts* municipal authority, reserving to local governments only their jurisdiction over local roads and their powers under the real property tax law.[81] Nevertheless, the *Dryden* court

concluded that the language of the statutes was similar. In doing so, the court committed the logical fallacy of assuming its conclusion: as evidence that the OGSML preempts only those local laws purporting to regulate operations, the court noted that the Pennsylvania statute "is similar to the supersedure provisions of the OGSML and the MLRL, which both preempt only those local laws which regulate operations."[82]

The *Dryden* court also failed to cabin its reliance on the Pennsylvania and Colorado cases in light of their distinguishable facts—none of those cases dealt with a town's complete prohibition of gas drilling. *Huntley* held only that a municipality might determine "where different uses should be permitted in…particular parts of the community,"[83] and *Bowen/Edwards* held explicitly that, "inasmuch as gas pools do not conform to municipal boundaries, a zoning ordinance that totally banned all drilling within a local government's borders *would* be preempted because it would conflict with the state's interest in fostering efficient development and production of oil and gas reserves."[84] In light of the inapposite nature of these cases from both a legal and a factual standpoint, the *Dryden* court's reliance on their reasoning was clearly misplaced.

ii. *Cooperstown Holstein Corp. v. Town of Middlefield*[85]

In June 2011, the Town of Middlefield—another municipality in the Marcellus region—amended its local zoning ordinance to include among its prohibited uses "oil, gas, or solution mining and drilling," which it defined as "[t]he process of exploration and drilling through wells or subsurface excavations for oil or gas, and extraction, production, transportation, purchase, processing, and storage of oil or gas…."[86] Thus, like Dryden, Middlefield "effectively banned oil and gas drilling within the geographical borders of the township."[87] In 2007, the plaintiff landowner had executed oil and gas leases with an extraction company. The plaintiff claimed that the town's ordinance frustrated the purpose of its leases and challenged that ordinance as preempted by § 23-0303 of the OGSML.[88]

The *Middlefield* court's analysis bypassed the language of the statute entirely, focusing instead on a lengthy survey of the OGSML's legislative history. The court first examined documentation in support of the original 1963 legislation, which plainly states that the DEC "shall fix the proper size drilling units and well locations."[89] This legislative history confirmed that the State Petroleum Council's support for the legislation "was premised upon the state's oversight of the industry's activities…so as to maximize utilization of these natural resources and to prevent waste from the inefficient and ineffective installation of wells."[90] Additional supporting documentation confirmed the DEC's regulatory role under the OGSML as covering the location of wells. A legislative brief addressed to Senator Elisha Barrett, cited favorably by the *Middlefield* court, noted that the statute authorizes the DEC "to establish well spacing units of a size and shape that can be economically and efficiently drained by one well."[91]

The *Middlefield* court went on to examine the addition of the supersession clause to the OGSML in 1981. The court focused its inquiry on a legislative memorandum in support of the amendment which stated that its purpose was "[t]o promote the growth, development and proper regulation of oil and natural gas resources in New York State" by, among other things, establishing new fees to fund additional regulatory personnel and cover costs for problems caused by industry activities.[92] The court read this language to imply that the bill was meant to do two separate and distinct things: (1) promote oil and gas resources; and (2) regulate the activities associated with extracting those resources.[93] In the court's view, the amended OGSML shifted responsibility for the promotion of oil and gas resources entirely to the state's Energy Office and left the DEC only with authority to regulate "the activity of the industry, i.e., [the] method and manner of drilling."[94]

The court ultimately held that it found "no support within the legislative history leading up to and including the 1981 amendment of the ECL as it relates to the supersession clause" for the claim that the DEC's authority to determine the proper location of wells preempted local legislation pertaining to land use.[95] Analogizing its reasoning to the construction of the MLRL in *Frew Run* and *Gernatt*, the *Middlefield* court ruled that state regulations control only "the 'how' of [drilling] procedures while the municipalities maintain control over the 'where' of such exploration."[96]

a. *Middlefield*'s Analytical Error

The *Middlefield* court misapplied the evidence it reviewed of the OGSML's legislative history in three key ways. First, it disregarded compelling evidence from the statute's initial passage that supported the plaintiff's position. Second, it misconstrued the legislative history describing the purpose of the 1981 amendment and arrived at a meaning to which the language of that evidence is not grammatically susceptible. Finally, it erroneously conflated the clauses of the OGSML and MLRL in much the same way as the *Dryden* court. Proper recognition and application of the law and the facts strongly supports the plaintiff's claim of preemption and seems to compel the opposite result of that reached by the court.

In its analysis of the OGSML as originally passed, the *Middlefield* court noted at some length that support for the legislation by a key interest group—the drilling industry—hinged on that group's understanding that state regulators would retain authority over well locations.[97] In fact, the legislative history cited by the court definitively demonstrates that the legislature intended for the OGSML to preempt local laws related to well location. As the court itself noted, the State Petroleum Council's support

for the legislation "was premised upon *the state's oversight* of the industry's activities."[98] The DEC's regulatory powers, conferred by the statute, include "the determination and establishment of proper well spacing units *and well locations*."[99] The statute included provisions for the DEC to approve voluntary or compulsory integration of land, necessary if the agency was to fulfill its mandate to "fix the proper size drilling units *and well locations*."[100] Nothing in the later legislative history the court cited claimed to strip the state agency of the power so plainly afforded it by the original statute. Nevertheless, the court claimed to find "no support" in its survey of the OGSML's legislative history in support of the plaintiff's position.[101] In light of the substantial evidence contradicting its assertion, the court's conclusion represents clear error.

The court's analysis of the history surrounding the 1981 amendment adding the supersession clause focused on a legislative memorandum which stated that the purpose of the amendment was "[t]o promote the growth, development and proper regulation of oil and natural gas resources in New York State."[102] The court read this language to imply that the bill was meant to do two separate and distinct things: (1) promote oil and gas resources; and (2) regulate the activities associated with extracting those resources.[103] Such a reading defies both grammar and logic. To properly denote the court's construction, the language of the memo would require two infinitives, as thus: "To promote oil and gas resources, and to regulate those resources." Without the inclusion of a second verb, speakers of English must conclude that the nouns following the verb "to promote" are all objects of that verb. The memo as written, then, states that the bill's purpose was threefold: (1) to promote the growth of oil and natural gas resources; (2) to promote the development of oil and natural gas resources; and (3) to promote the proper regulation of oil and natural gas resources. The grammatically accurate reading of the legislative history follows logically from the historical context in which the amendment was proposed. New York lawmakers were compelled to act, the memo states, because the national energy crisis in the late 1970s made it "important to promote the development of domestic energy supplie[s], including [New York]'s resources of oil and natural gas."[104] Nothing in the evidence presented indicates that in the face of the energy crisis the legislature meant to undermine a policy strongly in favor of developing available resources. If anything, the amendment demonstrates that the legislature meant to strengthen the DEC's supervisory role by increasing fees on the industry to allow the state agency to regulate effectively.[105] If the legislature meant for the statute's new supersession clause to have the counter-intuitive effect of limiting the DEC's authority over well locations, there would be no need for the state to raise increased funds through fees—municipal regulators would be responsible for funding their own research to determine whether to allow drilling. The *Middlefield* court erred by interpreting this evidence in a way that contradicted its grammar, syntax, and historical context.

Finally, the *Middlefield* court erred by relying on the *Frew Run* line of cases construing the MLRL's supersession clause. Such reliance was error for all of the reasons presented above in the *Dryden* case,[106] but the error is even clearer in this instance. The *Dryden* court at least attempted to highlight some similarity between the provisions of the MLRL and the OGSML, even if the similarity was confined to the two words "relating to." The *Middlefield* court made no such attempt, choosing instead to assert—parenthetically and without reference to any specific similarity—that the clauses are "strikingly similar."[107] In fact, the two clauses have considerably more differences than similarities.[108] The court's application of case law construing the MLRL without reference to the OGSML's distinctions was clear error.

D. On Appeal: A Proposed Construction of § 23-0303

This section of the article attempts to harmonize the language of the OGSML, the MLRL, and the relevant case law in a way that adheres to principles of statutory interpretation long-settled in this state. At the outset, readers should note that this article does not claim its proposed construction to be the only plausible reading of the statute. Indeed, § 23-0303 may be susceptible to multiple constructions. The construction contained herein is one author's attempt at an objective approach.

In *Frew Run*, the Court of Appeals outlined a useful analytical framework for its construction of the MLRL's supersession clause. The Court looked first to the clause's plain meaning as part of the entire statute, the relevant legislative history, and to its underlying purpose as part of the statutory scheme.[109] To construe the OGSML's supersession clause properly, it is rational to apply this analytical framework to its terms.

i. Plain Meaning

The Court of Appeals first instructs that the language of the statute should be read "in its natural and most obvious sense."[110] The most obvious reading of § 23-0303 is that a local law may only interfere with the state's regulation of gas drilling if it does so by virtue of its jurisdiction over local roads or through the real property tax law. The threshold question, then, is whether determining the location of gas wells constitutes "regulation" of the industry. There can be no doubt that it does. The OGSML contains numerous provisions relating to the location of oil and gas wells. Most notably, the statute authorizes the DEC to classify oil and gas pools, "including the delineation of boundaries."[111] Once it has established the location of oil and gas pools, the DEC establishes the most efficient "spacing unit" for drilling. A spacing unit is defined as "the geographic area assigned to the well for the purposes of sharing costs and production."[112] The statute requires

the DEC to integrate properties into a spacing unit, even by compulsion, if necessary to prevent waste or achieve a greater recovery gas.[113] Finally, the statute details with specificity where inside a spacing unit a well may be located.[114] It is clear, then, that the legislature meant for the location of wells to be a subject of state industry regulation.

Nevertheless, the statute expressly allows local ordinances to conflict with state regulations if they do so through jurisdiction over local roads or through the real property tax law. Dryden and Middlefield both sought to ban the practice of gas drilling by making it an impermissible use under the local zoning ordinance. Because these bans were clearly not achieved through municipal jurisdiction over local roads, the appropriate inquiry must be whether the right of a local government to prohibit a practice through a local zoning ordinance is one granted "under the real property tax law."[115]

As the authorities charged with assessment and collection of real property taxes, local governments receive a number of rights under New York's Real Property Tax Law ("RPTL"). Local governments appoint assessors to maintain inventory of real property for purposes of taxation.[116] Local governments may prepare their own tax maps—though all maps must still be certified by the state tax commissioner—and may impose fees on developers to cover the costs of creating new maps that reflect developments or subdivisions of property.[117]

Article 5, Title 5 of the RPTL governs assessments of real property associated with the exercise of oil and gas rights.[118] That title provides for the assessment of oil and gas "economic units"—that is, parcels with any right to "drill, mine, operate, develop, extract, produce, collect, deliver[,] or sell oil or gas"[119]—according to rates established by the state commissioner for each barrel of oil or thousand cubic feet of gas produced in a given year.[120] Each local assessor determines the value of all oil and gas economic units under her authority based on the annual production of the wells in those units.[121] The RPTL does not tax oil and gas properties owned by non-profit organizations otherwise exempt from taxation.[122] Nevertheless, the RPTL reserves to local governments the right to pass laws or ordinances that tax some of the organizations exempt under state law.[123] The RPTL's procedures for the assessment of oil and gas units, then, assign to local governments particular rights and responsibilities distinct from state law. These rights center around the assessment and collection of taxes from parcels that engage in drilling operations within the local jurisdiction. Although the RPTL affords municipalities some discretion over the details of the assessment process and whether to exempt parcels from taxation, nothing in the RPTL suggests that it reserves to municipalities the right to prohibit oil or gas drilling through zoning.

Local governments are the agencies and instrumentalities of the state and possess no inherent power to zone property; they must exercise such powers within the bounds established by state law.[124] The state grants local governments zoning power to determine permissible land uses not under the RPTL, but rather under the Statute of Local Governments.[125] That statute makes a point to note, however, that the powers granted to local governments "shall at all times be subject to such purposes, standards, and procedures as the legislature…may hereafter prescribe."[126] The MLRL, by its terms, does not supersede local government zoning authority because it plainly states that "nothing in this title shall be construed to prevent any local government from…enacting or enforcing local zoning ordinances or laws which determine permissible uses in zoning districts."[127] The OGSML, in contrast, should be construed by its plain meaning to supersede local zoning authority because it reserves to local governments only their "jurisdiction over local roads" and their rights "under the real property tax law."[128]

ii. Legislative History

The legislative history of the OGSML and its supersession clause supports the plain reading of the statute as preempting local ordinances that purport to regulate well locations. The New York State Petroleum Council's brief clearly demonstrates that at the time of the statute's original passage, that key interest group's support was based on an understanding that the act gave state regulators "regulatory powers pertaining to the determination and establishment of proper well spacing units *and well locations*."[129] Furthermore, the OGSML's supporters understood that the act empowered the DEC to "fix the proper size drilling units *and well locations*."[130]

The intent behind the original statute is borne out in the legislative history of the 1981 amendment that added the OGSML's express supersession clause. That amendment was passed in the context of a national energy crisis that spurred New York lawmakers "to promote the development of domestic energy supplie[s], including New York's resources of oil and natural gas."[131] Lawmakers anticipated an increase in drilling activities as a result of this pro-development policy, evidenced by the fact that the amendment imposed "new fees to fund additional regulatory personnel."[132] Critically, the funds necessary to facilitate the amended OGSML's pro-development posture were allocated to increase the DEC's regulatory capacity.[133] If legislators intended for local governments to regulate the location of wells, increased funding to the state regulatory authority would not be necessary—those governments would bear the considerable costs of determining whether a particular location was suitable for drilling. Both the historical context and the substance of the supersession clause's legislative history point to a policy strongly in favor of the promotion of resource development and the regulation of that development by state authorities. Reserving local governments the power to ban drilling would significantly impair this policy, making it unlikely that the legislature intended such a result.

iii. Underlying Purpose

Finally, the purposes underlying the OGSML's supersession clause support the conclusion that local ordinances relating to the location of gas wells are preempted by the statute. An appropriate inquiry into § 23-0303's purpose should be directed to the role it plays relative to the overall statutory scheme.[134] The statute's purpose clause states that the statute's overall purpose is:

> [T]o regulate the development, production and utilization of natural resources of oil and gas in this state in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be had, and that the correlative rights of all owners and the rights of all persons including landowners and the general public may be fully protected.[135]

Read grammatically, the clause delineates two primary purposes. First, the OGSML aims to regulate "in such a manner as will prevent waste," which it defines as the physical waste of oil and gas or the loss of otherwise recoverable oil and gas through inefficiency.[136] Second, the statute seeks to authorize development in a way that comports with three subsidiary goals: (1) achieving "a greater ultimate recovery of oil and gas," (2) protecting the correlative rights of the owners of developed properties, and (3) protecting the rights of "all persons including landowners and the general public."[137]

A construction of § 23-0303 that allows local governments to retain regulatory authority over drilling locations would be in direct opposition to the statute's first primary goal of preventing waste. Waste is defined under the statute to include "[t]he locating…of any oil or gas well or wells in a manner which causes or tends to cause reduction in the quantity of oil or gas ultimately recoverable from a pool."[138] Allowing local governments to effectively prohibit drilling through their zoning power would guarantee that whatever oil or gas might lie within a particular jurisdiction cannot be recovered and assure a reduction in the resources ultimately recoverable. Therefore, if local authority over the location of wells is not preempted by the supersession clause, that clause directly contradicts one of the OGSML's primary purposes.

The issue, then, must be whether allowing local governments to determine drilling locations through zoning is necessary either to achieve a greater ultimate recovery of oil and gas, to protect the correlative rights of owners, or to protect the rights of landowners and the general public.[139] Allowing municipalities to prohibit drilling in a jurisdiction cannot be necessary to achieve a greater ultimate recovery of gas—rather, it would seem to assure a reduction in the ultimate recovery. Nor would it have any bearing on the correlative rights of landowners, except perhaps to deny them those rights. According to the correlative rights doctrine, a landowner is entitled to recover a proportional royalty of any revenue derived from the use of her land.[140] Prohibition of oil or gas drilling by a municipality would prevent a landowner from receiving any royalty, regardless of how productive her land might be if developed.

The OGSML's indication that its final purpose is to protect "the rights of all persons including landowners and the general public" is difficult to square with other substantive provisions in the statute.[141] For example, the statute provides for the practice of compulsory integration of an individual's land when "necessary to carry out [the statute's] policy provisions."[142] The statute thus empowers the DEC to subject a landowner's property to drilling even if that landowner objects, so long as integrating the property prevents waste or achieves a greater ultimate recovery of gas.[143] A landowner's rights, then, are protected only to the extent that the landowner is entitled to recover a proportional royalty of revenue derived from the use of her land under the correlative rights doctrine. Protection does not extend to allowing landowners the right to prevent drilling on or under their land once the DEC finds it necessary to integrate that land into a spacing unit.[144]

Similarly, the rights of the general public do not seem to extend to the public's right to ban drilling by enacting a local zoning ordinance. That the OGSML's supersession clause reserves to local governments their rights under the real property tax law—not the zoning law as in the MLRL—strongly indicates that the OGSML intends the rights of the general public, like the rights of landowners, to mean the financial rights relating to reasonable compensation for the development and use of their land. The statute's purpose is to protect the public's right to benefit by having local government tax the land from which gas is extracted, not its right to determine whether to allow extraction in the first place. It seems clear that the purpose of the OGSML, then, is to prevent the loss of otherwise recoverable oil and gas resources within the state of New York and that regulatory authority over the location of wells is necessary to achieve that purpose. Local authority to determine well locations must therefore be preempted by § 23-0303 of the OGSML.

III. Conclusion

A regulatory policy most directly affects the local people and places closest to its enactment. Locals may, therefore, be more sensitive to the risks of a particular practice and may downplay its broader, more diffuse benefits. States, conversely, are likely to seize on the potential benefits and soft-pedal the risks. The best regulatory pol-

icy, then, would seem to be one that affords local interests some degree of input into the actions ultimately taken by the state. In this regard, New York's OGSML does not strike a particularly satisfactory balance. The statute's policy aims make the recovery of oil and gas resources paramount and leave local governments with little to no means of influencing regulatory decisions.

Because municipal governments are more in tune with the particular strengths and challenges of their local communities, the statute should include some role for them in determining the proper siting of oil and gas wells. The nature of that role should reflect a balance between the legitimate interests and unique perspectives of the locality and the state. The OGSML could be amended to strike such a balance. Municipal interests could be protected by allowing local governments to exclude drilling in certain districts if the nature of those districts makes drilling inadvisable. State interests could be protected by imposing a burden on municipalities to demonstrate good cause for the exclusion and explicitly preventing them from enacting blanket prohibitions like those at issue in *Dryden* and *Middlefield*. Such an amendment would clarify the uncertainty surrounding the scope of the OGSML's supersession clause, allow the state to continue a policy of promoting oil and gas development, and accommodate local interests in protecting the health and safety of residents.

Endnotes

1. *See, e.g.*, Triphammer Dev. Co. v. Village of Lansing, 154 Misc.2d 369, 373 (N.Y. Sup. Ct., Tompkins County 1992).
2. For more on express and implied preemption, *see* Frew Run Gravel Products v. Town of Carroll, 71 N.Y. 2d 126 (1987).
3. *See* Ryan Hackney, *Don't Mess With Houston, Texas: The Clean Air Act and State/Local Preemption*, 88 TEX. L. REV. 639, 639 (Feb. 2010) (listing school districts and police departments as two such vital local services).
4. *See* Mireya Navarro, *Gas Drilling is Severely Restricted in Catskill Watershed Supplying New York City*, N.Y. TIMES, Apr. 24, 2010, at A15.
5. *See, e.g.*, Clifford Krauss & Tom Zeller, Jr., *When a Rig Moves in Next Door*, N.Y. TIMES, Nov. 7, 2010, at BU1.
6. N.Y. ENVTL. CONSERV. LAW § 23-0102 (McKinney 2012).
7. *Id.* § 23-0303(2).
8. *See* Patrick Siler, *Hydraulic Fracturing in the Marcellus Shale: The Need for Legislative Amendments to New York's Mineral Resources Law*, 86 ST. JOHN'S L. REV. 351 (2012) (identifying a number of inherent conflicts within New York's Mineral Resources Law and recommending legislative clarification of the statute's policy goals).
9. *Id.* at § II.C.
10. N.Y. ENVTL. CONSERV. LAW § 23-2709(1)(d) (McKinney 2012).
11. *Id.* § 23-2709(1)(e).
12. *Id.* § 23-2709(1)(c).
13. *Id.* § 23-2705(8).
14. *Id.* § 23-2705(7) (emphasis added).
15. N.Y. ENVTL. CONSERV. LAW § 23-2703(2)(b) (McKinney 2012).
16. 71 N.Y. 2d 126 (1987).
17. *Frew Run*, 71 N.Y.2d at 129–30.
18. *Id.* at 130.
19. *Id.* at 131.
20. *Id.* (quoting Town of Carroll Zoning Ordinance, art. I, § 101).
21. *Id.*
22. *Id.* at 132. Specifically, the Court found that the purposes of the MLRL are "'to foster a healthy, growing mining industry' and 'aid in assuring that land damaged by mining operations is restored to a reasonably useful and attractive condition.'" *Id.* (quoting Governor Wilson's memorandum). The statute aimed to establish uniform regulations that would replace the "'patchwork system of [local] ordinances,'" but the Court recognized that the statute's parallel purpose—the reclamation of mined lands and their return to other productive uses—was of equal importance. *Id.* (quoting DEC's memorandum). Balancing these two purposes called for the retention of zoning power by the localities most affected by "the aftereffects of mining." *Id.* at 133.
23. N.Y. ENVTL. CONSERV. LAW § 23-2703(2)(b) (McKinney 2012).
24. *Frew Run*, 71 N.Y.2d at 133. Specifically, it would limit the municipal power "to adopt, amend[,] and repeal zoning regulations" granted by N.Y. STAT. LOCAL GOV'TS § 10(6) (McKinney 2012).
25. 87 N.Y.2d 668 (1996).
26. *Id.* at 674.
27. *Id.* at 680–81.
28. *Id.* at 681–82.
29. *Id.* at 684.
30. The Court cited Rathkopf's LAW OF ZONING AND PLANNING and Anderson's NEW YORK ZONING. Both treatises reference municipal zoning as a proper exercise of police powers. Both also note that as a "creature of the state," a municipality's powers are limited by the scope of what is delegated to the municipality by the state's enabling legislation. *See* 1 RLZPN § 1:9; AML Zoning § 2:5.
31. 964 A.2d 855 (Pa 2009).
32. *Id.* at 857.
33. *Id.* at 858. The Oil and Gas Act, at the time, was codified at 58 PA. CONS. STAT. § 601.101-601.605. It has since been re-codified at 58 PA. CONS. STAT. § 2301-3504.
34. *Huntley*, 964 A.2d at 858, *quoting* 58 PA. CONS. STAT. § 601.602 (subsequently re-codified at 58 PA. CONS. STAT. § 3302 (2012)) (emphasis added by the Court to highlight language supplied by a 1992 amendment).
35. *Huntley*, 964 A.2d at 860-61.
36. *Id.* at 861.
37. *Id.* at 861–62.
38. *Id.* at 862.
39. *Id.* (citing 58 PA. CONS. STAT. 601.102).
40. *Id.* (citing Liverpool Township v. Stephens, 900 A.2d 1030 (Pa. 2006)).
41. *Id.* at 863.
42. *Id.* at 864.
43. *Id.* at 865.
44. *Id.*
45. *Id.* at 866 (internal quotation marks omitted) (emphasis added).
46. 940 N.Y.S.2d 458 (Sup. Ct., Tompkins County, Feb. 2012) [hereinafter *Dryden*].

47. *Id.* at 461. The language of the amended ordinance can only be read as a complete ban, not merely on hydraulic fracturing, but on the storage, treatment, or disposal of natural gas and on any natural gas "support activities." *See id.* at 465.
48. *Id.* at 461.
49. *Id.*
50. *Id.* at 466.
51. *Id.* at 467.
52. *Id.* at 467–73.
53. *Id.*
54. *Id.* at 467.
55. *See* N.Y. ENVTL. CONSERV. LAW § 23-2703(2)(b) (McKinney 2012).
56. *See id.* § 23-0303(2); *Dryden*, 940 N.Y.S.2d at 468.
57. The MLRL states that its purpose is:

> [T]o foster and encourage the development of an economically sound and stable mining industry, and the orderly development of domestic mineral resources and reserves necessary to assure satisfaction of economic needs *compatible with sound environmental management practices*[;]…to provide for the management and planning for the use of these non-renewable natural resources and *to provide,* in conjunction with such mining operations, *for reclamation of affected lands*; to encourage productive use including…*the planting of forests, the planting of crops for harvest, the seeding of grass and legumes for grazing purposes, the protection and enhancement of wildlife and aquatic resources*, the establishment of recreational, home, commercial, and industrial sites; *to provide for the conservation*, development, utilization, management and appropriate use *of all the natural resources of such areas for compatible multiple purposes*; *to prevent pollution*; to protect and perpetuate the taxable value of property; to protect the health, safety and general welfare of the people, *as well as the natural beauty and aesthetic values* in the affected areas of the state.

N.Y. ENVTL. CONSERV. LAW § 23-2703(1) (McKinney 2012) (emphasis added to highlight those sections of the provision explicitly concerned with environmental matters or which implicate a municipality's zoning power)..

58. *Dryden*, 940 N.Y.S.2d at 468, 474.
59. 964 A.2d 855 (Pa 2009); *see supra* § II.B.ii.
60. 830 P.2d 1045 (Co. 1992).
61. *See Huntley*, 964 A.2d at 866; *Bowen/Edwards*, 830 P.2d at 1060.
62. *Dryden*, 940 N.Y.S.2d at 472.
63. In re Foreclosure of Tax Liens by Clinton County, 299 A.D.2d 709, 710 (3d Dept. 2002) (citing Presbyterian Hospital in the City of New York v. Maryland Cas. Co., N.Y.2d 274, 284-85 (1997). *See also* Pajak v. Pajak, 56 N.Y.2d 394, 397 (1982) ("The failure of the Legislature to include a matter within a particular statute is an indication that its exclusion was intended."); McKinney's CONS. LAWS OF N.Y., Book 1, Statutes, § 74.
64. *Dryden*, 940 N.Y.S.2d at 467.
65. *Id.* at 468.
66. Branford House, Inc. v. Michetti, 81 N.Y.2d 681, 688 (1993); *See also* Sanders v. Winship, 57 N.Y.2d 391, 396 (1982); McKinney's CONS. LAWS OF N.Y., Book 1, Statutes § 98.
67. N.Y. ENVTL. CONSERV. LAW § 23-2703(2)(b) (McKinney 2012).
68. *Id.* § 23-0303(2).
69. *Id.*
70. *Dryden*, 940 N.Y.S.2d at 468.
71. *Id.* at 468–69.
72. N.Y. ENVTL. CONSERV. LAW § 23-0301 (McKinney 2012).
73. *Id.* § 23-2703(1).
74. *Dryden*, 940 N.Y.S.2d at 468.
75. *Id.* § 23-0101 ("Waste means a. Physical waste, as that term is generally understood in the oil and gas industry; b. The inefficient, excessive or improper use of, or the unnecessary dissipation of reservoir energy; c. The locating, spacing, drilling, equipping, operating, or producing of any oil or gas well or wells in a manner which causes or tends to cause reduction in the quantity of oil or gas ultimately recoverable from a pool under prudent and proper operations, or which causes or tends to cause unnecessary or excessive surface loss or destruction of oil or gas; d. The inefficient storing of oil or gas; and e. The flaring of gas produced from an oil or condensate well after the department has found that the use of the gas, on terms that are just and reasonable, is, or will be economically feasible within a reasonable time."); see also N.Y. COMP. CODES RULES & REGS. § 550.3(ax) (2011). For more on the issue of this statutory definition of "waste" and the breadth of its application, *see Siler*, *supra* note 8.
76. N.Y. ENVTL. CONSERV. LAW § 71-1305(1) (McKinney 2012).
77. *Id.* § 23-2703(1).
78. *Id.*
79. *See Dryden*, 940 N.Y.S.2d at 473; *Bowen/Edwards*, 830 P.2d at 1058.
80. *See Dryden*, 940 N.Y.S.2d. at 472 (quoting *Huntley*, 964 A.2d at 858).
81. *See* N.Y. ENVTL. CONSERV. LAW § 23-0303(2) (McKinney 2012).
82. *Dryden*, 940 N.Y.S.2d at 472. The logical fallacy of circular reasoning demonstrated by the *Dryden* court here is known in logic as *Petitio Principii*, or "assuming the answer."
83. *Huntley*, 964 A.2d at 866.
84. *Dryden*, 940 N.Y.S.2d at 473 (emphasis added).
85. 2012 N.Y. Slip Op 22080 (N.Y. Sup. Ct., Otsego County, Feb. 2012) [hereinafter *Middlefield*].
86. *See* TOWN OF MIDDLEFIELD ZONING LAW, Art. V (A); Art. II (B)(8).
87. *Middlefield*, 2012 N.Y. Slip Op 22080 at 2.
88. *Id.* at 3.
89. *Id.* at 5, quoting Edgar S. Nelson's "Memorandum in Support" (Apr. 24, 1963).
90. *Middlefield*, 2012 N.Y. Slip Op 22080 at 5.
91. *Id.*at 6, quoting H. Ames Richards's "Legislative Brief" (Jan. 18, 1963).
92. *Middlefield*, 2012 N.Y. Slip Op 22080 at 7, citing Memorandum in support of S.6455-B / A.8475-B.
93. *Middlefield*, 2012 WL 1068841 at 7–8.
94. *Id.* at 8.
95. *Id.*
96. *Id.*
97. *See id.* at 5–6; *supra* notes 89–91 and accompanying text.
98. *Middlefield*, 2012 N.Y. Slip Op 22080 at 5 (emphasis added).
99. *Id.*, quoting Edgar S. Nelson's "Memorandum in Support" (Apr. 24, 1963) (emphasis added).
100. *Id.* (emphasis added).
101. *Id.* at 8.
102. *Id.* at 7, citing Memorandum in support of S.6455-B / A.8475-B.
103. *Middlefield*, 2012 N.Y. Slip Op 22080 at 7–8.
104. *Id.* at 7, citing Memorandum in support of S.6455-B / A.8475-B.
105. *Id.*

106. *See supra* pp 15–19.

107. *Middlefield*, 2012 N.Y. Slip Op 22080 at 9.

108. *Compare* the MLRL, N.Y. ENVTL. CONSERV. LAW § 23-2703(2)(b) (McKinney 2012), with the OGSML, § 23-0303(2).

109. *Frew Run*, 71 N.Y.2d at 131.

110. *Id.*

111. N.Y. ENVTL. CONSERV. LAW § 23-0305(8)(a), (c) (McKinney 2012).

112. Drilling Permit Application, N.Y. STATE DEP'T OF ENVTL. CONSERVATION, http://www.dec.ny.gov/energy/1783.html (last visited Apr. 16, 2012).

113. N.Y. ENVTL. CONSERV. LAW § 23-0501(3) (McKinney 2012). The DEC is required to take action "as expeditiously as possible." *Id.*

114. *Id.* § 23-0501(1)(b).

115. N.Y. ENVTL. CONSERV. LAW § 23-0303(2) (McKinney 2012).

116. N.Y. REAL PROP. TAX LAW §§ 310, 500 (McKinney 2012).

117. *Id.* § 503(3), (7).

118. *Id.* §§ 590, 594.

119. *Id.* § 590(2)–(3).

120. *Id.* §§ 590(6), 592.

121. *Id.* § 594(2). To determine the appropriate assessment, assessors multiply "(1) the appropriate unit of production value; [by] (2) the amount of production from that economic unit in the production year; [and] (3) the latest state equalization rate." *Id.*

122. *Id.* § 594(3)(b). Exemption applies to those organizations enumerated in N.Y. REAL PROP. TAX LAW §§ 420-a (establishing mandatory exemptions for certain types of non-profits) and 420-b (establishing permissive exemptions for other non-profits).

123. *Id.* § 594(3)(c). A local government may tax the organizations permissively exempted if, after a public hearing, it "adopts a local law, ordinance, or resolution so providing." *Id.* § 420-b(1)(a).

124. *See* Golden v. Planning Bd. of Ramapo, 30 N.Y.2d 359, 370 (1972).

125. *See* N.Y. STAT. LOCAL GOV'TS § 10 ("[E]ach of the following powers, which shall include but not be limited to those of local legislation and administration, is hereby granted to each local government…: (6) In the case of a city, village, or town with respect to the area thereof outside the village or villages therein, the power to adopt, amend and repeal zoning regulations.")

126. *Id.*

127. N.Y. ENVTL. CONSERV. LAW § 23-2703(2)(b) (McKinney 2012).

128. *Id.* § 23-0303(2).

129. Edgar S. Nelson, Exec. Dir., NYS Petroleum Council, *Memorandum in Support* (Apr. 24 1963) (quoted at *Middlefield*, 2012 N.Y. Slip Op 22080 at 5) (emphasis added).

130. *Id.* (emphasis added).

131. Legislative Memorandum in support of S.6455-B/A.8475-B (quoted at *Middlefield*, 2012 N.Y. Slip Op 22080 at 7).

132. *Id.*

133. *Id.*

134. *See Frew Run*, 71 N.Y.2d at 131.

135. N.Y. ENVTL. CONSERV. LAW § 23-0301 (McKinney 2012).

136. *Id.* § 23-0101.

137. *Id.* § 23-0301.

138. *Id.* § 23-0101.

139. *Id.* § 23-0301.

140. For more on the correlative rights doctrine as applied by the OGSML, *see Siler*, supra note 8.

141. *See id.*

142. N.Y. ENVTL. CONSERV. LAW § 23-0901(1) (McKinney 2012). The specific policy provisions to which this section of the statute refers are not identified. One must assume, since compulsion by its very nature indicates a limitation on a person's right to refuse, that 23-0901 does not refer to the provision that claims to protect fully the rights of landowners.

143. *Id.* §§ 23-0901(1), 23-0301.

144. *Id.* § 23-0901.

Patrick Siler is employed at Read & Laniado, LLP, an Albany-based law firm focusing on energy matters. He is a graduate of St. John's University School of Law, and lives in New York's capital region. Mr. Siler won second place in the NYSBA Environmental Law Section's 2012 Prof. William R. Ginsberg Memorial Essay Contest for this article.

Greening the Legal Profession—Law Office Climate Challenge Profiles

In early 2007, the American Bar Association (the "ABA") and the U.S. Environmental Protection Agency (the "EPA") partnered to encourage law offices to commit to waste reduction and energy and resource conservation by taking simple, practical steps to become better environmental stewards. Thereafter, the Law Office Climate Challenge Program was born. Since its inception, more than 250 law firms and organizations have enrolled, pledging to participate in one or more of the four voluntary program areas.

As part of the New York State Bar Association's ("NYSBA") effort to promote and grow the program, we are continuing our recognition of firms within the state of New York who have committed to this challenge. In this issue of *The New York Environmental Lawyer*, we recognize the innovation and commitment of attorneys in the New York offices of Arnold & Porter LLP and Cuddy & Feder LLP. Information on the ABA-EPA Law Office Climate Challenge Program can be found at: http://www.abanet.org/environ/climatechallenge/home.shtml. Questions regarding the NYSBA's support of the Law Office Climate Challenge may be directed to Megan Brillault (mbrillault@bdlaw.com) or Kristen Wilson (kwilson@harrisbeach.com).

Arnold & Porter LLP

Arnold & Porter's environmental stewardship dates back more than five years ago, when it formed a "green office" working group and subsequently became a member in the EPA's Green Power Leadership Club. The working group helped to establish the firm's Green Office Initiative Project. As part of this initiative, Arnold & Porter adopted a firm-wide Green Office policy to reduce resource consumption and promote sustainable business practices. The policy initially looked at implementing procedures to reduce paper use, energy consumption, and transportation impacts.

In 2007, Arnold & Porter also collaborated with the ABA and the EPA, playing a key role in the development of the ABA-EPA Law Office Climate Challenge. EPA certified the firm as a leader in the Green Power Partnership category in five of its six offices, including its New York office, and is a partner in the other three categories: Best Paper Practices, Waste Wise, and Energy Star.

As a Leader and Partner in the Climate Challenge Program, the firm has taken a number of steps to reduce paper consumption, including:

- Using recycled paper for printing, copying, and cleaning/bathroom paper products;
- Sending out electronic holiday cards;
- Internal distribution of reports, faxes, newsletters, and bulletins in electronic format—saving the firm approximately 350,000 sheets of paper per year;
- Setting the default settings on printers to two-sided, so that half as much paper will be needed; and
- Reducing toner settings on all printers and recycling its used toner cartridges.

In the area of energy conservation, Arnold & Porter's Washington, DC office is already "Energy Star" rated. The firm has committed to purchase Energy Star office equipment whenever possible and currently uses Energy Star products such as compact florescent light bulb replacements, duplex printers, and printers and photocopy machines with automatic "sleep" mode. These steps not only save money but also help protect the environment through the use of energy efficient products and practices.

In 2008, Arnold & Porter was presented with the "Green Business Award" from the *Washington Business Journal* and the "Green Leadership Award" from Bisnow in part because of its policy of purchasing, at the firm's expense, carbon offsets for firm-arranged business air travel, including travel on client business. The funds used to purchase carbon offsets go to greenhouse gas-reducing projects. In addition, firm management encourages employees to use environmentally sound methods of transportation and participate in pre-tax transportation deduction programs for public transportation. In those offices where it is possible, the firm works with its building managers to provide air pumps in employee parking facilities to promote the proper inflation of tires, which helps improve both fuel economy and safety.

An integral part of the firm's Green Office policy is an effective internal communication program. Arnold & Porter believes that not only can it become a better environmental steward through sustainable practices, but that each individual within the firm can lessen one's environmental impacts by improving his or her own sustainable practices. Through firm-wide notices, communications from management, and the integration of resource conservation material into the firm's training program, Arnold & Porter educates its personnel about the steps they personally can take to conserve resources and improve their environmental stewardship. For more information regarding Arnold & Porter's Green Office initiative, please see: www.arnoldporter.com or contact Toccarra Gates at Toccarra.Gates@aporter.com.

Cuddy & Feder LLP

Cuddy & Feder's dedication to a sustainable environment is evident in its daily operations. Indeed, the firm's motto is "If you're making a living from the community, you have an obligation to give something back." Since 2006, Cuddy & Feder has been giving back to the environmental community by reducing its energy needs, using recycled products, and purchasing Energy Star rated equipment.

In May 2008, Cuddy & Feder started participating in the ABA-EPA Law Office Climate Challenge. Cuddy & Feder is a partner in three out of the four programs of the Law Office Climate Challenge. As a participant, every year Cuddy & Feder files a report outlining its efforts and improvements in the areas of Best Paper Practice, WasteWise, and Energy Star.

Some ways in which the firm promotes each of these programs include the following:

- All printers are set to print on two sides of the paper;
- Recycling bins are placed throughout the office and collected on a regular basis by the building management;
- Policy to turn off all computers at the end of the day;
- All old computers are recycled;
- All copier and printer toner cartridges are recycled;
- Motion detector lights are installed in the copy and file rooms.

In addition, Cuddy & Feder has a practice of only running its Energy Star dishwasher twice a week and, if possible, purchasing recycled office supplies, from calendars down to pencils.

The firm also has LEED AP certified attorneys who assist clients in navigating the green building certification process and assist in development of Climate Smart Communities and Alternate Energy permitting.

For more information about Cuddy & Feder's sustainable practices, please contact William S. Null.

Administrative Decisions Update

Prepared by Robert A. Stout Jr.

In the Matter of a Renewal and Modification of a State Pollutant Discharge Elimination System ("SPDES") Permit Pursuant to Environmental Conservation Law ("ECL") Article 17 and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") Parts 704 and 750 et seq. by Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Indian Point 3, LLC, Permittees.

Ruling of the Regional Director

November 28, 2012

Summary of the Decision

Entergy is seeking to renew its SPDES permit for the Indian Point nuclear powered steam electric generating stations 2 and 3. 6 NYCRR Part 704.5 provides that: "[t]he location, design, construction and capacity of cooling water intake structures, in connection with point source thermal discharges, shall reflect the best technology available for minimizing adverse environmental impact." At issue in this proceeding was Entergy's motion to seek reconsideration of the fourth step in the analysis of what constitutes best technology available ("BTA") and its assertion that a cost-benefit analysis should be "reincorporated" into that step. DEC's initial formulation of the fourth step was based on administrative precedent. The fourth step was modified following the Second Circuit's decision in *Riverkeeper, Inc. v. United States Environmental Protection Agency*, 475 F3d 83 (2d Cir. 2007). Subsequently, the Second Circuit's decision was reversed by the Supreme Court. Entergy's motion for reconsideration of the standard followed. The Regional Director, serving as the Commissioner's designee, granted the petition and ruled that the fourth step requires a determination of "whether the costs of the feasible technologies are wholly disproportionate to the environmental benefits to be gained from such technologies" but rejected the argument that a cost-benefit analysis is required.

Background

DEC previously created a four step analysis to determine what constitutes BTA. DEC's initial formulation of the fourth element of that analysis was "whether the costs of practicable technologies are wholly disproportionate to the environmental benefits conferred by such measures." DEC's position was based on previous administrative precedent. Subsequently, the Second Circuit ruled that BTA for minimizing environmental impacts under section 316(b) of the federal Clean Water Act was the technology that achieves the greatest reduction in adverse environmental impacts at a cost that can "reasonably be borne" by the industry. *See Riverkeeper, Inc. v. United States Environmental Protection Agency*, 475 F3d 83 (2d Cir. 2007). The *Riverkeeper* decision resulted in a reformulation of the fourth element in *Matter of Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Indian Point 3, LLC, Interim Decision of the Assistant Commissioner, August 13, 2008*, (the "Interim Decision"). The Interim Decision recast the fourth step as "whether the cost of the technology can reasonably be borne by the industry and, upon making the determination that it can, whether considerations of cost-effectiveness allow for selection of a less expensive but equally effective technology." *Interim Decision* at 13. However, the *Riverkeeper* decision was reversed by the Supreme Court in 2009. *See Entergy Corp. v. Riverkeeper, Inc.* 556 US 208 (2009). Consequently, Entergy contended in this proceeding that the fourth step should be reconsidered and that section 316(b) of the Clean Water Act and 6 NYCRR Part 704.5 must be interpreted to include a cost-benefit analysis. DEC contended that the Supreme Court's decision stands only for the proposition that a cost-benefit analysis is not a standard in and of itself, but is instead a tool that a decision maker can use to consider costs in the implementation of the BTA standard.

Riverkeeper, Inc., Scenic Hudson, Inc. and Natural Resources Defense Council, Inc. opposed Entergy's motion and DEC's interpretation of the fourth step. This group of opponents asserted the fourth step, as set forth in DEC's Interim Decision, should control.

Ruling of the Regional Director

The Regional Director granted Entergy's motion for reconsideration and reincorporated the "wholly disproportionate" language that was in DEC's original standard. That standard provided "whether the costs of the feasible technologies are wholly disproportionate to the environmental benefits to be gained from such technologies." However, he rejected Entergy's assertion that the Supreme Court's decision mandates a "cost-benefit" approach and found that nothing in section 316(b) of the federal Clean Water Act or 6 NYCRR Part 704.5 requires a cost-benefit analysis. The Regional Director acknowledged that some consideration of costs should be given, citing the Interim Decision of the DEC Commissioner in the *Matter of Athens Generating Company, LP* (June 2, 2009), in which the Commissioner stated:

> a lone finding that the costs outweigh the environmental benefits to be gained is insufficient; instead, a finding must be made that the costs are "wholly disproportionate" to the environmental benefits to be gained. This more rigorous

standard gives presumptive weight to the value of environmental benefits and places the burden on a permit applicant to demonstrate that the relative costs are unreasonable" *Id.* at 14-15.

The Regional Director further noted that Commissioner's Policy 52 ("CP-52") defines the "wholly disproportionate test" as "neither a traditional cost-benefit analysis nor an economic analysis" but rather "a comparison of the proportional reduction in impact (benefit) as compared to the proportional reduction in revenue (cost) of installing and operating BTA technology to mitigate adverse environmental impact." (CP-52 at 4). As such, the Regional Director stated that the proponent of a technology will be required to show:

(1) The increase in the protection of aquatic organisms that would be gained from installing and operating the proposed technology as compared to current operations; and

(2) The increase in cost of the proposed technology at the stations (including but not limited to costs of installation, maintenance and operation) as compared to the costs of current maintenance and operation.

With this decision, DEC has returned to the "wholly disproportionate" standard contained in its original formulation. The Regional Director used the word "feasible" in his decision, citing its use in CP-52, but notes that there is no difference in meaning between feasible and practicable, which was used in DEC's original standard. The decision requires that CP-52 and administrative precedent be used as guidance in the application of the standard.

Robert A. Stout Jr. is an associate in the Environmental Practice Group of Whiteman Osterman & Hanna LLP in Albany, New York.

Recent Decisions and Legislation in Environmental Law

Recent Decisions

Camardo v. City of Auburn, 96 A.D.3d 1437 (2012)

Facts

On January 6, 2011, Respondent declared its intent to act as lead agency for State Environmental Quality Review Act (SEQRA) purposes with respect to a proposed Center for Performing Arts & Education Project.[1]

The respondent, the City of Auburn, issued a negative declaration and authorized the award of a demolition contract.[2] Petitioner brought an Article 78 proceeding challenging the City's issuance of a negative declaration of environmental significance with respect to the proposed demolition of a building, the subsequent transfer of property, and construction of a performing arts center.[3] Petitioner challenged the negative declaration on the ground that respondent failed to take the requisite hard look at environmental impact, improperly deferred resolution of environmental concerns until after demolition, and improperly amended the negative declaration and the notice of determination of non-significance.[4]

Procedural History

The Supreme Court, Cayuga County, dismissed petitioner's Article 78 proceeding and petitioner appealed.[5]

Issue

Was the city's negative environmental impact declaration proper to the extent the City recognized a potential for a significant adverse environmental impact and did not require additional measures to prevent contamination after demolition?

Rationale

The City's negative declaration was improper because it "identified the potential for a significant adverse environmental impact resulting from the project."[6] Though the City recognized that additional "environmental monitoring of the property after demolition was recommended due to the possibility of contamination," the City did not require additional measures to be taken in the event contaminants were found.[7]

The Court found that the decision by the City not to have measures in place was an improper delegation of authority.[8] The Court held the City should have instead issued a conditioned negative declaration "which is appropriate for this unlisted action…in which the action as initially proposed may result in one or more significant adverse environmental impacts [but] mitigation measures identified and required by the lead agency…will modify the proposed action so that no significant adverse environmental impacts will result."[9] The court also found that the additional requirements for when a lead agency issues a negative declaration, as laid out in 6 NYCRR 617.7[d], were not met in this case.[10]

Conclusion

The Fourth Department concluded that the Supreme Court erred in dismissing the Article 78 petition and instead should have granted it.

Matt Eisenstein
SUNY Buffalo Law School '13

Endnotes

1. *Camardo v. City of Auburn* , 96 A.D.3d 1437 (4th Dep't 2012)).
2. *Id.*
3. *Id.*
4. *Id.* at *1438.
5. *Id.* at *1437.
6. *Id.* at *1438.
7. *Id.*
8. *Id.*
9. *Id.* (quoting *Matter of Merson v. McNally*, 90 NY2d 742, 752 (1997)).
10. *Id.*

* * *

Center for Biological Diversity; Pacific Environment v. Salazar, Secretary of the Interior; U.S. Fish and Wildlife Service; Alaska Oil and Gas Association, 2012 WL 3570667 (9th Cir. 2012)

Facts

In 2005, Alaska Oil and Gas Association (the "Association") requested a set of five-year incidental take regulations from the U.S. Fish and Wildlife Service (the "Service") for its oil and gas exploration activities in the Chukchi Sea off the North Slope of Alaska.[1] In 2007, the Service issued an Environmental Assessment ("EA") pursuant to the National Environmental Policy Act (the "NEPA") for the proposed take regulations.[2] The EA concluded that the incidental take regulations, along with certain mitigation measures, "would result in no measureable impact o[n] the physical environment" and "the overall impact would be negligible on polar bear and Pacific walrus populations."[3] Pursuant to the Endangered Species Act (the "ESA"), the Service requested the Fair-

banks Fish and Wildlife Field Office to issue a Biological Opinion ("BiOp") for the incidental take regulations.[4] In May 2008, the BiOp concluded that the proposed regulations "were not likely to jeopardize the continued existence of the polar bear."[5] The effects of the incidental take regulations on the Pacific walrus were not considered by the BiOp because the species is not listed as threatened or endangered under the ESA.[6] In June 2008, the Service issued a final rule for the regulations for the incidental take of polar bears and Pacific walruses in the Chukchi Sea and on the adjacent coast of Alaska.[7] The final rule concluded that "any incidental take reasonably likely to result from the effects of the proposed activities, as mitigated through this regulatory process, will be limited to small numbers of walruses and polar bears."[8] The final rule also concluded that the under the regulations, the incidental take would have only a "negligible impact" on the polar bears and Pacific walruses.[9]

Procedural History

The Center for Biological Diversity and Pacific Environment brought suit against the Service, challenging the regulations and the accompanying environmental review documents for lack of compliance with the Marine Mammal Protection Act (the "MMPA"), the Endangered Species Act (the "ESA"), and the National Environmental Policy Act (the "NEPA").[10] The Association intervened as co-defendants.[11] The district court granted summary judgment to the Service and the Association.[12] The Plaintiffs appealed.[13]

Issues

(1) Is the Service's interpretation of the term "small numbers" in the MMPA § 101(a)(5)(A) arbitrary and capricious?

(2) Does the BiOp fail to comply with the ESA?

(3) Is the EA in compliance with the NEPA?

Rationale

The Ninth Circuit upheld the Service's 2008 Chukchi Sea incidental take regulations.[14] The Court did not find the Service's interpretation of "small numbers" to be arbitrary and capricious.[15] Although there is no statute that quantifies the terms "small numbers" and "negligible amount," they are distinct and separate standards that must be met by the Service in promulgating incidental take regulations.[16] The Service's "small numbers" analysis focused on the location of the exploration activities in relation to the mammals' larger population, and the "negligible impact" analysis focused on the effects of interactions on the mammals' recruitment and survival.[17] The Court held that the Service's "small numbers" and "negligible impact" analyses were "sufficiently distinct."[18] Therefore, the Court ruled that the regulations complied with the MMPA.[19] The Court also ruled that the BiOp and the EA complied with the ESA and the NEPA.[20] The methods used to generate the environmental reviews were permissible under the Acts and satisfied their requirements.

Conclusion

The Ninth Circuit did not find the U.S. Fish and Wildlife Service's interpretation of the terms "small numbers" and "negligible amount" in the MMPA § 101(a)(5)(A) arbitrary and capricious. Therefore, the proposed incidental take regulations are in compliance with the Marine Mammal Protection Act. The Court also held that the accompanying Biological Opinion and Environmental Assessment were pursuant with the Endangered Species Act and the National Environmental Policy Act, respectively.

Stephanie Lin
St. John's University School of Law '15

Endnotes

1. Ctr. for Biological Diversity; Pac. Env't v. Salazar, Sec'y of the Interior; U.S. Fish and Wildlife Serv.; Alaska Oil and Gas Ass'n, 10-35123, 2012 WL 3570667 at *2 (9th Cir. 2012).
2. *Id.* at *3.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at *4.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at *20.
15. *Id.* at *11.
16. *Id.* at *10.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at *20.

* * *

Chinese Staff v. Burden, 19 N.Y.3d 922 (2012)

Facts

Sunset Park is a predominately residential neighborhood in South Brooklyn that includes one of the city's Chinatowns and comprises a majority of Asian and Hispanic working class residents.[1] Concerns about overdevelopment in the neighborhood prompted community residents and organizations to ask the Department of City

Planning to help preserve the neighborhood's low-rise and residential character by rezoning the community.[2] Respondent asserted "[we] worked closely with area residents and community groups to obtain input, developing and refining the rezoning proposal through a participatory public process, and in close consultation with Brooklyn Community Board 7, to establish new contextual zoning districts."[3] Respondent then published a zoning plan for the neighborhood that it thought was the best way to develop the neighborhood.[4] Petitioners, an organization of Chinese workers, several religious congregations, and residents of the neighborhood, commenced an Article 78 proceeding, challenging respondent's negative determination under the State Environmental Quality Review Act (SEQRA) that proposed zoning changes would have no significant environmental impact.[5]

Procedural History

Petitioners are appealing an order of the New York State Supreme Court, Appellate Division, First Department affirming an order and judgment of the Supreme Court which had denied their Article 78 petition and dismissed the proceeding.[6]

Issue

Did Respondent abuse its discretion or act in an arbitrary or capricious manner when it issued a negative declaration determining that the proposed rezoning would have no significant adverse effect on the environment?[7]

Rationale

The Court reasoned that the agency making the initial determination under SEQRA will study both long- and short-term environmental impacts and determine if an environmental impact statement (EIS) is necessary.[8] The Court stated that "[W]here an agency determines that an EIS is not required, it will issue a negative declaration. Although the threshold triggering an EIS is relatively low, a negative declaration is properly issued when the agency has made a thorough investigation of the problems involved and reasonably exercised its discretion."[9]

The Court then held that the proper judicial standard of review "[o]f a lead agency's SEQRA determination is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination 'was affected by an error of law or was arbitrary and capricious or an abuse of discretion.'"[10] After reviewing the record to determine whether Respondent "identified the relevant areas of environmental concern, took a "hard look" at them, and made a "reasoned elaboration" of the basis for its determination," the Court concluded that Respondent "neither abused its discretion nor was arbitrary or capricious when it issued a negative declaration determining that the proposed rezoning in this case would have no significant adverse effect on the environment."[11]

Conclusion

Respondent neither abused its discretion nor was arbitrary or capricious when it issued a negative declaration determining that the proposed rezoning would have no significant adverse effect on the environment.[12]

Matt Eisenstein
SUNY Buffalo Law School '13

Endnotes

1. *Chinese Staff & Workers' Ass'n v. Burden*, 27 Misc.3d 1219(A) (2010).
2. *Id.* at *1.
3. *Id.* at *2.
4. *Id.*
5. *Id.*
6. *Chinese Staff & Workers' Ass'n v. Burden*, 88 A.D.3d 425, 932 N.Y.S.2d 1 (1st Dept. 2011).
7. *Chinese Staff & Workers' Ass'n v. Burden*, 19 N.Y.3d 922 (2012), at *924.
8. *Id.* (*quoting Matter of Spitzer v. Farrell*, 791 N.E.2d 394 (2003)).
9. *Id.* at *924.
10. *Id.* (*quoting Akpan v. Koch*, 554 N.E.2d 53 (1990)).
11. *Id.* at *924.
12. *Id.*

* * *

Coalition for Responsible Growth & Res. Conservation v. United States FERC, 2012 U.S. App. LEXIS 11847 (2d Cir. June 12, 2012)

Facts

The United States Federal Energy Regulatory Commission (FERC) granted Central New York Oil and Gas Company ("CNY Oil and Gas") a Certificate of Public Convenience and Necessity (the "Certificate").[1] The Certificate authorized CNY Oil and Gas to build and operate a 39 mile long natural gas pipeline through Pennsylvania, as well as the authority to build the necessary support facilities.[2] Petitioners sought and were denied a "Request for Rehearing the Certificate Order" by the issuing agency, and initiated this petition for review.[3]

Procedural History

Petitioners are appealing FERC's failure to grant their request for rehearing.

Issue

Whether the agency erred when it failed to grant a review of the Certificate Order.

Rationale

The Second Circuit found that FERC properly discharged its duties.[4] The court considered two factors, as required by National Environmental Policy Act (NEPA), when deciding whether the agency was required to issue an environmental impact statement (EIS): (1) "whether the agency took a 'hard look' at the possible effects of the proposed action" and (2) if the agency had taken a "hard look," whether "the agency's decision was arbitrary or capricious."[5]

The Circuit Court reasoned that because the FERC issued an Environmental Assessment which included a discussion of the development of the nearby Marcellus Shale natural gas reserves and because it was reasonable for the FERC to conclude that that the development would not impact the gas reserves directly, a full EIS was not necessary.[6]

Additionally, the court noted that the FERC addressed the project's effects on nearby forests and migratory birds and required CNY Oil to "take concrete steps to address environmental concerns raised by petitioners and others."[7]

Conclusion

The Court denied the petitioner's request for review of the certificate, holding that the FERC discharged its duties under the National Environmental Policy Act and that a full environmental impact statement was not necessary.[8]

Elizabeth Stapleton
Albany Law School '14

Endnotes

1. *Coal. for Respon. Growth & Res. Conserv. v. U.S. FERC*, 2012 U.S. App. LEXIS 11847, -*1-*2 (2d Cir. June 12, 2012).
2. *Id.* at *2.
3. *Id.*
4. *Id.* at *5.
5. *Id.* at *3 (*quoting* Nat'l Audubon Soc'y v. Hoffman, 132 F.3d 7, 14 (2d Cir. 1997)).
6. *Id.* at *4.
7. *Id.* at *4-5.
8. *Id.*

* * *

Coalition for Responsible Regulation, Inc. v. EPA, 684 F.3d 102 (D.C. Cir. 2012)

Facts

The Supreme Court previously held in *Massachusetts v. EPA* that greenhouse gases were "air pollutants" subject to regulation under the Clean Air Act ("CAA").[1] In response to the directive of the U.S. Supreme Court in *Massachusetts*, the Environmental Protection Agency ("EPA") issued an Endangerment Finding that defined an aggregate of six greenhouse gases (carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride) as a single air pollutant.[2] The EPA determined through examination of significant scientific evidence that motor vehicle emissions of those six gases combined, contributed to total greenhouse gas pollution and the global climate-change problem endangering the public welfare and requiring regulation under the CAA.[3]

Subsequently, the EPA published the Tailpipe Rule that set greenhouse gas emissions standards for cars and light trucks that went into effect January 2, 2011.[4] The EPA's action in issuing the Tailpipe Rule triggered the regulation of stationary greenhouse gas emitters under the Agency's longstanding interpretation of both the Prevention of Significant Deterioration of Air Quality ("PSD") and Title V requirements of the CAA.[5] These two sections of the act subject stationary emitters, such as oil refineries and power plants, to permit regulations if they emit any air pollutants regulated under the CAA over prescribed levels.[6] In response to the exceedingly large number of emitters now subject to permitting requirements, the EPA also issued the Timing and Tailoring rules that limited the emitters subject to the permitting requirement to only those exceeding 75,000 or 100,000 tons per year ("tpy") of emissions.[7]

The Petitioners included several States and industry representatives who challenged the EPA's conclusion that stationary providers be required to obtain a permit for emitting greenhouse gases. The Petitioners specifically challenged the adequacy of the scientific record supporting the Endangerment Finding, and the EPA's interpretation of the CAA in promulgating the Tailpipe Rule.[8]

Procedural History

The Petitioners, States and industry groups, filed petitions for review of final actions of the EPA in the United States Court of Appeals, District of Columbia Circuit.[9]

Issue

Whether the EPA's decision to classify a group of six greenhouse gases as air pollutants and the subsequent promulgation rules to regulate those pollutants, which resulted in the requirement that stationary emitters of those pollutants be regulated, was arbitrary and capricious.

Rationale

The Petitioners first attempted to challenge the adequacy of the scientific record underlying the Endangerment Finding.[10] Petitioners argued that the evidence was too uncertain to support the judgment that greenhouse gases endanger human health.[11] The D.C. Circuit rea-

soned that the substantial evidence gathered by the EPA supported its finding that anthropogenically induced climate change threatened human health by affecting air quality and the risk to food production, forestry, infrastructure, among other things.[12] The Court found Congress intended the statute as "precautionary in nature," and forward looking rather than remedial, where a direct cause and effect relationship would not be necessary to support an endangerment finding so that the EPA could regulate emission standards.[13]

Section 202(a) of the CAA states that EPA's Administrator "shall have" the authority to prescribe standards for motor vehicles and motor vehicle engines that contribute to air pollution, which "in his judgment cause or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[14] Petitioners challenged the EPA's interpretation of Section 202 and Section 169(1), alleging that the Agency's conclusion that the Tailpipe Rule triggered regulation under the PSD and Title V was arbitrary and capricious because the EPA failed to justify and consider the costs of such interpretation, and the regulation of greenhouse gases should not have been extended to stationary emitters.[15] The Court reasoned that by employing the verb "shall" in Section 202 of the CAA, Congress vested the EPA with a non-discretionary duty to regulate greenhouse gases.[16]

Additionally, the plain language of the CAA Section 169(1) (the PSD) required that stationary sources emitting major amounts of "any air pollutant" be subject to permitting requirements.[17] The Petitioners argued that this phrase is capable of a more narrow interpretation and the EPA should have avoided extending the PSD program to greenhouse gases.[18] The Court again reasoned that the plain language of Section 169(1) did not support the Petitioner's argument, and the EPA was required by the decision in Massachusetts to regulate greenhouse gases under the CAA.[19] The EPA simply could not avoid regulation of greenhouse gases as it was compelled under both statute and the decision in Massachusetts.[20]

Conclusion

The D.C. Circuit found that the EPA's interpretation of the CAA, extending PSD and Title V permitting requirements to stationary emitters, was compelled by statute, and that the Endangerment Finding was neither arbitrary nor capricious as it was based on a substantial administrative record consistent with the requirements of the CAA. The D.C. Circuit dismissed and denied the petitions.[21]

Dustin Howard
Albany Law School '14

Endnotes

1. *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 113 (D.C. Cir. 2012) (*citing Massachusetts v. EPA*, 549 U.S. 497 (2007)).
2. *Coalition for Responsible Regulation*, at 114.
3. *Id.* at 115.
4. *Id.*
5. *Id.* (explaining that EPA interpreted the phrase "any air pollutant" in both provisions to mean any air pollutant that is regulated under the CAA).
6. *Id.*
7. *Id.* at 116.
8. *Id.*
9. *Id.* at 117.
10. *Id.* at 116–17.
11. *Id.* at 121.
12. *Id.*
13. *Id.*
14. *Id.* at 117 (quoting 42 U.S.C. § 7521[a][1]).
15. *See id.* at 126.
16. *Id.*
17. *Id.* at 134.
18. *Id.*
19. *Id.*
20. *See id.* at 135–36.
21. *Id.* at 148.

* * *

Cooperstown Holstein Corp. v. Town of Middlefield, 35 Misc. 3d 767, 943 N.Y.S.2d 722 (Sup. Ct. 2012)

Facts

In February of 2007, the plaintiff executed two oil and gas leases for property owned by the plaintiff and located within the Town of Middlefield in Otsego County.[1] In June of 2011 the Town of Middlefield enacted a zoning law, a portion titled "Gas Oil, or Solution Drilling or Mining," which "effectively banned oil and gas drilling within the geographical borders of the township."[2] The plaintiff brought suit against the Town of Middlefield seeking relief for the frustration of purpose pertaining to the leases, based on the argument that New York State Environmental Conservation law §23-0303(2)(ECL) preempts the local law and awards exclusive jurisdiction over matters relating to the regulation of gas, oil, and solution drilling to the state.[3]

Procedural History

The plaintiff filed a Motion for Summary Judgment seeking that the relevant sections of the Town of Middlefield's zoning law be declared preempted by New York

State Environmental Conservation Law §23-0303 and therefore void.[4] Defendant filed a cross-motion opposing the plaintiff's motion and seeking a dismissal of the complaint.[5]

Issue

Whether the New York State Environmental Conservation Law § 23-0303(2)(ECL) preempts the Town of Middlefield zoning law.

Rationale

The court found that neither the plain language nor legislative history of the ECL support a finding that the ECL preempts local zoning laws. The language of the ECL expressly addresses preemption, therefore the court merely had to determine "to what extent preemption applied," and found that the 1981 legislation amending various provisions of the ECL drew a distinction between the regulation of the "activity of the [oil and gas] industry" and a municipality's "right to enact legislation pertaining to land use."[6]

Additionally, the court held that the Town of Middlefield's Zoning Law is "an exercise of the municipality's constitutional and statutory authority to enact land use regulations even if such may have an incidental impact upon the oil, gas and solution drilling or mining industry."[7] The court recognized that laws pertaining to land use do not frustrate the state's own industry regulations, and that "harmonization" between state and local laws is possible because the local municipality, based on the language and history of the ECL, is meant to control where oil, gas, and solution drilling occurs, while the state reserves the power to control how the drilling occurs.[8]

Conclusion

The court denied the plaintiff's motion for summary judgment, holding that "the Zoning law does not conflict with the state's interest in establishing uniform policies and procedures for the manner and method of the industry [n]or does it impede implementation of the state's declared policy with respect to these resources" and therefore is not preempted by the ECL.[9] Additionally, the court granted the defendant's cross-motion seeking to dismiss the plaintiff's complaint.[10]

Elizabeth Stapleton
Albany Law School '14

Endnotes

1. *Cooperstown Holstein Corp. v. Town of Middlefield*, 35 Misc. 3d 767, 943 N.Y.S.2d 722, 723 (Sup. Ct. 2012).
2. *Id.*
3. *Id.* at 723, 724.
4. *Id.* at 722.
5. *Id.*
6. *Id.* at 728.
7. *Id.* at 730.
8. *Id.* at 729.
9. *Id.* at 730.
10. *Id.*

* * *

DVL, Inc. v. Niagara Mohawk Power Corp., 2012 WL 3125570 (2d Cir. Aug. 2, 2012)

Facts

In 2003, DVL, Inc. ("DVL") purchased a piece of real estate and subsequently discovered that the soil on the property was contaminated by polychlorinated biphenyls ("PCBs").[1] Upon learning that the New York State Department of Environmental Conservation (DEC) was concerned by the levels of PCBs on the property, appellant hired an environmental consulting firm to remedy the contamination.[2] In 2007, DVL brought suit against General Electric Company and Niagara Mohawk Power Corporation to recover the costs of the contamination cleanup, alleging that they were responsible for the contamination on the property under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[3]

In 2010, the district court granted appellant's motion for summary judgment and appellant appealed.[4]

Procedural History

The appellants are appealing the United States District Court for the Northern District of New York's denial of their motion for summary judgment and grant of appellee's motion for summary judgment, as well as the striking of certain expert testimony.[5]

Issue

Whether the district court abused its discretion by striking the testimony of appellant's witness, and whether the district court erred in granting appellee's motion for summary judgment.

Rationale

The Court of Appeals reasoned that because the witness testimony relied heavily on scientific and technical knowledge, the witness was correctly classified as an expert witness.[6] Furthermore, because the appellees did not have notice of expert testimony, the district court correctly excluded this testimony.[7] Under CERCLA, a property owner may seek reimbursement for costs associated with contamination cleanup from a "potentially responsible party (PRP)."[8] To establish whether a party is responsible for clean-up costs, it must be probable that

the party "discharged hazardous material."[9] DVL presented circumstantial evidence to establish that GE and Niagara Mohawk disposed of contaminants; however, the court found that appellant failed to establish a connection between the appellees' activity and the specific site at issue.[10]

The circumstantial evidence presented by DVL to establish that GE disposed of PCBs on the property was related to activities that had no connection to DVL's property.[11] Similarly, the evidence presented against Niagara Mohawk was testimony that contaminating activity occurred, but the machinery witnessed at the DVL property did not bear a Niagara Mohawk logo.[12] The court reasoned that this testimony, combined with the fact that Niagara Mohawk provided service to the DVL property, was not enough to establish that Niagara Mohawk was present at the DVL property.[13]

Conclusion

The court denied the appellants petition, holding that DVL's evidence did not establish a genuine issue of fact, and that the district court's grant of summary judgment to the appellees was appropriate.

Elizabeth Stapleton
Albany Law School '14

Endnotes

1. *DVL, Inc. v. Niagara Mohawk Power Corp.*, 2012 WL 3125570, at *1 (2d Cir. Aug. 2, 2012).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at *2.
7. *Id.* at* 3.
8. *Id.* (*quoting Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F3d 112, 120 (2d Cir. 2010)).
9. *Id.*
10. *Id.* at *4.
11. *Id.*
12. *Id.* at *5.
13. *Id.*

* * *

Gulf Restoration Network v. Salazar, 10-60411, 2012 WL 1943636 (5th Cir. May 30, 2012)

Facts

The Sierra Club, the Gulf Restoration Network, and the Center of Biological Diversity ("the Center") petitioned for judicial review of sixteen plans for exploration and development in the Gulf of Mexico approved by the Department of the Interior ("DOI").[1] The petitioners sought review under the Outer Continental Shelf Lands Act ("OCSLA").[2] Under OCSLA, the DOI can grant leases on lands located on the Outer Continental Shelf.[3] The DOI has formulated four stages for lease, each requiring lessees to submit plans for the DOI to review.[4]

The petitioners argued the DOI's approval of the plans violated both OCSLA and the Natural Environment Policy Act ("NEPA") in two ways.[5] First, the DOI failed to consider the *Deepwater Horizon* disaster[6] when approving deep water drilling plans.[7] Second, the DOI inadequately reviewed the plans because it incorrectly applied categorical exclusions from NEPA requirements.[8] The petitioners asked the court to vacate the approvals and remand the plans for further consideration consistent with NEPA and OCSLA.[9]

Procedural History

The petitioners filed for judicial review under 43 U.S.C. §§ 1349(c)(2) and (3) to review the Department of the Interior's decision to allow sixteen plans for exploration and development in the Gulf of Mexico.

Issues

(1) Did the petitioners have organizational standing?

(2) Were any of the challenges moot?

(3) Did the Fifth Circuit have statutory appellate jurisdiction under OCSLA to review the DOI's actions?

(4) Did the Center's letter to the Secretary of the Interior satisfy the administrative participation requirement in OCSLA?[10]

Rationale

The Fifth Circuit found that the petitioners satisfied the first prong of organizational standing.[11] Each petitioner could sue in its own right, as its members had research, economic, recreational, and aesthetic interests in the Gulf of Mexico that would be injured by plans that did not properly account for environmental impact.[12] These injuries were fairly traceable to the DOI's approval of the plans.[13] The petitioners' injuries were also redressable, as OCSLA protected the Gulf of Mexico and thus could protect the petitioner's interests.[14]

The Court further found the petitioners had satisfied the second and third prongs for organizational standing. The litigation was germane to petitioners' purposes, as each regularly advocated and litigated for the protection of environmental causes.[15] Lastly, the court found that the participation of individual members was not necessary, as both the claims and the relief sought were not particular to an individual nor did they require individualized proof.[16]

Although the petitioners had standing, the Fifth Circuit found four of the claims against the challenged plans were moot. The DOI had superseded three of the challenged plans with new plans and cancelled the fourth plan, rendering the issue of their approval moot.[17] The Court also held that a fifth challenge was not moot, despite the DOI's claim that it had cancelled the plan.[18] Since the DOI issued no official letter of cancellation, the Court considered the plan intact and thus justiciable.[19]

The Fifth Circuit held it had appellate jurisdiction under 43 U.S.C. §§ 1349(c)(2) and (3).[20] Section (c)(2) states that a circuit court can review the DOI's approval and disapproval of plans if the actions affect a state in the circuit's territory.[21] Section (c)(3)(A), however, states that review under §§ (c)(1) or (2) is only available to persons who participated in the administrative proceedings relating to the challenged actions.[22] The DOI argued that since the petitioners' did not participate in the administrative proceedings, the court had no jurisdiction.[23]

The Court found this limit was not jurisdictional but an exhaustion of administrative remedies requirement.[24] The Court looked to Supreme Court decisions that have directed courts to consider similar limits as jurisdictional only if the statute clearly states as much.[25] Since § (c)(3) does not clearly state its limits are jurisdictional, the court had appellate jurisdiction.[26]

Despite this ruling, the Fifth Circuit refused to excuse the petitioners from § (c)(3)(A)'s exhaustion requirement.[27] The petitioners argued that the court should excuse their failure to participate because the DOI had placed information regarding these proceedings in an obscure location on the DOI's website, making the plans difficult to find.[28] The court disagreed and found that the petitioners had failed to fit their excuse into a recognized exception to exhaustion requirements.[29] The court refused to create a new exception because the petitioners had failed to show DOI's actions or omissions had caused their failure to participate, as a reasonably qualified attorney or researcher could find the plans on the DOI site.[30] Moreover, the petitioners failed to argue that they even tried to access the plans unsuccessfully.[31]

Lastly, the court found that the Center's letter to the Secretary of the Interior did not qualify as participation in administrative proceedings that § (c)(3)(A) required. The petitioners argued that the Center's letter urging the Secretary to rescind the DOI's policy of excluding drilling plans from thorough review should satisfy the participation requirement. The court found the letter to be a condemnation of the DOI's policies, not an act of participation.[32] The letter spoke to a general policy and did not specifically refer to any of the challenged plans.[33]

Conclusion

The Fifth Circuit ultimately dismissed the petitioners' challenges.[34] Although the petitioners had standing and the court had appellate jurisdiction, the petitioners failed to comply with the statutory exhaustion requirement. Since the petitioners' excuse fit no recognized exception and the Center's letter was not participation, the court dismissed the challenges.[35]

Michael Cataldo
St. John's University School of Law '13

Endnotes

1. *Gulf Restoration Network v. Salazar*, 10-60411, 2012 WL 1943636 at *1 (5th Cir. May 30, 2012).
2. *Gulf Restoration Network*, 2012 WL 1943636 at *1.
3. *Id.* at *2.
4. *Id.* These four stages are: (1) a five year leasing plan, (2) lease sales, (3) exploration by the lessees, (4) development and production of the leased land. *Id.*
5. *Gulf Restoration Network*, 2012 WL 1943636 at *1.
6. *Deepwater Horizon* was a BP-owned oil rig that exploded in the Gulf of Mexico and spilled 4.9 million gallons of oil into the ocean. *Id.*
7. *Id.*
8. *Id.* The petitioners specifically alleged that the DOI incorrectly excluded the requirement for environmental assessments and impact statements in the challenged plans. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at *4, *quoting Texans United for a Safe Econ. Educ. Fund v. Crown Cent. Petroleum Corp.*, 207 F.3d 789, 792 (5th Cir.2000). An organization has standing when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at *5.
15. *Id.*
16. *Id.* at *6.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. 43 U.S.C. § 1349(c)(2).
22. *Gulf Restoration Network*, 2012 WL 1943636 at *9; *see also* 43 U.S.C. § 1349(c)(3)(A).
23. *Gulf Restoration Network*, 2012 WL 1943636 at *9.
24. *Id.* at *9–10.
25. *Id.* at *10–11.
26. *Id.* at *11.
27. *Id.* at *18–19.
28. *Id.* at *12.
29. *Id.* at *12–13. The recognized exceptions are: the unexhausted administrative remedy would be plainly inadequate, the claimant has made a constitutional challenge that would remain standing after exhaustion of the administrative remedy, the adequacy of the administrative remedy is essentially coextensive with the merits of the claim, exhaustion of administrative remedies would be futile

because the administrative agency will clearly reject the claim, or irreparable injury will result absent immediate judicial review. *Id.* at *14 (citing *Taylor v. U.S. Treasury Dep't*, 127 F.3d 470, 477 (5th Cir.1997).

30. *Id.* at *15.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at *19.
35. *Id.* at *17–19.

* * *

Kirquel Development, LTD. v. Planning Board of Town of Cortlandt, 96 A.D.3d 754 (App. Div. 2d Dep't 2012)

Facts

The petitioner is appealing a judgment from the Supreme Court, Westchester County where he was originally seeking review of the Planning Board of the Town of Cortlandt (the "Planning Board").[1] The petitioner submitted plans to the Planning Board for approval for a 27-lot residential subdivision on a 53-acre site in the Town of Cortlandt.[2] In November 2010, the Planning Board, the lead agency for the purposes of the State Environmental Quality Review Act (SEQRA), issued a determination that the project would have a significant impact on the environment such as numerous steep slopes, the existence of wetlands, and the inclusion of the site in a biodiversity corridor.[3]

Procedural History

Over the next few years, hearings were held on the environmental impact statements, which ultimately led to the Planning Board approving the project.[4] However, the approval was only for 16 lots, not the original 27 desired by the petitioner, in addition to other conditions.[5] The petitioner filed a proceeding seeking review of the Planning Board's determination under CPLR Article 78, which, if the court finds for the petitioner, would direct the Planning Board to approve a 21-lot plan, in addition to invalidating 7 of the conditions.[6]

Issue

Whether the agency procedures were lawful and whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned explanation of the basis for its determination.[7]

Rationale

The court found that it is not the role of the courts to weigh the desirability of any action or choose among alternatives, as the statute's purpose is to focus the agency decision makers' attention on environmental concerns.[8] Furthermore, an agency's decision should only be repealed if it is arbitrary and capricious, an abuse of discretion, or affected by an error of law.[9] Lastly, the court determined that so long as there is a reasonable relationship between the problem that must be alleviated and the application concerning the property, the Planning Board is of the authority to impose certain conditions upon subdivision approval.[10]

Conclusion

The court ruled in favor of the Planning Board, finding that not only was the decision of the Planning Board not arbitrary and capricious, but, given the environmental constraints of the site led to a rational determination.[11] Further, SEQRA does not require the agency to take a "hard look" at the economic feasibility of the project.[12] The "hard look" required by the statute is meant only for the relevant areas of environmental concern imposed by the project, not the economic viability of the project.[13] The court also ruled that the conditions required by the Planning Board for the lot approval were proper, and not an unconstitutional delegation of authority.[14]

Allison Gold
Albany Law School '14

Endnotes

1. *Kirquel Dev., Ltd. v. Planning Bd. of Town of Cortlandt*, 96 A.D.3d 754, 754 (App. Div. 2d Dep't 2012).
2. *Id.*
3. *Id.* at 755.
4. *Id.* at 754–55.
5. *Id.*
6. *Id.* at 755.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 756.
11. *Id.*
12. *Id.* at 755–56.
13. *Id.* at 755.
14. *Id.* at 756.

* * *

League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Serv., 11-35451, 2012 WL 30648721689 F.3d 1060 (9th Cir. 2012)

Facts

In 1931, the Forest Service established the Pringle Falls Experimental Forest within the Deschutes National Forest in the Eastern Cascades of Oregon. The experi-

mental forest was created as "a center for silviculture, forest management, and insect and disease research in ponderosa pine forests."[1] In 2005, the Service observed that the trees in a section of the Experimental Forest had "grown to such an extent that their density put them at risk of beetle infestation and wildfire."[2] The concern was for "ongoing and future research projects" which would be compromised as a result of infestation and wildfire.[3] In 2007, the Service developed a Study Plan entitled "Forest Dynamics After Thinning and Fuel Reduction in Dry Forests."[4] This project "would reduce the fire and insect risk…while simultaneously addressing scientific objectives."[5] The Study Plan was discussed with interested groups and the Service hosted two field trips to the section of the forest at issue; the League attended the first field trip. In March 2010, the Service issued the Environmental Impact Statement (EIS) for the Project as required under the National Environmental Policy Act (NEPA). The EIS identified the purpose of the project as risk reduction and research and evaluated various alternatives to address the purpose—three alternatives were discussed in detail, and six less relevant alternatives were discussed briefly. The Service then published a Record of Decision which stated the alternative it had chosen and why. The alternative the Service selected involved logging the most trees of the three proposals but concluded that it was best suited for the project mission; this alternative met the target "stand density" for reducing the risk of infestation and wildfire.[6] In 2010, the League filed suit alleging the EIS for the project failed to comply with NEPA.

Procedural History

The court below granted summary judgment in favor of the Service. Petitioners here appealed.

Issue

Did the EIS submitted by the Service fail to comply with NEPA based on deficiencies in the purpose and need of the project, the proposed alternatives, scientific integrity, and environmental impact?

Rationale

An EIS under NEPA must "inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment."[7] The analysis of alternatives in the EIS is "the heart of the environmental impact statement."[8] The scope of alternatives in the EIS "depends on the underlying 'purpose and need'…for the proposed action" and the "agency need only evaluate alternatives that are 'reasonably related to the purpose of the project.'"[9]

The first allegation by the League was that "the EIS improperly cabins its analysis by specifying a limited purpose and need for the Project, and by considering only Project alternatives that fit predetermined specifications contained in the study plan."[10] The League argued that the Service did not consider a reasonable alternative that would have saved trees with a diameter greater than 12 inches. The Service, however, eliminated this proposal from the study plan because it would not achieve target "stand densities." The League argued that this alternative satisfied an "unreasonably narrow purpose and need" and that the EIS incorporates "rigid implementation of the Study Plan."[11]

The court stated that the Project's purpose and need is derived from federal statutes which vest authority in the Service to carry out experiments that it "deems necessary."[12] In addition, the statutes identify areas of research such as "protecting vegetation and other forest and rangeland resources from fires, insects and diseases."[13] In light of federal acts, the discretion that has usually been afforded to agencies in this area, and the Project's location in the Experimental Forest, the court concluded that the statement of purpose and need in the EIS was reasonable.[14] Therefore, the only alternatives requiring detailed discussion in the EIS are those that would meet the stated purpose and need.

The second allegation by the League was that the EIS lacked scientific integrity because it overstated the risk of beetle infestation and wildfire as well as failed to acknowledge that greater tree mortality would occur under the Project than with no action.[15] However, the conclusion of the Study Plan, which underwent both internal and external peer review, determined that trees in the area "currently have structural characteristics which place them at imminent risk of catastrophic loss to bark beetles."[16] The court did not find convincing evidence that the Service misrepresented scientific literature in asserting the risk facing the area.

The third allegation was that the Service did not take a "'hard look' at the potential environmental consequences of the proposed action…by considering all foreseeable direct and indirect impacts."[17] The environmental impact the League referred to is overall tree mortality and impact on snag-dependent species.[18] The court determined that the Service's analysis—an initial decrease in snag creation would result in larger snags—constitutes a "hard look under our precedent."[19]

Finally, "The EIS considers in detail a reasonable range of alternatives that would fulfill both of the projects goals by reducing risk of wildfire and beetle infestation… [and] is adequately supported by scientific data and takes a hard look at the significant impacts of the project."[20]

Anna Livshits
St. John's University School of Law '15

Endnotes

1. *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Serv*., 689 F.3d 1060, 1065 (9th Cir. 2012).
2. *Id.*
3. *Id.* at 1066.
4. *Id.*
5. *Id.*
6. *Id.* at 1072.
7. *Id.* at 1068.
8. *Id.* at 1069.
9. *Id.* at 1072.
10. *Id.* at 1068.
11. *Id.* at 1070.
12. *Id.*
13. *Id.*
14. *Id.* at 1071.
15. *Id.* at 1073.
16. *Id.*
17. *Id.* at 1075.
18. A snag-dependent species is one that depends on standing dead trees. Id. at 1076.
19. *Id.* at 1077.
20. *Id.*

* * *

Louisiana Environmental Action Network v. City of Baton Rouge; Parish of East Baton Rouge, 677 F.3d 737 (5th Cir. 2012)

Facts

On November 13, 2001, the United States and the State of Louisiana filed an enforcement action against the City of Baton Rouge (the "City") and the Parish of East Baton Rouge (the "Parish"), alleging that three wastewater treatment plants, owned by the City and Parish, violated their National Pollutant Discharge Elimination System (NPDES) permits and the Clean Water Act (CWA).[1] On March 15, 2002, the district court entered a consent decree (the "2002 consent decree") whereby the City and Parish were required to "implement extensive, physical remedial measures according to 'applicable schedules.'"[2] The consent decree also provided for less stringent effluent limitations than those set out in the NPDES permits.[3] In 2007, the EPA and Louisiana Department of Environmental Quality (LDEQ) approved a plan submitted by the City and Parish wherein the City and Parish proposed to complete all construction and achieve fully operational status of its wastewater facilities by January 1, 2015.[4] In April 2009, the district court approved a modification of the 2002 consent decree allowing the January 2015 compliance date.[5]

Procedural History

The plaintiff non-profit organization filed a citizen suit against defendants City and Parish, alleging violations of the CWA.[6] Defendants filed a motion to dismiss, asserting that the citizen suit was barred under 33 U.S.C. § 1365(b)(1)(B), the "diligent prosecution provision."[7] The U.S. District Court for the Middle District of Louisiana granted the dismissal, but on the ground that the 2002 consent decree mooted plaintiff's claims.[8] The plaintiff non-profit appealed.[9]

Issues

(1) Whether a plaintiff's action is rendered moot when it files a citizen suit after the entry of a consent decree between defendants and the United States?

(2) Whether the Clean Water Act's "diligent prosecution provision" is jurisdictional?

Rationale

In *Environmental Conservation Organization v. City of Dallas*,[10] the Fifth Circuit held that "where the entry of a consent decree occurred after the filing of a CWA citizen suit, the citizen suit is rendered moot unless the… plaintiff 'proves that there is a realistic prospect that the violations alleged in its complaint will continue notwithstanding the consent decree.'"[11] The district court applied this standard to the present case and found that, because defendants had asserted that they are in compliance with the conditions of the 2002 consent decree, the plaintiff could not meet the "reasonable prospect" test.[12] The Court of Appeals stated that in *City of Dallas* it recognized that developments subsequent to the filing of a citizen suit may moot the citizen's case since such circumstances may eliminate the actual controversy that was previously suitable for determination.[13] Because neither party argued that any circumstances subsequent to the filing of the citizen suit had rendered the suit moot, the court held that the district court erred in applying the *City of Dallas* standard to the present case.[14]

On appeal, the defendants urged the court to affirm the district court ruling dismissing the action because the "diligent prosecution" provision of the CWA "is jurisdictional and therefore strips the district court of subject matter jurisdiction to hear the case."[15] The Court of Appeals looked to Supreme Court cases, which provide guidance on determining whether a provision is jurisdictional, and found that "claim-processing rules" are among the types of rules that are non-jurisdictional.[16] In analyzing whether the "diligent prosecution" provision is jurisdictional, the Court of Appeals followed the Supreme Court's bright line rule: "A provision is jurisdictional '[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional."[17] The court concluded

that the text of the provision does not clearly state that it is jurisdictional and, therefore, Congress has not clearly mandated that the provision is jurisdictional.[18] The court also stated that the notice provision of the CWA citizen suit provision is a typical "claim-processing rule," and concluded that the placement of the "diligent prosecution" provision in the "Notice" section suggests that Congress intended the "diligent prosecution" bar to be a claim-processing rule as well.[19] The court considered the fact that the provision is located separate from provisions granting federal courts subject-matter jurisdiction over claims, further indicating Congress did not intend the provision to be jurisdictional.[20]

Conclusion

The court reversed the district court's decision to dismiss the action, finding that the consent decree did not render plaintiff's action moot.[21] The court also held that the "diligent prosecution" bar is a nonjurisdictional limitation on citizen suits and remanded the case to the district court to answer the question of whether the provision precludes the plaintiff's action.[22]

Abigail Sardino
Albany Law School '14

Endnotes

1. *La. Envtl. Action Network v. City of Baton Rouge*, 677 F.3d 737, 741 (5th Cir. 2012).
2. *Id.*
3. *Id.*
4. *Id.* at 741-42.
5. *Id.* at 742.
6. *Id.* at 739, 742.
7. *Id.* at 739.
8. *Id.*
9. *Id.*
10. *Envtl. Conserv. Org. v. City of Dallas*, 529 F.3d 519, 524 (5th Cir. 2008).
11. *La. Envtl. Action Network*, 667 F.3d at 744.
12. *Id.*
13. *Id.* at 745.
14. *Id.* at 744-45.
15. *Id.* at 745.
16. *Id.* at 746-47.
17. *Id.* at 747 (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 502 (2006)).
18. *Id.* at 747-48.
19. *Id.* at 748.
20. *Id.* at 748-49.
21. *Id.* at 745, 750.
22. *Id.* at 749-50.

* * *

Minnesota v. BNSF Railway Co., 686 F.3d 567 (8th Cir. 2012)

Facts

BNSF Railway owned and operated a property in Brainerd, MN from the 1880s until 1983.[1] During that hundred-year window, the property suffered extensive pollution including lead contamination of the soil.[2] The property subsequently changed hands several times before the Northern Pacific Center, Inc. (Center) purchased it in 1992.[3] After BNSF's initial sale of the property, the State declared the property a Superfund site.[4]

The State identified BNSF as the responsible party for the contamination.[5] The railway negotiated a cleanup plan that would reduce the lead contamination to a level that was considered acceptable for commercial property.[6] In 2000, BNSF began the cleanup of the property based on a State-approved final remediation plan design.[7] BNSF's remedial action reduced the lead content to 14000 mg/kg.[8] In 2002, the State notified BNSF that it had met its obligations under the cleanup plan.[9]

Subsequent to this cleanup, the Center began a process of redevelopment.[10] As indicated in the cleanup plan, the property was initially developed for commercial and industrial use.[11] The State Department of Health (DOH) indicated that although the remediation had been a success on its own terms, the parties had failed to plan for the lead contamination reduction to levels that the EPA would consider "health protective."[12] The DOH recommended that future development include more soil remediation with a goal of reducing lead levels by half.[13] As part of the Center's redevelopment plan, they removed more soil to reduce lead rates to 700 mg/kg and successfully petitioned to have the property delisted from Superfund status.[14]

Procedural History

Despite the state certification that BNSF had met its remediation obligations, the Center and the state brought a proceeding in Minnesota state court against BNSF under Minnesota's CERCLA statute, the Minnesota Environmental Response and Liability Act (MERLA), in 2006.[15] The suit sought to recover the costs of the cleanup that occurred since 2002 as part of the Center's redevelopment plan of the site.[16] BNSF disputed this claim, arguing that MERLA only held BNSF liable to private parties for remediation of pollution and not for removal of polluted material.[17]

BNSF successfully removed the case from Minnesota state court to the federal district court.[18] The district court twice granted the respondent's motion to dismiss.[19] The first motion was granted against the petitioners' common law tort claim on statute of limitations grounds.[20] Subse-

quently, the district court granted the motion against the MERLA claim.[21] The petitioners appealed this decision.[22]

Issue

Does the distinction in the MERLA statute between "removal" and "remedial" preclude the petitioners from making a claim for recovery against BNSF?

Rationale

The petitioners' argument hinges on whether or not the cleanup actions they undertook following the 2002 letter were removal actions.[23] Under the law, a government entity can recover costs of both removal and remedial actions.[24] However, nongovernmental entities can only recover "necessary removal costs."[25]

The circuit court agreed with the district court, holding that "removal actions" are more "preliminary or temporary" than "remedial actions."[26] The statute's definition for removal indicates this immediacy.[27] It describes removal actions in terms of prevention and response to immediate threats, whereas remedial actions are described using more permanent terms.[28]

Although little case law existed to support this distinction, BNSF pointed to similarities between MERLA and the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) upon which the former was modeled.[29] CERCLA contains "definitions of removal and remedial that are nearly identical to those used in MERLA."[30] The established CERCLA jurisprudence shows that removal actions are to "counter imminent and substantial threats" whereas "remedial actions are longer term."[31]

Having established the distinction between the two terms, the court held that the Center's actions were of a remedial nature, and thus it could not recover costs from BNSF.[32] Although lead does pose certain health risks, the DOH had concluded for the Center that the levels present on the site were not likely to pose an imminent threat.[33] Additionally, the actions taken by the Center were for development purposes, e.g., to delist the site from superfund to attract potential purchasers.[34] These type of long-term cleanup activities fall squarely under the rubric of "remedial" and not "removal actions."[35]

Conclusion

The court concluded that the scope of the actions in question was long-term, and that the petitioners could not recover their expenses under MERLA (and by extension its federal corollary, CERCLA). Thus, the court affirmed the district court's grant of summary judgment in favor of BNSF.[36]

Stewart Forbes
SUNY Buffalo Law School '13

Endnotes

1. *Minnesota v. BNSF Rwy. Co.*, 686 F.3d 567, 569 (8th Cir. 2012).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 570.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 570-71.
15. *Id.* at 571.
16. *Id.*
17. *Id.* at 571-72.
18. *Id.* at 571.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* (*quoting* Minnesota Environmental Response and Liability Act, Minn. Stat. § 115B.04, subdiv. 1(1); § 115B.02, subdiv. 18).
25. *Id.* (*citing* Minn. Stat. § 115B.04, subdiv. 1(2)).
26. *Id.* at 573.
27. *Id.*
28. *Id.* at 572-73.
29. *Id.* at 573.
30. *Id.*
31. *Id.* (*citing Morrison Enters., LLC v. Dravo Corp.*, 638 F.3d 594, 608 (8th Cir. 2011).
32. *Id.* at 574.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 575.

* * *

Natural Resources Defense Council, Inc., et al. v. United States Food and Drug Administration, et al., No. 11 CIV. 3562 THK, 2012 WL 1994813 (S.D.N.Y. June 1, 2012)

Facts

On March 9, 1999, a Citizen Petition ("1999 Petition") was submitted to the United States Food and Drug Administration (FDA) requesting that the agency withdraw approvals for subtherapeutic uses in livestock of any antibiotic used in human medicine.[1] The FDA issued two

tentative responses, stating it required additional time to consider the issues raised in the 1999 Petition, explaining that withdrawal proceedings could consume extensive agency resources.[2] On April 7, 2005, a second Citizen Petition ("2005 Petition") was submitted to the FDA requesting that the agency withdraw approvals for herdwide/flockwide uses of certain antibiotics in chicken, swine, and beef cattle for certain subtherapeutic purposes such as growth promotion.[3] The FDA issued a tentative response to that Petition explaining, again, that withdrawal proceedings would consume extensive agency resources.[4] The FDA did not issue a final response for either the 1999 or the 2005 Citizen Petition until November 7, 2011, during the pendency of the present action.[5] The FDA's final responses to the 1999 and 2005 Petitions denied the petitioners' requests, essentially stating that it was pursuing different strategies "to promote the judicious use of antibiotics in food-producing animals" and that withdrawal proceedings would consume extensive periods of time and resources.[6]

Procedural History

On May 25, 2011, plaintiffs filed an action against the FDA for failure to issue a final response to the two Citizen Petitions.[7] After receiving responses to the Petitions from the FDA on November 7, 2011, the plaintiffs withdrew their claim as moot.[8] On February 1, 2012, plaintiffs filed a supplemental complaint, alleging that the FDA's final responses denying the Petitions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[9] The parties cross-motioned for summary judgment.[10]

Issue

Whether the FDA's final responses to the 1999 and 2005 Citizen Petitions were arbitrary, capricious, or otherwise not in accordance with the law, when the FDA cited cost, time, and Agency resources as their main reasons for denying the petitions?

Rationale

The defendants argued "that the FDA's denial of the Petitions was an action 'committed to agency discretion by law' and thus outside the scope of judicial review."[11] The court stated that enforcement actions are outside the bounds of judicial review, because they are presumptively committed to agency discretion by law, however, initiating the withdrawal of approval of a new animal drug is not an enforcement action, but is more akin to informal rulemaking.[12] Furthermore, the court found that there were standards and law to apply in this case and, therefore, the FDA's denials of the Petitions were subject to judicial review.[13]

In determining whether the FDA's denials to the Petitions were arbitrary and capricious, the court looked to the Food, Drug, and Cosmetic Act (FDCA), which provides that the FDA's decision whether to initiate formal withdrawal proceedings must be based on an evaluation of the "…scientific evidence of a drug's safety."[14] The court noted the FDCA does not indicate that costs of the withdrawal proceedings are to be taken into account.[15] Yet, the final responses to both Petitions cited two grounds for denying the Petitions: (1) the time and expense required, and (2) the non-binding voluntary measures the FDA had adopted to promote the judicious use of antibiotics in animals.[16] The court determined that neither of those grounds provided a reasoned justification for the FDA's refusal to initiate withdrawal proceedings, suggesting that "[d]enying the Petitions on the grounds that it would be too time consuming and resource-intensive to evaluate each individual drug's safety, and withdraw approval if a drug was not shown to be safe, is arbitrary and capricious."[17] The fact that withdrawal proceedings may be costly was not, the court advised, a reason for the FDA to shirk its duty to analyze whether a drug is safe and effective.[18] The court stated that while the Petitions' administrative records containing numerous scientific studies was over three thousand pages in length, the FDA did not address the scientific evidence in its responses, and there was no evidence that the FDA performed any risk or safety assessments of the petitioned drugs.[19] In regards to the adoption of a voluntary program to address the concerns of antibiotic health risks in food-producing animals, the court determined a voluntary program is outside the statutory regulatory scheme and "does not excuse the Agency from its duty to review the Citizen Petitions on their merits."[20]

Conclusion

Because the "FDA failed to offer a reasoned explanation, grounded in the statute, for its refusal to initiate withdrawal proceedings," the court granted plaintiffs' motion for summary judgment, denied defendants' motion for summary judgment, and remanded the matter to the FDA for further proceedings.[21]

Abigail Sardino
Albany Law School '14

Endnotes

1. *Natural Res. Def. Council v. F.D.A.*, 11 CIV. 3562 THK, 2012 WL 1994813, at *4 (S.D.N.Y. June 1, 2012).
2. *Id.* at *5.
3. *Id.* at *6.
4. *Id.* at *6-7.
5. *Id.* at *5, 7.
6. *Id.* at *15.
7. *Id.* at *9.
8. *Id.*
9. *Id.*
10. *Id.*

11. *Id.* at *10.
12. *Id.* at *10-12.
13. *Id.* at *14.
14. *Id.*
15. *Id.* at 15.
16. *Id.*
17. *Id.* at *16.
18. *Id.*
19. *Id.*
20. *Id.* at *18.
21. *Id.* at *9.

* * *

Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 2012 WL 4215921 (9th Cir. 2012)

Facts

Appellants, the Native Village of Kivalina and City of Kivalina ("Kivalina"), are a federally recognized tribe and Alaskan municipality.[1] Collectively they occupy an area at the tip of a barrier reef along Alaska's northwestern coast line.[2] Kivalina's location makes it susceptible to erosional forces.[3] Sea ice, which protects the Appellant's land from erosion, has diminished over recent years.[4] As a result of diminished sea ice, over several decades the land has been washed out from beneath Kivalina.[5] Kivalina attributes the diminishment of ice to global warming brought on by greenhouse gas emissions.[6] Appellees ("Energy Producers") are energy companies that Kivalina alleges emit massive amounts of greenhouse gases that cause global warming.[7]

Procedural History

In District Court for the Northern District of California, Kivalina brought a federal common law claim for damages under a theory of public nuisance against the Energy Producers, individually and collectively.[8] Kivalina also brought an independent conspiracy and concert claim against the Energy Producers.[9] They claimed the Energy Producers acted in concert to maintain global warming despite scientific evidence to the contrary.[10] Finally, Kivalina brought a state law nuisance claim in the alternative to the federal common law nuisance claim.[11]

The district court granted the Energy Producers' motion to dismiss for lack of subject matter jurisdiction.[12] The Energy Producers argued Kivalina presented a nonjusticiable political question and lacked Article III standing.[13] On the political question doctrine, the district court held there was "insufficient guidance as to the principles or standards" to be applied by the court to resolve the claim.[14] It also reasoned that a resolution in favor of Kivalina would also determine the acceptable levels of greenhouse gas emissions, which was best left to the executive and legislative branches.[15] On Article III standing, the court held Kivalina failed to demonstrate a "substantial likelihood" that the Energy Producers caused Kivalina's injuries or that their actions were the "seed" of the injuries.[16] The court also declined to exercise supplemental jurisdiction over the state law claim and dismissed without prejudice.[17] The Ninth Circuit reviewed de novo the district court's dismissal for lack of subject-matter jurisdiction.[18]

Issue

Do the Clean Air Act or Environmental Protection Agency actions which displace claims for injunctive relief also displace damage claims?

Rationale

The Ninth Circuit began its analysis of Kivalina's standing with a three-part analysis of the federal common law.[19] First, it found that federal common law still exists for claims founded on the theory of public nuisance.[20] In a post-*Erie*[21]era, the Supreme Court limited federal common law to those areas, in which Congress has acted, within its Constitutional authority, or where the Constitution demands remedy from the federal common law.[22] One such area is that of environmental law relating to interstate movements of air and water pollutants.[23] Thus, in the general subject area of environmental law a public nuisance claim may be brought under federal common law.[24]

Then the court examined how the federal common law may be limited by Congress.[25] A court may be compelled to answer a federal common law public nuisance claim only if no answer may be found in the statutes.[26] In answer found in the statutes excludes the federal common law when it speaks directly to the issue and offers a sufficient legislative solution.[27]

Finally, the court held the Clean Air Act displaced Kivalina's public nuisance claim.[28] It found direct Congressional action towards the issue of greenhouse gases, the Clean Air Act, already displaced federal common law for injunctive relief.[29] The court expanded the "doctrine of displacement" to exclude damages from the federal environmental common law.[30] It concluded that when legislative action displaces a cause of action, the displacement extends to all remedies.[31] Thus, the action of Congress and the EPA towards regulating greenhouse gases displaced any federal common law remedies for Kivalina's public nuisance claim.[32]

Conclusion

The Ninth Circuit affirmed the district court's dismissal for lack of standing.[33] The court held that Kivalina lacked standing because Congress displaced the cause of

action through the Clean Air Act.[34] Further, it dismissed Kivalina's conspiracy claims after Kivalina conceded the claim dependant on the public nuisance claim.[35] The court's decision effectively removes federal common law remedies from environmental law claims.

Concurrence by Judge Pro

Judge Pro concurred with the majority but wrote further examining if displacement of injunctive relief displaces damages claims.[36] The judge performed an extensive analysis of the relevant case law discussed by the majority to find that the Congress displaced Kivalina's public nuisance claim.[37] Judge Pro also examined the district court's lack of standing finding.[38] The judge found that Kivalina failed to meet its burden showing it could "plausibly" trace their injuries to the Energy Producers.[39]

Mark Houston
Albany Law School '14

Endnotes

1. *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 2012 WL 4215921, *1 (9th Cir. 2012).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at *2, *6.
9. *Id.*
10. *Id.*
11. *Id.* at *6.
12. *Id.* at *2.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at *2, *6.
18. *Id.* at *2.
19. *Id.* at *3-*7.
20. *Id.* at *3.
21. 304 U.S. 64, 78, 58 S.Ct. 817 (1938).
22. *Kivalina* at *3 (*quoting American Electric Power Co. ("AEP"), Inc. v. Connecticut*, 131 S.Ct. 2527, 2535 (2011) (Ginsburg, J.) (*quoting* Friendly, In Praise of Erie—And of the New Federal Common Law, 39 N.Y.U. L. Rev 383, 408 n.119, 421-22 (1964)).
23. *Id.* at *3 (*citing Illinois v. City of Milwaukee ("Milwaukee I"*), 406 U.S. 91, 103, 92 S.Ct. 1385 (1972)).
24. *Id.* at *3.
25. *Id.* at *4.
26. *Id.* (*citing City of Milwaukee v. Illinois* ("*Milwaukee II*"), 451 U.S. 304, 314, 101 S.Ct. 1784 (1981)).
27. *Id.* (*citing AEP*, 131 S.Ct. at 2537; *Milwaukee I*, 406 U.S. at 101).
28. *Id.* at *4-*6.
29. *Id.* at *4 (*citing* AEP, 131 S.Ct. at 2530, 2537).
30. *Id.* at *4-*5.
31. *Id.* at *5 (*citing Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 4, 101 S.Ct. 2615 (1981); *Milwaukee II*, 451 U.S. at 314).
32. *Id.* at *5-*6.
33. *Id.* at *6.
34. *Id.*
35. *Id.*
36. *Id.* at *6.
37. *Id.* at *7-*14.
38. *Id.* at *14.
39. *Id.* at *15-*17.

* * *

Native Village of Point Hope v. Salazar, 680 F.3d 1123 (9th Cir. 2012)

Facts

In 2003, Shell Offshore Inc. (Shell) became the leaseholder of a portion of the outer continental shelf off of the coast of Alaska in order to explore and possibly develop the resources, namely oil and gas, which it contains.[1] Because of various procedural and legal issues, it has yet to begin exploration of the area.[2] Shell leased this right from Mineral Management Service (MMS) in accordance to the Outer Continental Shelf Lands Act (OSCLA).[3] In accordance with OSCLA, Shell submitted an exploration plan to the Bureau of Ocean Energy Management (BOEM) and the oil spill response plan to the Bureau of Safety and Environmental Enforcement (BSEE).[4] BOEM approved Shell's plan on August 4, 2011 subject to eleven conditions, and BSEE approved the oil spill response plan on March 28, 2012.[5]

Procedural History

Petitioners, Native Village of Point Hope, submitted expedited petitions to the Ninth Circuit Court of Appeals challenging BOEM's approval of Shell's revised exploration plan in order to halt the execution of that plan. Under section 706 of Administrative Procedure Act (APA), BOEM's decision can only be overturned if it is "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"[6]

Issues

(1) Whether BOEM incorrectly approved Shell's exploration plan because it did not reference an approved oil spill response plan and did not contain sufficient information regarding the well-capping stack and containment system as required by OSCLA.

(2) Whether BOEM is required to reconcile the conflicting information from Shell's past exploration plans about well-capping technology and the time it takes to drill a relief well in the event of an oil spill or well blow out.

(3) Whether BOEM is permitted to approve an exploration plan which is subject to conditions.

Rationale

The petitioners claim that because Shell's oil spill response plan was not yet approved by BSEE at the time BOEM approved the exploration plan, BOEM's approval is invalid.[7] However, it did not matter that the oil spill response plan was approved by BSEE after the submission of the exploration plan.[8] Because the oil spill response plan was approved, there cannot be a valid argument negating the approval of the exploration plan based on this.[9] In regards to the information about the well-capping stack and containment system, OCSLA gave BOEM the power in determining the sufficiency of the details required in each plan. Because it is reasonable for BOEM to "conclude that the exploration plan provided an adequate description and discussion of the technology," it is not possible to override BOEM's decision on the subject.[10]

Contrary to the assertion of the petitioners, OSCLA does not require BOEM to reconcile every inconsistency in a plan; BOEM is given broad powers of approval for exploration plans.[11] In this particular situation, the first exploration plan was never adopted or approved, and therefore, BOEM had no obligation whatsoever to consider the first plan when making the decision to approve the new exploration plan.[12] Even if BOEM was required to consider the change in Shell's position regarding the well-capping stack and containment system, it would not change the overall decision because it is not the only safety measure in place in the case of an oil spill.[13] In addition, evidence now supports the use of well-capping stack and containment systems in the Arctic.[14] Overall, BOEM's decision to accept this evidence should be respected. In addition, BOEM is not required to probe into Shell's assertion that the time to drill an emergency well will be faster than any other well.[15] BOEM's decision not to explore this is completely within its scope of power and expertise.[16]

BOEM approved Shell's exploration plan subject to conditions.[17] The petitioners claim that this is not valid fails because BOEM's interpretation of the regulations is controlling.[18] Since BOEM, in this situation, allowed for the approval subject to conditions, it is permitted.[19] Also, the conditions required by BOEM, including seeking other authorizations before exploration begins, mirrors requirements set forth in OSCLA.[20]

Conclusion

The court rejected the petitioners' challenge of the BOEM's approval of Shell's plan for exploration because BOEM's decision is determined to fall within the requirements set forth by OCSLA.[21]

Kathryn Swimm
St. John's University School of Law '14

Endnotes

1. *Native Village of Point Hope v. Salazar*, 680 F.3d 1123, 1128 (9th Cir. 2012).
2. *Id.*
3. *Id.* at 1126.
4. *Id.* at 1128.
5. *Id.* at 1129.
6. *Id.* (quoting 5 U.S.C. § 706(2)(A)).
7. *Id.* at 1130.
8. *Id.*
9. *Id.*
10. *Id.* at 1132.
11. *Id.* at 1133.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 1134.
16. *Id.*
17. *Id* at 1129.
18. *Id* at 1134.
19. *Id.*
20. *Id.*
21. *Id.* at 1135.

* * *

New York v. Nuclear Regulatory Comm'n, 681 F.3d 471 (D.C. Cir. 2012)

Facts

In a 1979 D.C. Court of Appeals decision, the Nuclear Regulatory Commission ("NRC") was required to publish a Waste Confidence Decision ("WCD") on whether "an off-site storage solution [for spent fuel] will be available by…the expiration of the plants' operating licenses" or whether there was "reasonable assurance that the fuel can be stored safely at the sites beyond those dates."[1] The NRC developed the WCD, outlining five "Waste Confidence Findings," which declared that: 1) safe disposal in a mined geologic repository is technically feasible, 2) such a repository will be available by 2007–2009, 3) waste will be managed safely until the repository is available, 4) SNF can be stored safely at nuclear plants for at least thirty years beyond the licensed life of each plant, and 5) safe, independent storage will be made available if needed.[2]

The NRC reviewed the WCD in 1990 updating to reflect new waste disposal techniques, and again in 1999 making no changes.[3] In 2010, the NRC revised item 2 to say suitable storage will be available "when necessary," thus removing the deadline of a specific date.[4] The NRC found that although a repository had yet to be constructed, there would be proper storage available in the future for SNF when it no longer could be stored on site.[5] The NRC also changed item 4, increasing the time SNF can be stored safely from thirty to sixty years.[6] The NRC concluded that past leaks of SNF storage sites only had "negligible near-term health effects" and that the latest regulatory updates would better protect against future leaks.[7]

The Petitioner, State of New York, alleged that the NRC violated the "National Environmental Policy Act of 1969 ("NEPA") by not performing an Environmental Impact Statement ("EIS") or an "Environmental Assessment" ("EA") on long-term storage of SNF before making the above changes.[8] The Respondent, NRC, argued that it did perform the necessary environmental assessments in constructing the WCD and that it was not necessary for the Commission to perform an EIS or EA.[9]

Issue

NEPA requires that before taking a major Federal action significantly affecting the quality of the human environment an EIS or EA must be prepared. The NRC doubled the length of safe storage time for SNF from thirty to sixty years, in addition to removing an established deadline for providing a secure long-term storage solution. Is the NRC required to perform an EIS or EA under NEPA prior to amending the WCD?

Rationale

The Court held that the NRC was required to perform an EIS or an EA prior to changing the SNF rules because the licensing or relicensing of nuclear facilities "significantly affect[s] the quality of the human environment."[10] The Petitioner argued that because the WCD findings are a predicate to all licensing or relicensing procedures and the findings are not challengeable at the time of the licensure, the WCD is a major federal action that requires an EIS or EA.[11] The NRC conversely argued that the revisions were not a major action because the WCD does not authorize licensing of facilities and that site-specific EISs would be conducted when determining eligibility for licenses anyway.[12] The NRC argued that in preparing the WCD it "crafted the WCD to account for" societal and political risks and that a specific date in Finding 2 is not required under NEPA.[13] Further, the NRC argued that the WCD was simply an answer to the mandate in *Minnesota v. NRC*, and that the finding's only purpose was to provide assurance that facilities were being licensed while long-term storage of SNF was available.[14]

The District of Columbia Court of Appeals rejected the NRC's arguments. The Court found that the WCD was used to enable licensing decisions and made general conclusions about the environmental effects of storing SNF that would be considered in future licensing decisions.[15] The court concluded that because of the significance of the WCD findings in determining the licensing facilities, amending the WCD was a major federal action as defined by the Council on Environmental Quality under NEPA.[16] The Court held that under NEPA, an agency must look at both the probabilities of potentially harmful events and the consequences if such events occur and here the NRC failed to do so.[17] The NRC can only avoid the requirement of analysis of consequences if the harm in question is so "remote and speculative," where the probability of occurrence is zero.[18]

Conclusion

The Court held that a more thorough analysis of the consequences of the WCD Update is needed.[19] The Court acknowledged that the NRC was conducting an EIS currently and that future rulemaking would potentially correct the issue identified in this case.[20] The 2010 WCD revisions were vacated and the case was remanded for further proceedings.

Dustin Howard
Albany Law School '14

Endnotes

1. *N.Y. v. Nuclear Regulatory Comm'n*, 681 F.3d 471, 474–75 (D.C. Cir. 2012) (*quoting Minnesota v. NRC*, 602 F.2d 412, 418 (D.C. Cir. 1979)).
2. *Id.* at 475 (*citing* 49 Fed. Reg. 34,658, 34,659–60 Aug. 31, 1984).
3. *Id.* (*citing* Waste Confidence Decision Review: Status, 64 Fed. Reg. 68,005, 68,006–07 Dec. 6, 1999).
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 476.
9. *See id.*
10. *Id.* (*quoting* 42 U.S.C. § 4332(2)(C)).
11. *Id.*
12. *Id.*
13. *See id.* at 478.
14. *Id.* at 476.
15. *Id.* at 477.
16. *Id.* at 476.
17. *See id.* at 478; *see also id.* (*citing Baltimore Gas and Elec. Co. v. NRDC*, 462 U.S. 87, 100 1983).
18. *Id.* at 482.
19. *See id.* at 483.
20. *Id.*

* * *

Open Space Council, Inc. v. Town Board of the Town of Brookhaven, 2012 WL 3561108 (N.Y. Sup. Ct. 2012)

Facts

A planned development, the Meadows at Yaphank, was proposed to include commercial space for retail, office and private use.[1] The Town Board of the Town of Brookhaven ("the Town Board") approved plans that would build 850 residential units and 1,032,500 square feet of commercial space. The site would also include a wastewater treatment plant.

Diane Schneider, who was found to have standing to bring a petition against the Town Board in a 1997 decision, lives in a condominium within a half-mile of the proposed Meadows site. She is a member of the Open Space Council, an environmental advocacy group "concerned with environmental protection, preservation of open space and educating the public in the Town of Brookhaven."[2]

On July 20, 2010, the Town Board gave permission for the change of zoning for the Meadows project. The zoning change required preparation of a Draft Generic Environmental Impact Statement (DGEIS) because of the project's potential environmental impact. Before the project could be approved, the developer was required to undergo a formal scoping process and public scoping meeting.

The Town Board accepted the DGEIS as complete on April 12, 2011. Through June 2011, the Town Board allowed written public and agency comments. These comments were discussed in the Final Generic Impact Statement (FGEIS). The FGEIS was adopted on August 16, 2011. A notice of its adoption was published in the Environmental Notice Bulletin and given to those interested. The resolutions for adoption of the FGEIS were finalized at a hearing on October 4, 2011. At the same time, Petitioners submitted their objections to the Town Board's FGEIS.

Procedural History

An Article 78 proceeding, brought by individual community members, challenging the rezoning of the Meadows at Yaphank on the grounds that environmental concerns were not considered before the Town Board's proposal, was dismissed by the trial judge for lack of standing. Open Space Council and Schneider resubmitted the proceeding, and the court deemed the parties to have standing to file the proceeding. Schneider was granted standing as an owner of a nearby condominium, and her standing conferred to Open Space Council, an community organization of which Schneider is a member. The trial court found that Petitioners provided sufficient evidence demonstrating the proposed plan's adverse environment impact on the surrounding area.

Issue

Did the Town Board of the Town of Brookhaven fail to comply with SEQRA requirements and arbitrarily, capriciously or unlawfully approve plans for development at the Meadows without regard to the impact on the environment and surrounding community?

Rationale

Petitioners argued that the Town Board failed to consider the pending Preservation and Management Plan for the Carmans River Watershed in its hasty approval of the Meadows project. The State Environmental Quality Requirements Act (SEQRA) requires that "all areas of environmental concern" must be identified by a lead agency and that agency must "take a complete and 'hard look' at such areas, and thereafter, following the identification, analysis, and review of such areas, make a determination which minimizes and avoids adverse environmental effects."[3] Petitioners cite this requirement to support their allegation that the Town Board did not consider the pending Carmans River plan. The Court stated that because the plan is pending legislation and has not been adopted "as a town policy, statute, regulation or ordinance," the Town Board is not bound to follow the plan.[4]

Petitioners also cited twenty-six other projects in and around the Carmans River area that the Town Board failed to consider in its FGEIS. The Town Board provided evidence through an expert affidavit discounting the projects as inappropriate under SEQRA regulations because the projects are "either finished, have been approved with Negative Declarations, or do not exist on file as pending application."[5]

Further, petitioners claimed that the Town Board failed to take the environmental impact of the Meadows project into account. SEQRA requires a lead agency to prepare findings addressing these concerns. The Court reasoned that the Town Board went beyond the requirements of SEQRA. The Town Board did address the environmental impact in the FGEIS and also considered traffic and the effects of the plan on the surrounding community; the formal scoping period held by the Town Board lasted longer than required under SEQRA. The scoping period "addressed the formation of the FGEIS" and invited public comment.[6]

Conclusion

The Court dismissed the Article 78 proceeding holding that the Town Board did not fail to comply with the requirements of SEQRA. The Court also held that,

because of extended formal scoping period, the Town Board's approval of the Meadows plan "was not arbitrary, capricious or unlawful."[7]

Christopher Eisenhardt
St. John's University School of Law '16

Endnotes

1. *Open Space Council, Inc. v. Town Board of the Town of Brookhaven*, 2012 WL 3561108, 2012 NY Slip Op 32156 (U) (N.Y. Sup. Ct. 2012) (unnumbered decision).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*

* * *

Riverso v. Rockland County Solid Waste Management Authority, 2012 WL 2016821 (2d Dept. 2012)

Facts

Until 2009, the Town of Clarkstown (the "Town") operated the Clarkstown Solid Waste Management Facilities (the "Facility").[1] The facility housed multiple operations, including "a concrete / asphalt crushing operation, a wood mulching operation, and a leaf composting operation."[2] A section of the property on which the facility was located was previously used as a landfill.[3] The landfill portion of the facility took over 1.5 acres of the neighboring property, which was owned by Raphael Riverso.[4] The Town and the New York State Department of Environmental Conservation (the "DEC") entered into an Order on Consent in 1989.[5] This Order declared the facility an environmental hazard and required the Town to create a remediation plan, which was approved by the DEC in 1995.[6] The approved plan involved capping the landfill and the additional 1.5 acres of Riverso's property that had been encroached upon.[7] The Town never received the required access to Riverso's property to carry out the remediation; it also failed to complete the remediation of the landfill property.[8] In 2009, the Rockland County Solid Waste Management Authority (the "County") purchased the facility from the Town but was unable to purchase Riverso's property.[9] Determined to obtain the additional property, the County began the condemnation process.[10] To that end, the County issued a determination authorizing the condemnation, along with a State Environmental Quality Review Act ("SEQRA") negative declaration.[11] The negative declaration indicated that the condemnation "would not have a significant negative impact on the environment," meaning the County need not prepare a draft environmental impact statement.[12]

Procedural History

Riverso sought review of the County's determination that a draft environmental impact statement was not required in the instant case.[13]

Issue

Whether the County complied with the requirements of SEQRA when issuing its determination?

Rationale

The Court first looked at whether the County followed the proper SEQRA procedure in undertaking the condemnation of Riverso's land.[14] A threshold issue for the Court was whether a proposed condemnation requires a SEQRA review at all; the Court found that it does.[15] The Court then looked to whether the County met the requirement to "identif[y] the relevant area[s] of environmental concern."[16] The Court was troubled by the County's failure to "address the environmental concerns pertaining to the land outside the 1.5-acre property immediately adjacent to the landfill."[17] The County also did not undertake an updated review of what effect, if any, its plan would have on the groundwater on Riverso's property.[18] Although a review had been conducted in 1989, "the passage of more than 10 years since that investigation has been conducted necessitates further review under SEQRA to ensure that no new environmental concerns exist."[19]

The Court then turned to the question of whether the County's actions in splitting the SEQRA review into two separate parts, time and geography, was proper. The County argued that it need not perform a SEQRA review of the portion of Riverso's property outside of the 1.5 acres it was condemning because it did not plan on further developing the existing facility.[20] The Court determined that allowing the County to forgo conducting a full SEQRA review would be counter to the spirit of the law, which expressed a preference for not segmenting the SEQRA review process.[21]

Conclusion

The Court ruled for the petitioner, saying "the Authority failed to comply with SEQRA in connection with the proposed condemnation and proposed land acquisition."[22] The Court remitted the matter to the County to perform a proper SEQRA review.[23]

Krystyna M. Baumgartner
St. John's University School of Law '13

Endnotes

1. *Riverso v. Rockland County Solid Waste Management Authority*, 2012 WL 2016821 (2d Dep't 2012).
2. *Id.* at *1.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* (*citing Matter of Gryodyne Co. of Am., Inc. v. State Univ. of N.Y. at Stony Brook*, 17 A.D.3d 675, 794 N.Y.S.2d 87).
16. *Id.* (*quoting Matter of Chemical Specialties Mfrs. Assn. v. Jorling*, 85 N.Y.2d 382, 397, 626 N.Y.S.2d 1).
17. *Id.* at *2.
18. *Id.*
19. *Id.* (*citing Matter of Doremus v. Town of Oyster Bay*, 274 A.D.2d 390, 711 N.Y.S.2d 443).
20. *Id.* at *2.
21. *Id.* (*citing Matter of Save the Pine Bush v. City of Albany*, 70 N.Y.2d 193, 200, 518 N.Y.S.2d 943; *Matter of Concerned Citizens for Envt. v. Zagata*, 243 A.D.2d 20, 22, 672 N.Y.S.2d 956; *Matter of Farrington Close Condominium Bd. of Mgrs. v. Incorporated Vil. Of Southampton*, 205 A.D.2d 623, 626, 613 N.Y.S.2d 257; *Matter of Long Is. Pine Barrens Socy. v. Planning Bd. of Town of Brookhaven*, 204 A.D.2d 548, 550-551, 611 N.Y.S.2d 917).
22. *Id.* at 2.
23. *Id.*

* * *

In re September 11 Litigation, 2012 WL 1863405 (2d Cir. 2012)

Facts

After September 11, 2001, Plaintiff Cedar & Washington Associates, LLC ("Cedar") began remodeling its 12-story office building.[1] Cedar sought to convert the building into a 19-story business hotel.[2] The New York State Department of Environmental Conservation and the United States Environmental Protection Agency notified Cedar that the building might contain "WTC Dust" requiring remediation.[3] Small particles of "concrete, asbestos, silicon, fiberglass, benzene, lead, and mercury" compose WTC Dust.[4] This hazardous WTC Dust formed when the World Trade Center collapsed.[5] The remediation process proved expensive, so Cedar filed suit to recover from the owners and lessees of WTC buildings and "the companies that owned and operated the two aircraft that were crashed into the Twin Towers."[6]

Procedural History

Cedar brought the claims under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601–9675, and common-law indemnification.[7] Dismissing the claims, the district court found that: 1) for the purposes of CERCLA's statute of limitations, the Federal Emergency Management Agency's (FEMA) construction of scaffolding "in the immediate aftermath of the September 11 attacks was 'initiation of physical on-site construction of the remedial action,'" thus rendering the lawsuit unripe; and 2) Cedar "failed to allege either a 'release' or a 'disposal' of hazardous substances necessary to pursue a claim for cost recovery under CERCLA § 107(a)(1) and (a)(2) and common-law indemnification."[8]

Issue

Whether the Defendants can be held liable for recovery costs to Plaintiff, under CERCLA, and whether the Defendants may use an affirmative defense allowed under CERCLA?

Rationale

The Court noted that "[t]he 96th Congress passed CERCLA in response to the serious environmental and health risks posed by industrial pollution and to promote the timely cleanup of hazardous waste sites."[9] Since Cedar's lawsuit invites CERCLA to be applied in new and unanticipated ways, the Court acknowledged that the statutory interpretation would be difficult here; the Court expressed an unwillingness to deal with CERCLA absent consideration of whether the September 11th attacks can be interpreted as an "act of war" for purposes of CERCLA's affirmative defense.[10]

All Defendants to Cedar's claim asserted or adopted the affirmative defense found in CERCLA Section 107(b), "where the release or threat of release of a hazardous substance was caused solely by…an act of war."[11] The Court noted that the district court did not have the chance to consider this issue.

Conclusion

While retaining jurisdiction over the case, the Court remanded the case back to the district court for the limited purpose of allowing a re-pleading of the act-of-war affirmative defense.[12]

Kelsey O'Brien
Albany Law School '14

Endnotes

1. *In re September 11 Litigation*, 2012 WL 1863405, at *1 (2d Cir. 2012).
2. *Id.*
3. *Id.*

4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* (*quoting Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009)) [internal citations omitted].
10. *Id.*
11. *Id.* at *2 (*quoting* 42 U.S.C. § 9607(b)) [internal citations omitted].
12. *Id.*

* * *

State v. Slezak Petroleum Products, 2012 WL 2138268 (3d Dep't 2012)

Facts

Defendant owned real property in the City of Amsterdam which contained a gasoline station and underground storage tanks.[1] In 2004, the Department of Environmental Conservation (DEC) conducted an investigation after fumes were detected approximately one quarter mile from the storage tanks and established that "vapors had infiltrated nearby sewer lines and residences."[2] An integrity test performed by the defendant revealed that one of the storage tanks failed a "tightness test."[3] The tank was subsequently removed, and holes were observed on its bottom.[4] Investigation of the subsurface by the defendant revealed petroleum-contaminated soil at the spill site, which the defendant removed; however, the defendant failed to investigate further.[5] An investigation conducted by the DEC determined that the location of the defendant's storage tanks was the only site located close enough to the contaminated areas to be the source of the spill.[6] The DEC demanded that the defendant undertake remediation; however, the defendant failed to do so and the DEC undertook measures to remove the contamination from the spill site and surrounding areas.[7]

Procedural History

In 2006, the State of New York, as plaintiff, commenced an action against defendant under Article 12 of the Navigation Law to recover remediation costs and penalties.[8] The State alleged that the defendant was strictly liable for clean-up costs related to the spill from its underground tanks.[9] The Supreme Court, Albany County, awarded partial summary judgment to the State holding the defendant strictly liable for the clean-up costs.[10] The court reasoned that the defendant could be held strictly liable for the unintentional contamination because the defendant had continuous "control over activities occurring on their property."[11] The defendant appealed the lower court's granting of partial summary judgment and award of damages.[12]

Issue

Whether defendant can be held strictly liable under Article 12 of the Navigation Law for contamination of surrounding property from underground storage tanks when the defendant has offered evidence suggesting the existence of other spill sites at nearby locations that defendant claims were the primary source of contamination of nearby property.

Rationale

Under section 12 of the Navigation Law, "[a]ny person who has discharged petroleum" is strictly liable for the related clean-up and remediation costs.[13] In this case, the defendant is the undisputed owner of the spill site as well as the underground storage tanks that were responsible for the contamination.[14] The Third Department affirmed the decision of the lower court, holding that the defendant had control over the property as well as the knowledge and ability to prevent the spill and the contamination.[15]

The defendant argued that while it was in fact responsible for a "small spill" at the site, that the spill did not migrate off-site and alleged that spills at other nearby locations were in fact responsible for the contamination.[16] The State, however, offered affidavits from experts that established with a "reasonable degree of scientific certainty" that the primary source of contamination was located on the defendant's property.[17] The DEC also established that no evidence existed that would suggest a source of contamination located north of the spill site that would account for a migration down the top edge of the contamination plume.[18]

Because the State had established that it was entitled to partial summary judgment based on the defendant's strict liability, the burden of proof shifted to the defendant to present a triable issue of fact that would negate the defendant's liability.[19] The only evidence that was presented by the defendant was an affidavit of the defendant's principals suggesting that the contamination arose from other nearby businesses, an affidavit from the defendant's counsel who claimed no expertise relating to the disputed issue, and an affidavit from a geologist and environmental analyst which did not establish an opinion to the required reasonable degree of scientific certainty.[20] The expert's affidavit was not given significant weight in the summary judgment decision because the report did not establish that migration of contaminants from the defendant's property did not occur, but "suggested further study of the issue."[21]

Therefore, the court found that the defendant did not meet the burden of proof required to defeat the motion for summary judgment in this case. Furthermore, the court held that the possibility that more than one source of contamination existed is irrelevant to establishing defendant's own liability.[22]

Conclusion

The court affirmed the granting of the motion for partial summary judgment and damages award, holding that "the plaintiff was not required—in order to establish defendant's strict liability—to exclude other parties as contributing dischargers, and defendant cannot avoid liability or defeat summary judgment by establishing that other parties may have contributed to the discharge and contamination."[23]

Elizabeth Stapleton
Albany Law School '14

Endnotes

1. *State v. Slezak Petroleum Products*, 2012 WL 2138268 at *1 (3d Dep't 2012).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at *2.
9. *Id.*
10. *Id.*
11. *Id.* (*citing New York v. Green*, 96 N.Y.2d 403, 407 (2001)).
12. *Id.*
13. *Id.*
14. *Id.* at *3.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at *4.
21. *Id.*
22. *Id.*
23. *Id.*

* * *

S. Union Co. v. United States, 132 S. Ct. 2344, 2349 (2012)

Facts

In September 2004 in Pawtucket, Rhode Island, youths from a nearby apartment complex broke into a facility owned by Appellant, Southern Union Company, where they discovered illegally stored liquid mercury.[1] The youths began playing with the mercury and spread it around the facility, as well as in the neighboring apartment complex.[2] In 2007, a grand jury indicted Southern Union for violating several environmental statutes, primarily "knowingly storing liquid mercury without a permit in violation of the Resource Conservation and Recovery Act of 1976" ("RCRA").[3]

At trial, the jury convicted Southern Union for unlawfully storing liquid mercury from "on or about September 19, 2002 to October 19, 2004," a period of 762 days which resulted in a maximum fine of $38.1 million ($50,000 per day in violation).[4] Southern Union objected to the fine, and argued that the jury was never instructed to determine the duration of the violation and absent a factual finding the penalty could only be assessed for a single day.[5] Further, Southern Union argued that according to the Supreme Court's interpretation of the Sixth Amendment in *Apprendi v. New Jersey*, the court could not conduct fact finding to determine the amount of the days in violation because the Sixth Amendment required the jury to make such a finding.[6]

The Government conceded that the jury was not asked to specify the duration of the violation; however, it argued that *Apprendi* Rule did not apply to criminal fines.[7] The District Court of Rhode Island held that the *Apprendi* Rule did apply, but concluded that based on "the content and context of the verdict all together," the jury found a 762-day violation.[8]

Procedural History

Southern Union appealed the District Court's decision. The United States Court of Appeals for the First Circuit rejected the lower court's conclusion that there was a 762-day violation and the ruling that the assessment of criminal fines was solely a jury function under the Sixth Amendment as construed by *Apprendi*.

Issue

Whether the Sixth Amendment confers the power of assessing the statutory maximum criminal penalty to the jury or the judge?

Rationale

In *Apprendi v. New Jersey*, the Supreme Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."[9] The Supreme Court explains that the rule established in *Apprendi* preserves the historic function of the jury as fact finder, and reinforces the requirement that the prosecution prove every element of an offense beyond a reasonable doubt.[10] The Court found it had traditionally applied the *Apprendi* rule to many different sentencing schemes and there was no principal difference between criminal fines and imprisonment because the maximum penalty is determined by the facts of the case in both circumstances.[11]

The Respondent, the U.S. Government, argued that the severity of the sentence must be examined when construing the scope of the Sixth Amendment and that criminal fines are less burdensome on defendants than imprisonment or the death penalty.[12] As a result, the Government argued the Sixth Amendment concerns addressed in *Apprendi* do not apply.[13] The Supreme Court rejected the Respondent's argument because not all fines are insubstantial and in cases where the underlying fine is large enough to implicate a jury, a Sixth Amendment issue does exist and *Apprendi* applies in full.[14]

In the present case, RCRA imposed a fine of $50,000 per day, which the Respondent conceded was enough to implicate a jury trial.[15] The Court ruled that under *Apprendi*, to preserve the Appellant's Sixth Amendment right, the prosecution was required to prove the specific duration of the violation and the District Court was required to instruct the jury to also determine the duration.[16] Consequently, the District Court was not allowed to enlarge the maximum penalty beyond what the jury was asked to determine because *Apprendi* was intended to guard against this type of judicial fact finding.[17]

Conclusion

The Supreme Court concluded that the rule established in *Apprendi* applies to criminal fines, and that these fines are to be assessed by the jury rather than a judge. The judgment of the court of appeals was reversed and the case was remanded. Justice Breyer delivered the dissent with whom Justice Kennedy and Justice Alito joined.

Dustin Howard
Albany Law School '14

Endnotes

1. *S. Union Co. v. U.S.*, 132 S. Ct. 2344, 2349 (U.S. 2012).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *See Apprendi v. N.J.*, 530 U.S. 466, 490 (2000).
7. *S. Union Co.*, 132 S. Ct. at 2349.
8. *Id.*
9. *Id.* at 2350 (*quoting Apprendi v. N.J.*, 530 U.S. at 490).
10. *See S. Union Co.*, 132 S. Ct at 2350–51.
11. *Id.*
12. *See id.* at 2351.
13. *Id.*
14. *Id.* at 2351–52.
15. *Id.* at 2352.
16. *See id.* at 2352.
17. *Id.* at 2352.

* * *

Town of New Windsor v. Avery Dennison Corp., 2012 WL 677971 (S.D.N.Y. 2012)

Facts

From 1956 to 1994, Avery Dennison Corporation, through its subsidiary Dennison Monarch Systems, Inc. (collectively Dennison), operated a factory in New Windsor, N.Y. that produced metal furniture, accessories, office and computer equipment.[1] Over time, waste from two large degreasing pits leached "into the soils, groundwater, and bedrock underlying the Plant property."[2] Dennison stopped manufacturing at the plant in 1994.[3]

New Windsor owns property adjacent to the Dennison factory, which includes wetlands and several wells linked to the town water supply.[4] Although by the 1990s the wells were no longer part of the town's main water system, they remained an emergency backup source.[5]

During the 1990s, Dennison investigated the site in conjunction with the New York State Department of Environmental Conservation (DEC) and found contamination throughout the site, including subterranean contamination.[6] In 1999, two years prior to the dissolution of the Dennison Monarch entity, the state and Dennison signed a Voluntary Cleanup Agreement.[7]

Despite this agreement, Dennison refused to acknowledge that any pollution from the factory had spread onto the town's adjacent property and into the wells.[8] In 2008, New Windsor hired a geological consulting firm to test the wells in question.[9] The firm concluded that the pollution from the factory had leached onto the Town's property and contaminated the wells.[10]

Procedural History

New Windsor filed suit in state court in October, 2010 alleging negligence, strict liability, trespass, and public and private nuisance. Dennison successfully removed the case to federal court. This ruling is in response to a defense motion to dismiss all claims.[11]

Issues

May a town seek remedy in law against a dissolved corporation under theories of strict liability, trespass, and private nuisance? Or, does the fact that the corporation is dissolved provide the defendant a prima facie claim justifying a motion for dismissal under the Federal Rules of Civil Procedure 12(b)(6)?

Rationale

Delaware law, which governs suits against corporations organized under its auspices, limits suits against dissolved corporations to three years following the dis-

solution; however, this statutory limit is not dispositive.[12] A corporation may be deemed active if it fails to notify a state registering body of its dissolution, and it continues to act in its official capacity.[13] Although the district court did not rule on this issue, it indicated that in-state evidence could overcome an act of dissolution by a foreign corporation in a foreign jurisdiction.[14]

The court further held that there was sufficient support for the town's strict liability claim to survive the motion to dismiss.[15] The court reasoned that the pleadings indicated sufficient information to "plausibly support imposition of strict liability" on at least five of the six factors followed by the Court of Appeals.[16] These six factors include whether or not the abnormally dangerous activity: 1) poses a high degree of risk of harm to people, land, or chattels; 2) poses a risk of serious harm; 3) could have been conducted risk-free by an exercise of reasonable care; 4) was a matter of common usage; 5) was appropriate given its location; 6) and was of greater value than risk to the community.[17]

Having sustained the strict liability claim, the court held that the trespass claim included the requisite intent to survive the motion to dismiss. Citing *Scribner v. Summers*, the court held that the trespasser does not need to show intent to cross property lines; rather, he must show an intent to act in a way that produces an unlawful invasion.[18] The court held that Dennison should have known that the pollution on its land would spread to the Plaintiff's land.[19] Given that Dennison's environmental consultants reported the flow pattern of the groundwater between the property, Dennison's behavior met the intent prong and was enough to overcome the motion to dismiss.[20]

The court dismissed the claim in private nuisance because the contamination in question posed a threat to the whole town, not just a few people.[21] Private nuisance actions should proceed where an individual or a few people have their rights impinged upon.[22] Public nuisance is an offense against a government entity typically.[23] As such, the town made the wrong claim, and so the court granted the motion to dismiss the private nuisance claim.

Conclusion

The court held that indicia of activity might allow a suit against a dissolved corporation to go forward, in spite of any statute of limitations that might exist.[24] The court also denied the defendant's motion to dismiss in strict liability and trespass. It did, however, grant the motion against the private nuisance claim.[25]

Stewart Forbes
SUNY Buffalo Law School '13

Endnotes

1. *Town of New Windsor v. Avery Dennison Corp.*, 2012 WL 677971 at *1 (S.D.N.Y. 2012).
2. *Id.*
3. *Id.*
4. *Id.* at *2.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at *3.
10. *Id.*
11. *Id.* at *4.
12. *Id.* at *6-7.
13. *Id.* at *7. Dennison Monarch Systems had failed to file for dissolution in New York.
14. *Id.*
15. *Id.*
16. *Id.* at *12-*13; *Doundoulakis v. Town of Hempstead*, 42 N.Y.2d 440, 448 (1977) (*citing* RESTATEMENT (SECOND) OF TORTS § 520 (1977).
17. *Town of New Windsor*, 2012 WL 677971 at *13.
18. *Id.* (*citing Scribner v. Summers*, 84 F.3d 553, 557 (2d Cir. 1996).
19. *Town of New Windsor*, 2012 WL 677971 at *15.
20. *Id.*
21. *Id.* at *16.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*

* * *

Tuxedo Land Trust, Inc. v. Town of Tuxedo, 34 Misc. 3d 1235(A) (N.Y. Sup. Ct., Orange Co. 2012)

Facts

The petitioners in this case, the Tuxedo Land Trust, Inc. (TLT), brought 12 causes of action against the Town of Tuxedo, the Town Board of the Town of Tuxedo (the "Town Board"), the Planning Board of the Town of Tuxedo (the "Planning Board"), the Building Inspector of the Town of Tuxedo, and Tuxedo Reserve Owner, LLC (TRO).[1] TLT is a not-for-profit corporation formed for the purpose of conserving the natural resources and preserving the community character in and around the Village of Tuxedo.[2] TRO's land consists of 3 irregularly shaped tracts of land that do not touch, but border to the north, east, and south the Village of Tuxedo Park (the "Village").[3] Since sometime before 1998, TRO had been attempting to obtain a Special Permit and Preliminary Plan ("Special Permit") in order to commence construc-

tion and development in the area, part of which had been previously designated the Tuxedo Reserve, an open land buffer.[4] The Special Permit was not challenged, nor was the environmental review conducted by the lead agency pursuant to the State Environmental Quality Review Act (SEQRA).[5] For several years after, various amendments and modifications were made to the Special Permit, again without challenges.[6]

In August 2008, TRO applied for further amendments to the Special Permit, but this time the amendments proposed to alter the amount, type and increase the allowed acreage of commercial development.[7] The amendment was granted following the approval of another SEQRA review in November 2010.[8]

Procedural History

In December of 2010 the petitioners filed 12 causes of action, seeking to annul the determinations and resolutions of the Town Board concerning recent 2008 amendments.[9] The claims of the petitioners concerned environmental and cultural injuries caused by the amendments.[10] They also claimed that the Town Board engaged in activities that violated the Open Meetings Law, the General Municipal Law and several other Town Laws.[11] Though the court's discussion on the various causes of action was extensive, the most notable included the first five causes and the twelfth, which alleged claims based on the SEQRA reviews.[12]

Issue

Do the petitioners have sufficient standing to have suffered injuries due to a violation of SEQRA?

Rationale

The court found that in order to sustain a claim that the agency is responsible for administering SEQRA, the petitioner must show that the injury falls within the zone of interests that SEQRA seeks to promote or protect.[13] The petitioner must also suffer direct harm that is in some way different from that of the public at large.[14] Only those with properties within a close proximity to the area at issue are given the presumption that they are adversely affected by the SEQRA violation, and these parties do not need to allege a specific injury.[15] Parties alleging that their property qualifies as one within a close proximity have the burden of proving this with competent evidence that their property is located within the immediate vicinity of the site at issue.[16]

The court also held that the petitioners needed to show that their injuries were not the result of a prior determination, meaning the alleged harm needed to be from the 2008 amendments and the SEQRA environmental review relative to those amendments, not the approval of the original development plans by TRO.[17] In addition, the petitioners needed to show that each of them had standing, in that they each needed to have suffered an environmental injury which was different from that of an injury to the public at large, all due to the 2008 amendments and environmental review.[18]

The court reasoned that though the respondents had properties near the Tuxedo Reserve, the acreage approved for development by the amendments was not close enough to the petitioners' properties.[19] The reason that the properties were not close enough to the development was because the court was limited to only review of amendments in considering the development itself, which only affected the development parcel of the land. In contrast, considering the entire parcel would have included the open buffer zone, making the petitioners' properties within the immediate vicinity.[20]

In addition, the court also found that the environmental harm of impacts from increased vehicular traffic, pollution of drinking water, and the diminution of their enjoyment of the historic quaint character of Tuxedo Park would be no different than the harm suffered by the public at large.[21] For each of these issues, the petitioners submitted no evidence to support the allegations, other than a broad assumption of increasing development resulting in these damages, though again, these would be for the entire population of the town.[22]

Conclusion

The court found in favor of the respondents.[23] The court found that none of the petitioners had proved that their properties were within necessary proximity to the project.[24] The court also found that the environmental harm resulting from the amendments would be no different than a generalized harm suffered by the public at large.[25] Lastly, the court found no sufficient evidence as to the claims of bad faith and dishonest behavior on the part of the Town Board, Planning Board, or Building Inspector for which a verdict in favor of the petitioners.[26]

Allison Gold
Albany Law School '14

Endnotes

1. *Tuxedo Land Trust, Inc. v. Town of Tuxedo*, No. 13675/10, 2012 WL 716636, at *1 (N.Y. Sup. Ct. Mar. 5, 2012).
2. *Id.* at *3.
3. *Id.* at *1.
4. *Id.* at *2.
5. *Id.* at *1.
6. *Id.* at *2.
7. *Id.*
8. *Id.*
9. *Id.* at *3.
10. *Id.*

11. *Id.* at *11–14.
12. *Id.* at *1.
13. *Id.*
14. *Id.* at *4.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at *6.
19. *Id.* at *5.
20. *Id.*
21. *Id.* at *8.
22. *Id.* at *9.
23. *Id.* at *1.
24. *Id.* at *5.
25. *Id.* at *8.
26. *Id.* at *1.

* * *

Woodbury Heights Estates Water Co., Inc. v. Village of Woodbury, 943 N.Y.S.2d 385 (N.Y. Sup. Ct. Orange Co. 2012)

Facts

Plaintiff Woodbury Heights Estates Water Co., Inc. is a private water works company located in the Village of Woodbury, the Defendant.[1]

In April 1999, Plaintiff provided water for Woodbury Heights Estates under section 3 of the New York Transportation Corporations Law.[2]

Nearly ten years later in August 2008, Defendant passed Local Law No. 6.[3] In this law, section 246-1 indicates that "the unregulated and uncontrolled relocation, removal and exportation of certain natural materials may degrade the environment of the Village to a point that is detrimental to the public safety, health and general welfare."[4] Section 246-11 further specifies that "[t]he removal of groundwater, either directly or after storage, for use outside of the incorporated Village of Woodbury is expressly prohibited, except by intermunicipal agreement with the Village Board of Trustees."[5] Section 246-12 holds that violations of Local Law No. 6 could result in penalties ranging from fines to misdemeanor charges.[6]

In July 2010, Plaintiff entered into an agreement with the Town of Monroe in which Plaintiff was to supply water for residential purposes to a property known as the "Forest Edge"—a subdivision located in the Town of Monroe.[7]

In January 2011, Plaintiff noted that it had entered into a contract to supply water to the Town of Monroe, by Certificate of Extension filed pursuant to section 46 of the New York TPL.[8]

In February, 2011, Plaintiff commenced this action.[9]

Procedural History

Plaintiff filed suit to 1) have Local Law No. 6 ruled invalid, null, and void as preempted by State law, and 2) obtain damages flowing from a taking without just compensation pursuant to 42 U.S.C. § 1983.[10] Plaintiff moved for summary judgment for declaratory relief on the remaining cause of action.[11]

Issue

Whether Local Law No. 6—a local law banning the removal of groundwater for use outside of the village except pursuant to an intermunicipal agreement—invalid?

Rationale

New York State Constitution Article IX section 2, known as the "home rule provision," grants broad power to local government respective to its citizens' welfare.[12] However, the doctrine of conflict preemption provides that a right or privilege granted by the State may not be usurped by a local law.[13] The doctrine of field preemption provides that when a State has acted upon a subject, the State has manifested that the State law shall preempt any prospective local law.[14]

The Court noted that Plaintiff, a duly formed water works corporation, falls under the jurisdiction of both the New York Department of Environmental Conservation (DEC) and also the New York Public Service Commission.[15] The DEC is granted broad authority to protect water resources in the State of New York.[16] Further, the DEC must provide a permit to a water works company before that company may provide potable water.[17] Before a permit may be granted to a water works company such as the Plaintiff, the DEC must, among other things, determine that the proposed project is "justified by public necessity."[18]

New York State has shown concern about protecting water resources and has enacted a thorough system regarding the provision of potable water to municipalities.[19] Finally, the Court held that Local Law No. 6 was preempted by saying,

> [r]elevant to the case at bar, the scheme expressly contemplates a situation where potable water is supplied to more than one municipality, and requires the DEC to determine whether a project is just and equitable to all affected municipalities and their inhabitants with regard to their present and future needs for sources of potable water supply. Therefore, the Legislature has demonstrated its intent to preempt the field, and Local Law No. 6 is preempted, regardless of whether it actually conflicts with the State law.[20]

Conclusion

The Court granted the Plaintiff's motion for summary judgment, holding that "Local Law No. 6 is preempted by State Law, particularly by article 15 of the Environmental Conservation Law," and that the State has an overriding interest in the protection of water resources.[21] Local Law No. 6 was declared invalid, null, and void.[22]

Kelsey O'Brien
Albany Law School '14

Endnotes

1. *Woodbury Heights Estates Water Co., Inc. v. Vill. of Woodbury*, 943 N.Y.S.2d 385, 386 (Sup. Ct., Orange Co. 2012).
2. *Id.*
3. *Id.*
4. *Id.* at 386-87 (*quoting* Local Law No. 6 section 246-1*)*.
5. *Id.* at 387 (*quoting* Local Law No. 6 section 246-11).
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 388.
12. *Id.* at 389.
13. *Id.*
14. *Id.*
15. *Id.* at 390 (*citing* N.Y. PUB. SERV. LAW § 5 (McKinney 2012); N.Y. ENVTL. CONSERV. LAW § 15 (McKinney 2012)).
16. *Id.* (*citing* N.Y. ENVTL. CONSERV. LAW § 15 (McKinney 2012)).
17. *Id.*
18. *Id.* at 391 (*citing* N.Y. COMP. CODES R. & REGS. tit 6, § 601.6).
19. *Id.*
20. *Id.* (*quoting* N.Y. ENVTL. CONSERV. LAW § 15-1503(2)(c) (McKinney 2012)).
21. *Id.* at 390.
22. *Id.* at 386.

* * *

Recent Legislation

An Act to Amend the New York State Urban Development Corporation Act, in Relation to Creating the Dairy Farm Improvement Energy Efficiency Program, A.5145A

Assembly bill A.5145A, same as S.3126-A, is an act to amend the New York State urban development corporation act.[1] The bill is sponsored by Assembymember Dennis Gabryszak, and co-sponsored by Assemblymembers Reilly, Crouch, Gunther, Jaffee, Cahill, Clark, Cook, Destito, Glick, Gottfried, Katz, Magee, McEneny, Millman, Peoples-Stokes, Pheffer and Sayward.[2]

The dairy farm improved energy efficiency program's main goal is to "[a]ssist dairy farms with high efficiency lighting, high efficiency pumping and cooling equipment, and other energy management systems."[3] In order to facilitate this program, the bill would create low-interest loans that dairy farmers could apply for in order to implement advanced energy saving technology equipment on their farms.[4]

The goal of the act is two-fold. The first goal is to develop methods for New York's dairy farmers to continue to compete in the market. On one side, farmers in New York are having an extremely difficult time keeping their farms afloat with rising costs of production and an inadequate return on milk prices.[5] By providing energy efficient equipment at a reasonable price, the bill's sponsors feel farmers will be able to drive down their overhead costs in milk production.[6] The other goal of the act is to increase demand for energy efficient equipment.[7] By increasing demand, producers of this equipment would have to hire more New Yorkers, thus creating more job opportunities.[8] Loan eligibility begins with an "energy audit" that a dairy farm can obtain through the New York State Energy Research and Development Authority (NYSERDA).[9] The energy audit is a program designed to aid customers in identifying and executing energy efficient methods.[10] The dairy farm will provide documentation of its identified improvement areas in order to qualify for the loans.[11]

This bill was first introduced during the 2011 legislative session, but failed to make it out of the economic development committee.[12] Furthermore, the bill is subject to appropriations, which means it is currently not funded.[13]

Governor Cuomo announced a grant program through NYSERDA for farmers to reduce energy costs in January of 2011.[14] This program made $3.2 million available to farmers to make "process improvements, lighting upgrades, and high-efficiency fan, pump, and motor systems, and other measures."[15] These upgrades are similar to the improvements included in the act, though the act does not limit energy efficient methods to the improvements it identifies.[16] Governor Cuomo had a similar goal to that of the proposed legislation, noting that "[t]hese grants will improve the energy efficiency of farming operations and lower costs for farmers. This not only protects farming jobs, it creates green jobs for the people making the improvements."[17]

It is uncontested that New York farmers need assistance to stay competitive and to continue to fuel the agricultural section of New York's economy.[18] Whether it is through legislation or executive order, improving farm infrastructure would benefit farmers, manufacturers and New York State as a whole.

Edward Hyde Clarke
Albany Law School '14

Endnotes

1. An Act to amend the New York State urban development corporation act, in relation to creating the dairy farm improved energy efficiency program, A.5145, 235th N.Y. Leg. Sess. (2012), http://assembly.state.ny.us/leg/?default_fld=&bn=A05145&term=2011&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y.
2. *Id.*
3. Sponsor's Memo. in Support of A.5145, http://assembly.state.ny.us/leg/?default_fld=&bn=A05145&term=2011&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y.
4. *Id.*
5. *Id.*
6. A.5145 § 1.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. A.5145 Bill Actions, http://assembly.state.ny.us/leg/?default_fld=&bn=A05145&term=2011&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y.
13. Sponsor's Memo.
14. Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces Grant Program To Help Farmers Reduce Energy Usage, Control Costs (Jan. 6, 2011), http://www.governor.ny.gov/press/010611grantprogram.
15. *Id.*
16. A.5145 § 2.
17. *Id.*
18. *Id.*

* * *

An Act to Amend the Penal Law, in Relation to Unlawful Defilement of a Water Supply, S.1074

On January 5, 2011 Senator Greg Ball introduced Bill 1074 (S.1074) to the New York Senate, an act to amend the Penal Law, in relation to unlawful defilement of a water supply.[1] The Senate passed S.1074 on March 28, 2011 and delivered it to the Assembly.[2] The Assembly subsequently rejected and returned the bill to the Senate on January 4, 2012.[3] As of the end of the 2011-12 regular legislative sessions, the Senate recommitted S.1074 to the Senate Rules Committee.[4] If passed, S.1074 would amend the N.Y. Penal Law by adding the new section 270.08 "Unlawful Defilement of a Water Supply."[5]

Paragraph one of the N.Y. PL §270.08 defines "water supply" and "defiling agent" for the purposes of the purposed law.[6] A "water supply" is considered any well or reservoir which provides potable water for residential, commercial, or industrial needs including fire services.[7] Public and private transmission, treatment, or supply facilities are included in the definition of a "water supply."[8] S.1074 defines a "defiling agent" as any chemical, biological or radioactive agent or substance capable of causing sickness, physical injury, severe disfigurement, death, irreparable harm to a water source, or disturbance of the public peace if placed in a "water supply."[9] Substances placed into a "water supply" either by a municipal or state entity or introduced through lawful practices of agricultural or industrial entities are not to be considered "defiling agents" for the purpose of the purposed law.[10]

The purposed bill criminalizes the defilement of a water supply by any person that intentionally introduces, or causes to be introduced, a defiling agent designed to cause sickness, physical injury, severe disfigurement, death, irreparable harm to a water supply, or disturb the public peace through introduction into a water supply.[11] A person that acts with reckless disregard to the introduction of a defiling agent into a water supply that causes the aforementioned results would also be guilty of defilement under this law.[12] Any person found guilty of defiling a water supply would be charged with a class B felony under this law.[13]

Currently, N.Y. PL does not consider defilement of a water supply a crime.[14] The purpose of S.1074 is to establish defilement of a water supply as a crime for this reason.[15] The sponsor's memo recognizes the critical nature of potable water supplies and justifies the law as a protection of such supplies from terrorist threats.[16] However, the wording within the bill, specifically the inclusion of acts of reckless disregard, may have a broader application than to the prevention of terrorism. S.1074, if passed, would become law on the first of November following the passage of the bill.[17]

Mark Houston
Albany Law School '14

Endnotes

1. The N.Y. Senate, *S1074-2011: Creates the crime of unlawful defilement of a water supply*, OPEN, http://open.nysenate.gov/legislation/bill/S1074-2011.
2. *Id.*
3. *Id.*
4. *Id.*
5. An Act to Amend the Penal Law, in Relation to Unlawful Defilement of a Water Supply, S.1074, 235th N.Y. Leg. Sess.§ 1.
6. *Id.*
7. *Id.* § 1.
8. *Id.*
9. *Id.* § 1.
10. *Id.*
11. *Id.* § 1.
12. *Id.*
13. *Id.*
14. Memorandum from Senator Ball on S.1074(2011), http://open.nysenate.gov/legislation/bill/S1074-2011.
15. *Id.*
16. *Id.*
17. S.1074 § 2.

* * *

An Act to Amend the Tax Law, in Relation to Tax Credits Provided for Solar Energy System Equipment, A00034B

Assembly bill A.34B, same as S.149-B, is an act to amend the New York State tax law in relation to tax credits for solar energy equipment.[1] Governor Andrew M. Cuomo signed the act into law on August 17, 2012.[2] Assembymember Kevin Cahill introduced the bill, and Assemblymembers P. Rivera, Abinanti, Lupardo and P. Lopez co-sponsored the bill.[3] The act is aimed at encouraging homeowners to utilize solar energy system equipment by creating a tax credit.[4] The tax credit would be available to homeowners who either lease the equipment or make power purchase agreements for a period of at least 10 years.[5] A taxpayer who purchases power, or leases equipment, for a ten-year period qualifies for twenty-five percent tax credit against the total aggregate cost over the ten year period of use.[6] The maximum allowable credit is set at $3,750.[7] Qualified expenditures are identified as "expenditures for materials, labor costs properly allocable to on-site preparation, assembly and original installations, architectural and engineering services, and designs and plans directly related to the construction or installation of the solar energy equipment."[8] Further, the lease of such equipment, or written agreement to purchase such power, shall be a qualified expenditure.[9] The fiscal implications of the act have been estimated at less than $1,000,000 annually.[10]

The idea of creating tax incentives for implementing solar panels is not new. On the federal level, President Clinton proposed a program to finance energy independent homes and increase the amount of homes with solar panels to one million by the year 2010.[11] The leading question that still remains is whether or not residential solar panels could lead to an eventual decrease in the United States' dependence on foreign fuels.[12] The goal of implementing solar panels is motivated by both energy and environmental interests.[13] Yet, to this point tax incentives have been relatively insufficient to spur a takeoff of this technology.[14] Now that this incentive is law in New York State, it will be interesting to see if new goals and levels of implementation can be reached.

Edward Hyde Clarke
Albany Law School '14

Endnote

1. An act to amend the tax law, in relation to tax credits provided for solar energy system equipment, A.34B, 235th N.Y. Legis. Sess. (2012), http://assembly.state.ny.us/leg/?default_fld=&bn=A00034&term=2011&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y.
2. *Id.*
3. A.34B Bill Summary, http://assembly.state.ny.us/leg/?default_fld=&bn=A00034&term=2011&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y.
4. Sponsor's Memo. In Support of A.34B, http://assembly.state.ny.us/leg/?default_fld=&bn=A00034&term=2011&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y.
5. A.34B § 1.
6. *Id.* at § 1 (1) & (2)(D).
7. *Id.* § 1 (1).
8. *Id.* at § 1 (B).
9. *Id.* § 1 (2).
10. Sponsor's Memo.
11. Andrew B. Smith, *Environmental Activism in the Form of Residential Solar Panels and the Resulting Conflicts for the 21st Century*, 3 Envt'l & Energy L. & Pol'y J. 330, 330 (2008).
12. *Id.* at 334.
13. Sponsor's Memo.
14. *See* Smith, *supra* note 11, at 334.

* * *

An Act Requiring the Department of Environmental Conservation to Publish on Its Public Website All Information Pertaining to Participation in the Regional Greenhouse Gas Initiative, A.8814-2011

A8814-2011 seeks to add a new section regarding public disclosure of funding to the environmental conservation law that first established New York's participation in the Regional Greenhouse Gas Initiative (RGGI).[1] RGGI was established as an environmental effort between 10 Northeastern states in the U.S., including New York, to reduce greenhouse gas emissions from power plants.[2] RGGI was designed as a cap-and-trade system, similar to the one created to help reduce acid rain.[3] Under RGGI, each state sets its own limits on and creates certain allowances for carbon dioxide emissions from utilities, such as power plants. States will then auction off these allowances at CO2 Allowance Auctions to the utilities, who must obtain enough allowances to cover themselves. Any extra allowances can be traded on the open market, giving utilities an incentive to invest in clean energy technologies, since utilities that create energy through environmentally friendly methods do not need to purchase the allowances.[4] All bidders are subject to anti-collusion regulations and an independent market monitor who reviews the auction process.[5] States would then use the revenue to support consumers both through environmental conservation programs and direct savings over time on their energy bills.[6]

One of the major concerns when RGGI was enacted was that the revenue received by the state would end up diverted towards other budgetary expenses, instead of the clean energy and environmental protections it was intended for.[7] Critics of the program also contend that consumers will end up footing the real bill because the utilities will simply pass down their new expenses through

higher energy costs.[8] Three New York State government departments were initially appointed to share the responsibility for implementing and enforcing the CO2 Budget Training Program used to carry out RGGI. These are the New York State Energy Research and Development Authority (NYSERDA), the Department of Environmental Conservation (DEC), and the Department of Public Service.[9]

To be fair, NYSERDA attempts to do what this additional legislation proposes, only one would not have to locate and read the 30-page Status Report put out quarterly by the agency.[10] The law would require the DEC to publish on its public website all information pertaining to RGGI funds.[11] That includes, but is not limited to, application deadlines, program regulations, participants in the Carbon Dioxide Allowance Auction, the Auction results, bids by participants, clearing prices, quantities of credits offered and sold, and the total amount of proceeds collected by the DEC for credits sold.[12] The legislation is most likely an attempt to satisfy both the critics and curious about what money comes in and what it is used for, since Governor Chris Christie pulled New Jersey from RGGI, calling it an illegal tax because the costs are passed to consumers.[13] Recently a lawsuit filed by members of Americans for Prosperity against 2 New York State agencies and Governor Cuomo was dismissed for lack of standing, in that no one in the group had suffered a distinct injury due to the alleged illegal taxes levied on consumers of utilities.[14]

A study published in the fall of 2011 called RGGI an overall success, with power plants paying $912 million from mid-2008 through September 2011.[15] Regionally, the economy has gained more than $1.6 billion in value, customers of utilities have saved $1.1 billion since RRGI was implemented and 16,000 jobs were created.[16] Furthermore, the money was allocated by some being spent on environmental energy efficiency, a portion being spent on unrelated environmental initiatives and needs and some going to general use by states.[17] This legislation would help to clear up questions from the public about where the money is going and the results it is yielding. The bill was last referred to the New York State Legislative Environmental Conservation Committee, with the enacting clause stricken.[18]

Allison Gold
Albany Law School '14

Endnotes

1. Assemb. 8814-A, 234th Sess. (N.Y. 2011), http://assembly.state.ny.us/leg/?default_fld=&bn=A08814&term=2011&Text=Y (last visited July 5, 2012).
2. Reg'l Greenhouse Gas Initiative, DEP'T OF ENVTL. CONSERVATION, http://www.dec.ny.gov/energy/rggi.html (last visited July 5, 2012).
3. Ed., *Ten States With a Plan*, N.Y. TIMES, Sept. 24, 2008, http://www.nytimes.com/2008/09/25/opinion/25thu2.html.
4. Reg'l Greenhouse Gas Initiative, supra note 2; *Ten States With a Plan*, supra note 3.
5. Reg'l Greenhouse Gas Initiative, supra note 2.
6. Matthew L. Ward, *Carbon Trading Initiative a Success Study Says*, N.Y. TIMES, Nov. 15, 2011, http://green.blogs.nytimes.com/2011/11/15/greenhouse-gas-initiative-a-success-study-says/.
7. *Ten States With a Plan*, supra note 3.
8. Mireya Navarro, *Challenge to Carbon Trading Fails*, N.Y. TIMES, June 14, 2012, http://green.blogs.nytimes.com/2012/06/14/challenge-to-carbon-trading-fails/.
9. Reg'l Greenhouse Gas Initiative, supra note 2.
10. *New York's RGGI-Funded Programs Status Report*, N.Y. ENERGY RESEARCH & DEV AUTH., http://www.nyserda.ny.gov/Page-Sections/Energy-and-Environmental-Markets/Regional-Greenhouse-Gas-Initiative/~/media/Files/Publications/Energy-Analysis/RGGI-Q4-2011-r.ashx (last visited July 5, 2012).
11. See Assemb. 8814-A, supra note 1.
12. *Id.*
13. Navarro, supra note 8.
14. *Id.*
15. *New Analysis Quantifies Economic Impact of Regional Greenhouse Gas Initiative in Ten States*, ANALYSIS GRP., Nov. 15, 2011, http://www.analysisgroup.com/rggi.aspx (last visited July 1, 2012).
16. *Id.*
17. Ward, supra note 6; *New Analysis Quantifies Economic Impact of Regional Greenhouse Gas Initiative in Ten States*, supra note 15.
18. B. Status Search by B. No. A8814, 2011 Leg., 234th Sess. (N.Y. 2011), http://public.leginfo.state.ny.us/menugetf.cgi (last visited July 7, 2012).

* * *

A9422A-2011: An Act Requiring the Department of Environmental Conservation to Take Action with Respect to Non-native Animal and Plant Species

A9422A-2011 is an act to amend the NY Environmental Conservation Law and the NY Agriculture and Markets Law, in relation to non-native animal and plant species.[1] It requires the Department of Environmental Conservation ("DEC"), in cooperation with the Department of Agriculture and Markets ("Ag & Markets"), to take action with respect to non-native animal and plant species.[2]

The act states: "The Department [of Environmental Conservation], in cooperation with the Department of Agriculture and Markets, shall restrict the sale, purchase, possession, propagation, introduction, importation, transport and disposal of invasive species pursuant to this section."[3] These departments will provide a list of prohibited species and a way of acquiring a permit to engage with said species. The departments will also provide a list of species unlawful to possess or use in any sort of transaction.[4]

In order to allow businesses the opportunity to make necessary arrangements for species they have in their possession that are soon to become unlawful, the departments and the council will provide a grace period.[5]

In order to enforce these laws, the DEC, in cooperation with Ag & Markets, will have the authority to establish state-wide databases of all clearinghouses for all taxa of invasive species.[6]

The act also provides penalties for breaking these laws. For the initial violation, a written warning as well as issued education materials may be distributed in place of a penalty.[7] A subsequent violation, however, will result in a fine of no less than $200.[8] Businesses, however, will be fined no less than $600 for first time violations.[9] A second violation will result in a $2,000 fine, and a third may result in suspension of business.[10]

This act will take effect 180 days after it becomes law.[11] Effective immediately, the DEC and Ag & Markets shall promulgate regulations to implement the provisions of this act.[12] Such regulations shall be completed on or before September 1, 2013.[13]

Laura Sonneborn-Turetsky
St. John's University School of Law '15

Endnotes

1. A9422A-2011 (N.Y. 2012).
2. A9422A-2011, §1.
3. A9422A-2011, §1(1).
4. A9422A-2011, §1(1)(C).
5. A9422A-2011, §1.
6. A9422A-2011, §1(2)(A).
7. A9422A-2011, §2(9).
8. A9422A-2011, §2(9)(A).
9. A9422A-2011, §2(9)(B).
10. A9422A-2011, §2(9)(B).
11. A9422A-2011, §4.
12. A9422A-2011, §4.
13. A9422A-2011, §4.

* * *

An Act Requiring Permit Holders to Test Groundwater Prior to and After Drilling Wells for Oil and Natural Gas, S.3483-2011

S3483-2011 proposes to amend the environmental conservation law to require holders of drilling permits to test the surrounding groundwater both before and after drilling for oil or natural gas wells.[1] The legislation would clarify and regulate the requirements for water testing criteria pre-drilling and post-drilling.[2]

The bill would require holders of drilling permits to test within a 1,000-foot radius of the drilling area and on all of the water wells in the production unit, along with allowing the New York State Department of Environmental Conservation (DEC) to determine an expanded radius for testing if it deems it necessary.[3] The testing must be done prior to drilling, after any hydrofracturing, before the well is completed and annually for wells that are producing oil or natural gas.[4] It will define what "compounds or contaminants of concern" are, which at a minimum will include the components of hydrofracturing fluids and chemical treatment.[5] Though oil and gas companies have testified in hearings before the New York State Assembly that they do in fact test water prior to drilling, this does not address the concerns of many as to what happens to the water post-drilling, particularly concerns about the hydraulic fracturing (hydrofracturing) methods used to drill for natural gas.[6]

Many in the natural gas industry have maintained that there is no record of a freshwater aquifer having been contaminated by hydrofracturing, even though there is a documented EPA case dating back to the 1980s that documents this very concern: a nearby property owner's water well was contaminated by the drilling fluids and the natural gas itself, rendering his water unusable.[7]

What is perhaps one of the more interesting elements of the bill is that it lays out the liabilities for the permit holder, should the ground or surface water within the designated area test positive for any contaminants that are of concern, violate the state sanitary code or violate the federal Safe Drinking Water Act.[8] In addition, permit holders can be liable if the flow rate of the ground or surface water has been adversely affected.[9] Permit holders could be liable for the removal, cleanup and costs for any other injury to not only the landowner, but to any other party adversely affected by the drilling.[10] This is particularly relevant since a growing area of concern, especially with the state of the economy, is the leasing of private property by owners to drilling companies that often leave property owners with more problems than they bargained for or can ever afford to clean up.[11] The leases presented to landowners are incredibly complicated and differ from most lease contracts, in that there is little coverage offered by consumer protection laws.[12] Most of these leases do not contain a clause that requires drillers to pay for a test of water prior to drilling, so if property owners are left with contaminated water, it is incredibly difficult to show that their water was not contaminated before the drilling started.[13]

DEC attempts to assist landowners with a Guide to Oil and Gas Leasing on its website, but the complications presented by these types of leases are often too much for the average attorney, who say that drilling companies are intentionally vague with the language in their lease

contracts.[14] The bill was last referred the New York State Legislative Environmental Conservation Committee.[15]

Allison Gold
Albany Law School '14

Endnotes

1. S. 3483, 2011 Leg., 234th Sess. (N.Y. 2011), http://open.nysenate.gov/legislation/bill/S3483-2011.
2. *Id.*
3. *See id.*
4. *See id.*
5. *Id.*
6. N.Y. S. 3483; Ian Urbina, *A Tainted Water Well, and Concern There May Be More*, N.Y. TIMES, Aug. 3, 2011, http://www.nytimes.com/2011/08/04/us/04natgas.htm.
7. Urbina, *supra* note 6.
8. N.Y.S. 3483.
9. *See id.*
10. *See id.*
11. Ian Urbina & Jo Craven McGinty, *Drilling Down: Learning Too Late of the Perils in Gas Well Leases*, N.Y. TIMES, Dec. 1, 2011, http://www.nytimes.com/2011/12/02/us/drilling-down-fighting-over-oil-and-gas-well-leases.html?pagewanted=all.
12. Urbina, *supra* note 11.
13. *See id.*
14. *Landowner's Guide to Oil & Gas Leasing*, DEP'T OF ENVTL. CONSERVATION, http://www.dec.ny.gov/energy/1553.html (last visited July 5, 2012); Urbina, *supra* note 11.
15. B. Status Search by B. No. S3483, 2011 Leg., 234th Sess. (N.Y. 2011), http://public.leginfo.state.ny.us/menugetf.cgi (last visited July 6, 2012).

* * *

The Aquatic Nuisance Species Coalition Participation Act, S.145

On January 4, 2012 Senator Maziarz introduced Bill 145 (S.145) in the New York State Senate, an act to amend the New York Environmental Conservation Law, in relation to enacting the "aquatic nuisance species coalition participation act."[1] The senator previously introduced the bill to the Senate on January 5, 2011.[2] In both sessions the bill died in the Senate Environmental Conservation Committee.[3] S.145, if passed, would amend the Article 17 of the New York Conservation Law by adding a Title 23.[4]

Legislative Findings

Section 17.2303 of the new title states the legislative findings which recognize the significant impact aquatic nuisance species (ANS) have on the ecology and economy of the state.[5] Since the opening of the St. Lawrence Seaway ballast discharges from ocean-going vessels are estimated to account for more than two-thirds of ANS in the Great Lakes.[6] No exact number exists but at least 180 ANS have been identified in the Great Lakes.[7] These species impact the native flora and fauna by seriously altering the ecosystem, possibly to an irreparable state.[8] Aquatic nuisance species also harm the State economically by damaging commercial and recreational fisheries as well as water and energy production infrastructures.[9] The State has already spent over $1.5 billion to remedy the effect of zebra mussels in the Great Lakes.[10]

The use of the Great Lakes by ocean-going vessels continues to pose a threat of introducing of new nuisance species.[11] Ballast water discharges from these vessels have been implicated as the source of introduction to more than two-thirds of the ANS.[12] Introduction of a new species anywhere in the Great Lakes poses a threat to New York's waters regardless if the ship stops at a New York port.[13] As such, New York carries an obligation to actively participate in the Great Lakes Nuisance Species Coalition created by the State of Michigan in 2005.[14]

Great Lakes Aquatic Nuisance Species Coalition.

Section 17.2307 of Title 23 would authorize the N.Y. Department of Environmental Conservation (DEC) to participate in the Great Lakes Aquatic Nuisance Species Coalition (GLANSC). The DEC would be required to participate with Michigan's Department of Environmental Quality to develop regulations to address the discharge of ballast water of ocean-going vessels.[15] The DEC would also work with other state, federal, and international entities concerned with ANS to the extent consistent with New York's sovereign rights and responsibilities.[16] An annual report would be given to the Governor and Legislature on GLANSC activities.[17] If passed this act would become effective immediately.[18]

Mark Houston
Albany Law School '14

Endnotes

1. The N.Y. Senate, *S145-2011: Enacts the "aquatic nuisance species coalition participation act,"* OPEN, http://open.nysenate.gov/legislation/bill/S145-2011.
2. *Id.*
3. *Id.*
4. An Act to Amend the Environmental Conservation Law, in Relation to Enacting the "Aquatic Nuisance Species Coalition Participation Act," S.145, 235th N.Y. Leg. Sess. § 1.
5. *Id.* § 1.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*

13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. Aquatic Nuisance Species Coalition Participation Act § 2.

* * *

The Cell Phone Right to Know Act, H.R. 6358

On August 3, 2012, Congressman Kucinich introduced H.R. 6358 directing the Federal Communications Commission and Environmental Protection Agency "to examine, label, and communicate adverse human biological effects associated with exposure to electromagnetic fields from cellphones and other wireless devices, and for other purposes."[1] If enacted by Congress, H.R. 6358 (the "Bill") will be cited as the "Cell Phone Right to Know Act."[2] Representatives Elijah E. Cummings, Grace F. Napolitano, and Chellie Pingree cosponsored the Bill.[3] The House floor has referred the Bill to the Committee on Energy and Commerce.[4]

If enacted, the Bill will create a new research program that determines the effect of cell phone electromagnetic fields on human biology."[5] The research results would then be made widely available to the general public and reported to Congress.[6] The Bill tasks the FCC with developing regulations to allow researchers access to phone users data usages. Cell phone users must first consent to the study before there information may be used."[7] Once the research program establishes a correlation, the Bill tasks the EPA with developing maximum exposure limits.[8] The FCC will then implement and enforce those standards and will be responsible for promulgating regulations to provide for labeling of mobile communication devices, including the exposure rating of the device and the maximum allowable exposure level.[9]

Abigail Sardino
Albany Law School '14

Endnotes

1. Cell Phone Right to Know Act, H.R. 6358, 112th Cong. (2012), http://www.gpo.gov/fdsys/pkg/BILLS-112hr6358ih/pdf/BILLS-112hr6358ih.pdf.
2. H.R. 6358 § 1.
3. Cell Phone Right to Know Act, H.R. 6358, 112th Cong. (2012) (including legislative history), http://www.govtrack.us/congress/bills/112/hr6358.
4. *Id.*
5. H.R. 6358 § 2.
6. *Id.*
7. *Id.*
8. *Id.* at § 3.
9. *Id.* at § 4.

* * *

Fair Trade in Seafood Act of 2012, S.3518

A bill is currently under consideration in the U.S. Senate that would, among other things, make it a principal negotiating objective of the United States in trade negotiations to eliminate government fisheries subsidies.[1]

The Fair Trade in Seafood Act of 2012 is sponsored by Sen. Ron Wyden (D, OR). It was created to reduce "overfishing subsidies."[2] If overfishing is not stopped, there is a great risk that the oceans will become too depleted to fish and will have a negative impact on the environment and world economy.[3] According to the Food and Agriculture Organization of the United Nations, 85 percent of the world's fisheries today are overexploited to some degree, and in some instances are recovering from overexploitation.[4] Fisheries subsidies have added to the creation of a worldwide fishing fleet that is up to 250 percent larger than what would be required to satisfy the world's need for fish.[5]

One of the main causes of the global fisheries crisis is government subsidies that create motivation for continued fishing despite the decrease in catches.[6] "Many long-range foreign fleets" are aided by various government grants for fuel and other expenses.[7] This allows the fleets to fish longer, at greater distances, and more intensively than is commercially or environmentally warranted.[8]

Fisheries subsidies offered by the governments of other countries give the fleets of those countries an unfair advantage over United States fishermen.[9] Foreign fisheries subsidies also put United States fishermen at a disadvantage in potential export markets.[10] Many developing countries are particularly affected by fisheries subsidies provided by other governments because the developing countries are unable to compete against subsidized industrial fleets.[11]

Sharon Ziegler
St. John's University School of Law '15

Endnotes

1. Fair Trade in Seafood Act of 2012, S. 3518, 112th Cong. (2012).
2. *Id.* § 2(8).
3. *Id.*
4. *Id.* § 2(1).
5. *Id.* § 2(4).
6. *Id.* § 2(2).
7. *Id.* § 2(5).
8. *Id.*
9. *Id.* § 2(7).
10. *Id.*
11. *Id.* § 2(6).

* * *

Fracturing Regulations Are Effective in State Hands Act of 2012, H.R. 4322, S.2248

A bill currently under consideration in the U.S. House of Representatives and U.S. Senate would clarify that each State has the authority to regulate all aspects of the hydraulic fracturing process on federal land.[1]

The "Fracturing Regulations are Effective in State Hands Act" is sponsored by Representative Louie Gohmert (TX).[2] Senator James M. Inhofe (OK) sponsored a similar bill, S.2248.[3] The bill would clarify that hydraulic fracturing on federal land is up to the sole authority of the State to regulate.[4] This authority would include the ability to promulgate all regulations and the power to guide the permitting process that may be involved in natural gas drilling.[5]

The bill is most specific in regards to regulating the fluids that are injected into the ground during the hydraulic fracturing process.[6] The bill outlines that the State will regulate what permits are required for the injection fluids and propping agents that will be used.[7] Full disclosure of the fluids that are injected into the ground during the hydraulic fracturing process is currently not required under federal law.[8]

The legislation comes as a result of the 2011 announcement by the Secretary of the Interior of intentions to promulgate regulations for hydraulic fracturing on Federal land.[9] The term Federal land for the purposes of this act includes: public land, National Forest System land, land under the jurisdiction of the Bureau of Reclamation, and land under the jurisdiction of the Corps of Engineers.[10] The Legislative findings maintain that states that currently allow hydraulic fracturing already have comprehensive measures in place to ensure the safety of drinking water.[11] Further, they contend that there has never been a proven contamination of water from hydraulic fracturing.[12] The majority of the support for this legislation is from Texas and other Republican representatives from states that have a high volume of drilling.[13]

H.R. 4322 has been referred to the House Subcommittee on the Environment and the Economy.[14] The co-sponsors of the bill include Representatives Joe Barton (TX), Rick Berg (ND), Rob Bishop (UT), Kevin Brady (TX), Francisco Canseco (TX), John Carter (TX), K. Michael Conaway (TX), John Abney Culberson (TX), Jeff Duncan (SC), Blake Farenthold (TX), John Fleming (LA), Trent Franks (AZ), Ralph Hall (TX), James Lankford (OK), Robert Latta (OH), Cynthia Lummis (WY), Kenny Marchant (TX), Michael McCaul (TX), Randy Neugebauer (TX), Ted Poe (TX), Reid Ribble (WI), Pete Sessions (TX), Marlin Stutzman (IN), John Sullivan (OK), Lee Terry (NE), Mac Thornberry (TX), Lynn Westmoreland (GA).[15]

The bill has been read twice and referred to the Committee on Energy and Natural Resources.[16] The co-sponsors of the bill include Senators John Cornyn (TX), John Hoeven (ND), Mike Lee (UT), Lisa Murkowski (AK), Rob Portman (OH), James Risch (ID), Pat Roberts (KS), Jeff Sessions (AL), David Vitter (LA).[17]

Edward Hyde Clarke
Albany Law School '14

Endnotes

1. The Library of Congress, *Bill Summary & Status: 112th Congress (2011–2012):* H.R.4322. *All Information*, THOMAS, http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.4322.
2. *Id.*
3. The Library of Congress, *Bill Summary & Status: 112th Congress (2011–2012):* S. 2248. *All Information*, THOMAS, http://thomas.loc.gov/cgi-bin/query/z?c112:S.2248.
4. Fracturing Regulations are Effective in State Hands Act of 2012.
5. *Id.* § 4(a).
6. *Id.*
7. The Library of Congress, *Bill Text: 112th Congress (2011–2012):* H.R. 4322 § 4(b). *Text of Legislation*, THOMAS < http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.4322:>.
8. *Id.* § 2(9)(B).
9. *Id.* § 2(10).
10. *Id.* § 3.
11. *Id.* § 2(3).
12. *Id.* § 2(4-8).
13. The Library of Congress, *Bill Summary & Status: 112th Congress (2011–2012):* H.R. 4322. *All Information*, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR04322:@@@P|.
14. The Library of Congress, *Bill Summary & Status: 112th Congress (2011–2012):* H.R. 4322. *All Information*, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR04322:@@@X.
15. The Library of Congress, *Bill Summary & Status: 112th Congress (2011–2012):* H.R. 4322. *All Information*, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR04322:@@@P.
16. Fracturing Regulations are Effective in State Hands Act of 2012.
17. *Id.*

* * *

Green Building Tax Exemptions, S.1462

On July 18, 2012, Governor Cuomo authorized S.1462, which grants tax exemptions for "green" buildings.[1] The Act amended the New York State Tax Law by adding section 470, to allow a municipal tax exemption for LEED and similarly "green certified" buildings.[2] The Act operates by empowering municipalities to adopt the exemption through local legislation or resolution after a public hearing.[3] The exemption will be available for green-certified construction taking place after January 1, 2013 in municipalities that adopt the exemption.[4]

Buildings meeting the initial requirements of time and location must satisfy a LEED professional's examination.[5] Exemptions will be granted for construction costing more than $10,000 that constitutes more than ordinary maintenance or repairs.[6] If granted, the amount of the exemption will be dependent upon the certification level

(Certified, Silver, Gold, or Platinum).[7] The certification must be filed with and approved by the local assessor, who will record the tax exemption on the assessment roll.[8]

Lee Bender
SUNY Buffalo Law School '13

Endnotes

1. An Act to amend the real property tax law, in relation to authorizing a municipal corporation to provide a real property tax exemption for improvements to real property meeting certification standards for green buildings, S. 1462, 235th N.Y. Legis. Sess. (2011), *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=S01462&term=2011&Summary=Y&Actions=Y&Memo=Y&Text=Y.
2. *Id.* at § 1.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

* * *

The Hudson-Mohawk River Basin Bill of 2012

The Hudson-Mohawk River Basin Bill of 2012 (the "bill") would authorize the Secretary of the Interior to conduct research and projects on water sources in the Hudson-Mohawk River Basin.[1] Representative Tonko introduced the bill to the House of Representatives on June 7, 2012, upon which it went to committee.[2] The purpose of the bill is to unify the five States (New York, New Jersey, Vermont, Massachusetts, and Connecticut) and five sub-basins (the Upper and Lower Hudson, Mohawk, Passaic, and Raritan Rivers) that compose the Hudson-Mohawk River Basin under one resource management strategy.[3] To achieve this goal, the bill directs the President to establish the Hudson-Mohawk River Basin Commission (the "Commission").[4]

The Commission is to consist of one Federal and five State representatives.[5] The Secretary of the Interior is to serve as the federal representative and coordinator of all relevant federal agencies.[6] The five State representatives shall be the five States' governors or their appointed representative.[7]

The Commission would be given four major duties.[8] First is to cultivate and execute "plans, policies, and projects relating to the water resources of the Hudson-Mohawk River Basin."[9] It is also to adopt, promote, and coordinate uniform policies for the management and conservation of water resources.[10] On the administrative level, the Commission is to adopt an annual capital budget detailing the estimated costs and method of financing projects undertaken or proposed.[11] The bill also directs the Commission to coordinate, direct, and fund water resources projects consistent with its plans and policies.[12]

Comprehensive Plan for Water Resources

The Commission would be tasked with developing comprehensive management plans for the water resources of the Hudson-Mohawk River Basin.[13] In developing the plan, the Commission would consult with State and Federal agencies with jurisdiction over the water resources, and any other interested municipal party.[14] The plan would address both human and ecosystem based water use needs in the basin.[15] The Commission would inventory historical and cultural resources to identify projects for cultural enrichment, preservation, and education in the basin.[16] In support of water resources management, a comprehensive assessment of the status of water resources would be conducted annually.[17] The Commission would also establish the mechanisms to promote communication and coordination among the various State agencies engaged in water resource management within the Hudson-Mohawk River Basin.[18]

Water Resources Programs

The comprehensive plan developed by the Commission would serve as the basis for its water resources program.[19] The program would identify projects, or facilities, to be undertaken by the Commission, other governmental or private entities, and any individuals within a 5-year period.[20] The resources program will include a systematic presentation for each of the five sub-basins.[21] The presentations are to identify the specific needs to be addressed by the program, existing and proposed projects required to satisfy those needs, any subset of projects to be undertaken by the Commission during such a period, and the budget of the identified projects and studies.[22]

Savings Provisions

This bill does not seek to extend federal authority over those water resources traditionally controlled by the States.[23] The saving provision specifically states that the bill is not to be construed to repeal, modify, or limit the authority of local governments to regulate land use or the Commission members to adopt and enforce additional legislation.[24]

Appropriations

The bill would fund the Commission and comprehensive plan through the 2020 fiscal year.[25] The Commission would be authorized to appropriate $500,000 each fiscal year to carry out its duties.[26] The Secretary of the Interior would be authorized to appropriate $25,000,000 for each fiscal year for comprehensive plan projects.[27]

Mark Houston
Albany Law School '14

Endnotes

1. Hudson-Mohawk River Basin Act of 2012, H.R. 5927, 112th Cong. (2012), http://www.gpo.gov/fdsys/pkg/BILLS-112hr5927ih/pdf/BILLS-112hr5927ih.pdf.
2. *Id.*
3. 158 Cong. Rec. E1011 (daily ed. June 7, 2012) (statement of Rep. Tonko), http://www.gpo.gov/fdsys/pkg/CREC-2012-06-07/pdf/CREC-2012-06-07-pt1-PgE1011-4.pdf.
4. H.R. 5927 § 4.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at § 5.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at § 6.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at § 7.
24. *Id.*
25. *Id.* at § 8.
26. *Id.*
27. *Id.*

* * *

Prohibits the Sale or Offer for Sale of Electric Lamps That Contain Mercury in Excess of Specified Amounts, S.7004

The New York State Senate passed an act, sponsored by Senator Grisanti, that would amend the New York Environmental Conservation Law, to prohibit the sale, or offers to sell, electric lamps containing mercury in excess amounts ("the Act") on June 12, 2012.[1] The purpose of this Act is to reduce the environmental hazards that accompany the disposal of fluorescent light bulbs.[2] Because of Federal Government's push to decrease the use of incandescent light bulbs in an effort to conserve energy, many people have been prompted to purchase fluorescent light bulbs.[3] Fluorescent light bulbs, however, can contain significant amounts of mercury, which can become hazardous if it enters the waste stream.[4] The Act has since been delivered to the New York State Assembly, which has referred the Act to the Committee on Environmental Conservation.[5] The Act sets out to accomplish its purpose by proposing amendments to several sections of the ECL.[6]

Section 1 of the Act seeks to amend section 27-2101 of the NY ECL by adding five new subdivisions.[7] As it currently exists, section 27-2101 defines relevant terms relating to the collection, treatment, and disposal of refuse and other solid wastes under Title 27 of the NY ECL.[8] The Act would amend the current law to include a more specific definition of lighting sources containing mercury, including "compact fluorescent lamps, straight fluorescent lamps[,] and nonlinear fluorescent lamps, to which mercury or mercury compounds are added during the manufacturing process."[9] Section 1 will also define the parameters of light bulb lifetime, as it relates mercury content standards for normal and long lifetime fluorescent light bulbs.[10] Furthermore, section 1 of the Act defines a

> "producer of lighting that contains mercury" include persons that manufacture, sells, resells, imports, or exports lighting that contains mercury. The only exception to a "producer of lighting that contains mercury" is a reseller of lighting that contains mercury if the brand of the manufacturer of the lighting that contains mercury appears on the lighting.[11]

Section 1 of the Act essentially provides more definitive parameters as to what types of lighting, and what types of producers of lighting, fall under this Act.

The remaining sections of the Act address prohibitions of mercury content, and violation consequences. Specifically, section 2 of the Act amends New York ECL § 27-2107, adding three subdivisions that spell out specified mercury content amounts, as they relate to certain types of fluorescent lamps, that a producer of lighting containing mercury is prohibited from selling within the state of New York.[12] Sections 3 and 4 amend New York ECL section 71-2724 by substantially elevating the penalties for violations of the would-be mercury content standards set out in section 2 of the Act as compared to the current law's penalties.[13] The civil penalty for a first violation under the proposed amendment would amount to a fine not exceeding $10,000, as compared to the current first violation civil penalty fine of $100.[14] Subsequent violations under the amendment would amount to a civil penalty not exceeding $25,000, again as compared to the current maximum civil penalty of $500.[15]

An added benefit of the proposed amendments is that, if passed, the law will be very clear as to what the mercury content standards are, to whom the standards will apply, and to which type of lighting product. Essentially the pros of such a piece of legislation are that New York will be taking a giant step in the direction of safeguarding its residents by trying to manage and limit

the amount of mercury that is disposed in our waste systems, decreasing the hazards associated with mercury contamination. There are, however, always cons to such regulations. Here, such cons might include burdening manufacturers' production processes of fluorescent light bulbs, potentially affecting manufacturers' productions costs, as well as hitting manufacturers with heavy fines for any violations. In this case the pros seem to outweigh the cons.

Tammy Garcia
Albany Law School '13

Endnotes

1. An Act to Amend the Environmental Conservation Law, in Relation to Prohibiting the Sale or Offer for Sale of Electric Lamps That Contain Mercury in Excess of Specified Amounts, S. 7004, 235th NY Legis. Sess. (2012), http://open.nysenate.gov/legislation/bill/S7004-2011.
2. Majority Press, *Senate Passes Bill to Reduce Mercury in Light Bulbs*, New York Senate Newsroom, June 12, 2012, *available at* http://www.nyseneate.gov/press-release/senate-passes-bill-reduce-mercury-light-bulbs.
3. *Id.*
4. Sponsor's Memo, in Support of S.7004, http://open.nysenate.gov/legislation/bill/S7004-2011.
5. S. 7004 Legis. Actions, http://open.nysenate.gov/legislation/bill/S7004-2011.
6. S.7004.
7. S. 7004 at § 1.
8. NY ECL § 27-2101 (McKinney's 2012).
9. S. 7004 § 1. (NY ECL § 27-2101 makes references to lamps, and other electrical devices containing mercury, but does not expound on those objects with great specificity. NY ECL § 27-2101(7)(e-f) (McKinney's 2012)).
10. *Id.*
11. *Id.*
12. *Id.* at § 2.
13. *Id.* at §§ 3 & 4.
14. *Id.*
15. *Id.* at § 4; NY ECL § 71-2724 (McKinney's 2012).

* * *

REINS Act—Regulations from the Executive in Need of Scrutiny Act of 2011

On February 7, 2011 the Regulations from the Executive in Need of Scrutiny ("REINS") Act, also known as H.R. 10, was introduced in the Senate after passing in the House of Representatives.[1] The purpose of the bill is to increase the accountability of the Executive branch and improve transparency in the Federal regulatory process.[2] The bill carries 31 co-sponsors and proposes to amend chapter 8 of title 5 of the United States Code.[3]

The REINS Act proposed amendment of chapter 8 title 5 would require that before major rules of the executive branch can take effect, the Federal agency promulgating the rule must submit to each house of Congress and the Comptroller General a report explaining the proposed rule including a cost benefit analysis.[4] A major rule as defined by the act is any rule that has "an annual effect on the economy of one-hundred million dollars ($100,000,000) or more."[5] Under the REINS Act, the proposed major rule can only become active after the report is submitted and a joint resolution of approval passes both houses.[6]

Both majority leaders from each house would have to submit a joint resolution within three days of receiving the report from the Federal agency.[7] If the joint resolution is not enacted into law by the end of 70 session days from the time the report is received, the rule would be deemed not approved and it would not take effect.[8] The President could potentially enact a rule prior to Congressional approval under the proposed bill only if the rule is necessary because of an imminent threat, enforcement of criminal laws or for national security.[9] The bill has been referred to the Committee on Homeland Security and Governmental Affairs.[10]

Dustin Howard
Albany Law School '14

Endnotes

1. Felicia Sonmez, *REINS Bill to Expand Congressional Power Over Executive Regulations Passed by House*, Washington Post, Dec. 7, 2011, http://www.washingtonpost.com/blogs/2chambers/post/reins-bill-to-expand-congressional-power-over-executive-regulations-passed-by-house/2011/12/07/gIQAs6VMdO_blog.html.
2. Regulations From the Executive in Need of Scrutiny Act of 2011, S. 299, 112th Cong. § 2(b) (2011).
3. The Library of Congress, *Bill Summary & Status: 112th Congress (2011–2012):* S. 299. *All Information*, THOMAS <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN00299:@@@L&summ2=m&>.
4. *Id.* at § 801(a)(1)(A).
5. *Id.* at § 804(2)(A).
6. *Id.* at § 801(b)(1); *see also id.* § 802(a).
7. *Id.* at § 801(1–2).
8. *Id.* at § 801(b)(2).
9. *Id.* § 801(c)(1–2).
10. The Library of Congress, *Bill Summary & Status: 112th Congress (2011–2012):* S.299. *All Information*, THOMAS <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN00299:@@@L&summ2=m&>.

* * *

Relates to Global Warming Pollution Control; Establishes Greenhouse Gas Limits and a Greenhouse Gas Reporting System, A.5346

The New York State Assembly passed the Global Warming Pollution Control Act ("the Act"), sponsored by Assemblyperson Sweeney, on April 25, 2012.[1] The Act has since been delivered to the New York State Senate, which has referred the Act to the committee on Environ-

mental Conservation.[2] The Act is to amend the New York ECL in relation to global warming pollution control.[3] The amendment seeks to "require the New York Department of Environmental Conservation (DEC) to promulgate rules and regulations establishing limits on greenhouse gas emissions" in hopes of reducing aggregate levels of greenhouse gas emissions in the state of New York by eighty percent by the year 2050.[4]

This Act has an extensive prior history. A similar act by the same name was first introduced in the Assembly in 2008 where it passed, but died in the Senate after being referred to the Committee on Environmental Conservation.[5] Again, in 2009 a nearly identical bill by the same name was introduced in the Assembly where it passed; however, it too died in the Senate but was returned to the Assembly for amendment.[6] The 2009 Act was then resubmitted to the Senate where it died in the Finance Committee.[7]

The Act starts out by highlighting some of the dangers that global warming may lead to, such as air quality issues, water supply reduction, displacement of coastal businesses and residents due to rising sea levels, and damage to the natural environment and ecosystems, to name a few.[8] Article 19 of the Environmental Conservation Law is to be amended by adding a new title detailing a reduction plan for greenhouse gas emissions.[9] Currently, Article 19 only addresses global warming issues in relation to vehicle emissions.[10]

The Act defines greenhouse gas as "carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfloorocarbons, sulfur hexafluroide, and any other gas determined by the DEC to be a significant contributor to global warming."[11] The Act also indentifies a list of greenhouse gas emission sources.[12] The Act thus largely increases the classes of entities that greenhouse emissions regulations would apply to, and furthermore, leaves the applicability open as additional entities could be deemed emitters of greenhouse gases by the DEC.[13]

Additionally, while the Act leaves the task of global warming pollution control up to the DEC, it is not unguided. The Act entails that the DEC enforce regulations requiring greenhouse gas emissions reporting from greenhouse gas emissions sources in annual tonnage.[14] Under this Act, the DEC must also provide reporting tools and formats to source, and ensure that sources comply with maintaining comprehensive emissions records.[15] The Act also proposes that by January 1, 2016, and every three years after, the DEC is required to issue a report containing the annual emissions reporting information, as well as information regarding the progress being made by the program.[16] The regulations set up by the DEC are to be consistent with International, Federal, and other states' greenhouse emissions reporting systems.[17]

In terms of limiting greenhouse gas emissions, the Act mandates that a limit of the aggregate level of greenhouse gas emissions be set by the year 2015.[18] Such limit is to be reduced every five years by increments of ten percent until the total reductions are eighty percent of the original limit set in 2015; this eighty percent reduction is to be reached by the year 2050, and will remain at that amount.[19] While the Act proposes a systematic way to reduce greenhouse gas emissions on paper, it may be difficult to accomplish in actuality. The legislation itself notes, however, that it "seeks to accomplish [its] goal and at the same time provide opportunity for public involvement and input into the regulatory process in order to ensure that the resulting emission limits do not impose undue environmental or economic hardship."[20] While this Act may pose a difficult task, it is not impossible; "seven other states have adopted laws to establish greenhouse gas emission standards."[21]

If passed, this Act would become effective immediately.[22] It could potentially result in a substantial decrease in greenhouse gas emissions mainly due to the fact that emissions regulations would apply to a broader class of entities than mandated under the current law. The past similar acts had generated mass support from many organizations across the state.[23]

Tammy Garcia
Albany Law School '13

Endnotes

1. Global Warming Pollution Control Act, A. 5346, 235th NY Legis. Sess. (2012), http://assembly.state.ny.us/leg/?default_fld=&bn=A05346&term=2011&Summary=Y&Actions=Y&Text=Y.
2. *Id.*
3. *Id.*
4. Sponsor's Memo. in Support of A.5346, http://assembly.state.ny.us/leg/?default_fld=&bn=A05346&term=2011&Summary=Y&Actions=Y&Text=Y.
5. Global Warming Pollution Control Act, A. 10303, 233rd N.Y. Legislative Session (2008), *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=A10303&term=2007&Summary=Y&Actions=Y&Text=Y.
6. *Id.*
7. *Id.*
8. A. 05346.
9. *Id.* at § 2.
10. NY ECL § 19-1103 (McKinney 2012).
11. A. 5346 § 2.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*

18. *Id.*
19. *Id.*
20. Sponsor's Memo A.5346.
21. *Id.*
22. A. 5346 § 3.
23. *See New York State Moves to Cut Climate Change Pollution*, ADIRONDACK COUNCIL.ORG (June 4, 2008), *available at* http://www.adirondackcouncil.org/GWcap%20608pr.html.

Safe Chemicals Act of 2011, S.847

On July 25, 2012, the Safe Chemicals Act of 2011 ("the Act") was approved by the Committee on Environment and Public Works and could be considered by the full house of the Senate this fall.[1] Senator Frank Lautenberg (D) of New Jersey proposed the bill in 2011 and has 25 cosponsors.[2] The purpose of the bill is to amend the Toxic Substances Control Act ("TSCA") so that "the risks of chemicals are perfectly understood and managed."[3] The bill intends to do this by directing the Administrator of the Environmental Protection Agency ("EPA") to issue rules that would require chemical companies to provide the EPA with data so that it can determine which chemicals are safe to be sold.[4] This would effectively shift the burden of demonstrating the safety of chemicals from the EPA to the chemical producers.[5]

The Act proposes to amend Section 4 of TSCA so that the EPA can require chemical companies to provide information on the chemicals produced in what the Act refers to as a "minimum data set"[6] The Act defines these data sets to include the minimum amount of information necessary for the EPA to conduct screenings and risk assessments, naming specific characteristics such as toxicological properties, exposure, and use of the chemical substances.[7] Each chemical processor of the substance would be required to submit the data set for both new and existing chemical substances (within five years of enactment of the Act) to the EPA for evaluation.[8]

Additionally, the Act would give the EPA authority to require testing with respect to any chemical substance, and can require the submission of test results by a specified date to enforce any provision of the act if need be.[9] This amended bill would establish a new system which would require chemical related information be provided to the EPA.[10] Currently under TSCA, the EPA has the burden of showing that a chemical possesses an unreasonable risk to human health or the environment before it can regulate the substance.[11] The proposed legislation would shift that burden to the chemical producers by giving the EPA the power to impose conditions on the manufacture, use, sale, and disposal of the substances produced in accordance with the Agency's safety determination.[12] The Bill was approved by the committee in a 10-8 vote, but given the negative support indicated by Senate Republicans it is unclear if the bill will be called to a vote on the floor.[13]

Dustin Howard
Albany Law School '14

Endnotes

1. Cheryl Hogue, *Senate Committee Adopts TSCA Reform Bill*, CHEMICAL & ENGINEERING NEWS (July 25, 2012), http://cen.acs.org/articles/90/web/2012/07/Senate-Committee-Adopts-TSCA-Reform.html (last visited September 14, 2012).
2. The Library of Congress, *Bill Summary & Status: 112th Congress (2011–2012):* S.847. *All Information*, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.00847 (last visited August 30, 2012).
3. The Safe Chemicals Act of 2011, S. 847, 112th Cong. § 2 (2011).
4. *See* The Library of Congress, *Bill Summary & Status: 112th Congress (2011–2012):* S.847. *All Information*, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.00847 (last visited August 30, 2012).
5. *See id.* at § 6.
6. *Id.* at § 4(a)(1)(B)(iii).
7. *Id.*
8. *Id.* at § 4(a)(2).
9. *Id.* at § 4(a)(3)(b).
10. The Library of Congress, *Bill Summary & Status: 112th Congress (2011–2012):* S.847. *All Information*, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.00847 (last visited August 30, 2012).
11. Cheryl Hogue, *Senate Committee Adopts TSCA Reform Bill*, CHEMICAL & ENGINEERING NEWS (July 25, 2012), http://cen.acs.org/articles/90/web/2012/07/Senate-Committee-Adopts-TSCA-Reform.html (last visited September 14, 2012).
12. S. 847 at § 6(b)(1)(B); *see also* § 6(c).
13. Cheryl Hogue, *Senate Committee Adopts TSCA Reform Bill*, CHEMICAL & ENGINEERING NEWS (July 25, 2012), http://cen.acs.org/articles/90/web/2012/07/Senate-Committee-Adopts-TSCA-Reform.html (last visited September 14, 2012).

Section Committees and Chairs

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

Adirondacks, Catskills, Forest Preserve and Natural Resource Management
Thomas A. Ulasewicz
FitzGerald Morris Baker Firth PC
16 Pearl Street, Suite 101
Glens Falls, NY 12801
tau@fmbf-law.com

John W. Caffry
Caffry & Flower
100 Bay Street
Glens Falls, NY 12801-3032
jcaffry@caffrylawoffice.com

Amy L. Smith
P.O. Box 687
Lake Placid, NY 12946-0687
amylsmithesq@adelphia.net

Agriculture and Rural Issues
David L. Cook
LeclairRyan
70 Linden Oaks, Suite 210
Rochester, NY 14625
david.cook@leclairryan.com

Peter G. Ruppar
Duke Holzman Photiadis & Gresens LLP
1800 Main Place Tower
350 Main Street
Buffalo, NY 14202-3718
pruppar@dhpglaw.com

Ruth A. Moore
R.A. Moore Consulting
28 William Street
Kinderhook, NY 12106
rmoore49@nycap.rr.com

Air Quality
Robert R. Tyson
Bond, Schoeneck & King, PLLC
One Lincoln Center
Syracuse, NY 13202-1355
rtyson@bsk.com

Biotechnology, Nanotechnology and the Environment
David W. Quist
New York State Department of Health
Division of Legal Affairs
Empire State Plaza, Corning Tower
Albany, NY 12237-0026
davidquist@earthlink.net

Peter C. Trimarchi
Nixon Peabody LLP
677 Broadway, 10th Floor
Albany, NY 12207
ptrimarchi@nixonpeabody.com

Brownfields Task Force
David J. Freeman
Gibbons, P.C.
1 Pennsylvania Plaza, 37th Floor
New York, NY 10119-3701
dfreeman@gibbonslaw.com

Lawrence P. Schnapf
Law Offices of Lawrence Schnapf
55 East 87th Street, Suite 8b
New York, NY 10128
larry@schnapflaw.com

Coastal and Wetland Resources
Reed Super
Super Law Group, LLC
131 Varick Street, Suite 1033
New York, NY 10013-1417
reed@superlawgroup.com

Erica Levine Powers
University at Albany (SUNY)-MRP Program
P.O. Box 38023
Albany, NY 12203-8023
Erica.Powers@gmail.com

Dominic R. Cordisco
Drake Loeb Heller Kennedy Gogerty Gaba & Rodd, PLLC
555 Hudson Valley Avenue, Suite 100
New Windsor, NY 12553
cordisco@gmail.com

Continuing Legal Education
Maureen F. Leary
NYS OAG
Environmental Protection Bureau
The Capitol
Albany, NY 12224
maureen.leary@ag.ny.gov

James J. Periconi
Periconi, LLC
260 Madison Avenue, 17th Floor
New York, NY 10016
jpericoni@periconi.com

James P. Rigano
Rigano, LLC
425 Broad Hollow Road, Suite 217
Melville, NY 11747
jrigano@riganollc.com

Corporate Counsel
George A. Rusk
Ecology and Environment, Inc.
368 Pleasantview Drive
Lancaster, NY 14086-1316
grusk@ene.com

Robert M. Hallman
Cahill Gordon & Reindel LLP
80 Pine Street
New York, NY 10005-1701
rmhallman@gmail.com

Edward J. Malley
TRC
1430 Broadway, 10th Floor
New York, NY 10018
emalley@trcsolutions.com

Energy
Kevin M. Bernstein
Bond, Schoeneck & King, PLLC
One Lincoln Center
Syracuse, NY 13202-1325
kbernstein@bsk.com

Enforcement and Compliance
Dean S. Sommer
Young Sommer LLC
Executive Woods
5 Palisades Drive
Albany, NY 12205
dsommer@youngsommer.com

Craig B. Kravit
Kravit Partners LLC
14 East 44th Street, 4th Floor
New York, NY 10017
cbk@kravit.com

George F. Bradlau
George F. Bradley PLLC
One North Lexington Avenue
7th Floor
White Plains, NY 10601
gbradlau@gfbalaw.com

Environmental Business Transactions
Jeffrey B. Gracer
Sive Paget & Riesel PC
460 Park Avenue, 10th Floor
New York, NY 10022
jgracer@sprlaw.com

Robert H. Feller
Bond, Schoeneck & King, PLLC
111 Washington Avenue
Albany, NY 12210
RFeller@bsk.com

Environmental Impact Assessment
Kevin G. Ryan
Ryan Law Group, LLC
10 Circle Avenue
Larchmont, NY 10538
kgr@ryanlawgroupllc.com

Mark A. Chertok
Sive Paget & Riesel PC
460 Park Avenue, 10th Floor
New York, NY 10022
mchertok@sprlaw.com

Environmental Insurance
Daniel W. Morrison III
Jones Morrison LLP
Penthouse
670 White Plains Road
Scarsdale, NY 10583
dmorrison@jonesmorrisonlaw.com

Gerard P. Cavaluzzi
Malcolm Pirnie, The Water Division of ARCADIS
44 South Broadway, 15th Floor
White Plains, NY 10601
gerard.cavaluzzi@arcadis-us.com

Environmental Justice
Yelann L. Momot
Bergmann Associates
28 East Main Street
200 First Federal Plaza
Rochester, NY 14614
ymomot@bergmannpc.com

Peter M. Casper
New York State Thruway Authority
Legal Department
200 Southern Blvd; PO Box 189
Albany, NY 12201-0189
peter.casper@thruway.ny.gov

Luis Guarionex Martinez
Natural Resources Defense Council
40 West 20th Street, 11th Floor
New York, NY 10011
lmartinez@nrdc.org

Ethics
Yvonne E. Hennessey
Hiscock & Barclay LLP
80 State Street
Albany, NY 12207
yhennessey@hblaw.com

Randall C. Young
New York State Department of Environmental Conservation
Region 6
317 Washington Street
Watertown, NY 13601-3744
ryoung2934@aol.com

Global Climate Change
Virginia C. Robbins
Bond, Schoeneck & King, PLLC
One Lincoln Center
Syracuse, NY 13202
vrobbins@bsk.com

Robin Schlaff
Westchester Family Justice Center
111 Dr. Martin Luther King Blvd
White Plains, NY 10601
Robiesq@aol.com

J. Kevin Healy
Bryan Cave LLP
1290 Avenue of the Americas
New York, NY 10104
jKhealy@bryancave.com

Michael B. Gerrard
Columbia Law School
435 West 116th Street
New York, NY 10027
michael.gerrard@aporter.com

Hazardous Waste/Site Remediation
Lawrence P. Schnapf
Law Offices of Lawrence Schnapf
55 East 87th Street, Suite 8b
New York, NY 10128
larry@schnapflaw.com

David J. Freeman
Gibbons, P.C.
1 Pennsylvania Plaza, 37th Floor
New York, NY 10119-3701
dfreeman@gibbonslaw.com

Historic Preservation, Parks and Recreation
Jeffrey S. Baker
Young Sommer LLC
5 Palisades Drive
Albany, NY 12205
jbaker.9118q@youngsommer.com

Christopher Rizzo
Carter Ledyard & Milburn LLP
2 Wall Street
New York, NY 10005-2001
rizzo@clm.com

International Environmental Law
John French III
435 East 52nd Street
New York, NY 10022
frenchiii.john@gmail.com

Andrew D. Otis
Curtis, Mallet-Prevost, Colt & Mosle LLP
101 Park Avenue
New York, NY 10178-0061
aotis@curtis.com

Internet Coordinating
Alan J. Knauf
Knauf Shaw LLP
2 State Street
1125 Crossroads Building
Rochester, NY 14614-1314
aknauf@nyenvlaw.com

Robert S. McLaughlin
Bond, Schoeneck & King, PLLC
One Lincoln Center
Syracuse, NY 13202
rmclaughlin@bsk.com

Land Use
Rosemary Nichols
Rosemary Nichols Law Firm
1241 Nineteenth Street
Watervliet, NY 12189-1602
rosemarynicholslaw@nycap.rr.com

Edward F. Premo II
Harter Secrest & Emery LLP
1600 Bausch & Lomb Place
Rochester, NY 14604
epremo@hselaw.com

Michael D. Zarin
Zarin & Steinmetz
81 Main Street, Suite 415
White Plains, NY 10601
mzarin@zarin-steinmetz.net

Legislation
Michael J. Lesser
50F Knights Bridge
Guilderland, NY 12084-9434
mlesser@nycap.rr.com

Jeffrey D. Brown
Mackenzie Hughes LLP
101 South Salina Street, Ste 600
P.O. Box 4967
Syracuse, NY 13221
jbrown@mackenziehughes.com

Jillian Kasow
Harris Beach PLLC
677 Broadway
Albany, NY 12207

John L. Parker
157 Stone Meadow Road
South Salem, NY 10590
parkerjl@me.com

Membership
Robert Alan Stout Jr.
Whiteman Osterman & Hanna LLP
1 Commerce Plaza
Albany, NY 12260
rstout@woh.com

Jason Lewis Kaplan
Sahn Ward Coschignano & Baker PLC
333 Earle Ovington Blvd, Suite 601
Uniondale, NY 11553
jkaplan@swcblaw.com

Mining and Oil & Gas Exploration
Dominic R. Cordisco
Drake Loeb Heller Kennedy Gogerty
Gaba & Rodd, PLLC
555 Hudson Valley Avenue, Suite 100
New Windsor, NY 12553
cordisco@gmail.com

Thomas S. West
The West Firm PLLC
677 Broadway, 8th Floor
Albany, NY 12207
twest@westfirmlaw.com

Pesticides
Vernon G. Rail
New York State Department
of Environmental Conservation
Region 1, Bldg. 40-SUNY
Stony Brook, NY 11790
railmail@optonline.net

Telisport W. Putsavage
Sullivan & Wocester LLP
1666 K Street, NW
Washington, DC 20006
tputsavage@sandw.com

Petroleum Spills
Wendy A. Marsh
Hancock & Estabrook, LLP
1500 AXA Tower I
P.O. Box 4976
Syracuse, NY 13202
wmarsh@hancocklaw.com

Gary S. Bowitch
Bowitch & Coffey LLC
17 Elk Street
Albany, NY 12207
bowitch@bcalbany.com

Douglas H. Zamelis
Law Office of Douglas H. Zamelis
8363 Vassar Drive
Manlius, NY 13104
dzamelis@windstream.net

Pollution Prevention
Megan Rose Brillault
Beveridge & Diamond PC
477 Madison Ave., 15th Floor
New York, NY 10022-7380
mbrillault@gmail.com

Kristen Kelley Wilson
30 Lake Street
White Plains, NY 10603
kwilson@harrisbeach.com

Public Participation, Intervention and ADR
Gary A. Abraham
Law Office of Gary A. Abraham
170 North 2nd Street
Allegany, NY 14706
gabraham44@eznet.net

Jan S. Kublick
McMahon, Kublick & Smith, P.C.
500 South Salina St., Suite 800
Syracuse, NY 13202-3371
jsk@mkms.com

Hon. Glen T. Bruening
New York State Court of Claims
PO Box 7344
Capitol Station
Albany, NY 12224
gbruening@nycourts.gov

Rachel E. Deming
University of Michigan Law School
625 S State St,
Ann Arbor, MI 48109-1215
redeming@umich.edu

Solid Waste
Marla E. Wieder
U.S. Environmental Protection Agency
Region II
290 Broadway, 17th Floor
New York, NY 10007-1823
wieder.marla@epa.gov

John Francis Lyons
Grant & Lyons, LLP
149 Wurtemburg Rd.
Rhinebeck, NY 12572
jlyons@grantlyons.com

Toxic Torts
Cheryl P. Vollweiler
Traub Lieberman Staus
& Shrewsberry LLP
Mid-Westchester Executive Park
7 Skyline Drive
Hawthorne, NY 10532
cvollweiler@traublieberman.com

Transportation and Infrastructure
John Fehrenbach
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006-3817
jfehrenbach@winston.com

Richard J. Brickwedde
Brickwedde Law Firm
211 W. Jefferson Street, Suite 26
Syracuse, NY 13202
rbrickwedde@brickwedde.com

Water Quality
George A. Rodenhausen
Rapport Meyers LLP
20 Spring Brook Park
Rhinebeck, NY 12572-1194
grodenhausen@rapportmeyers.com

Task Force on Licensed State Professionals
Kevin G. Ryan
Ryan Law Group, LLC
10 Circle Avenue
Larchmont, NY 10538
kgr@ryanlawgroupllc.com

Section Officers

Publication—Editorial Policy—Subscriptions

Persons interested in writing for this *Journal* are welcomed and encouraged to submit their articles for consideration. Your ideas and comments about the *Journal* are appreciated.

Publication Policy: All articles should be submitted to me and must include a cover letter giving permission for publication in this *Journal*. We will assume your submission is for the exclusive use of this *Journal* unless you advise to the contrary in your letter. If an article has been printed elsewhere, please ensure that the *Journal* has the appropriate permission to reprint the article. Authors will be notified only if articles are rejected. Authors are encouraged to include a brief biography.

For ease of publication, articles should be e-mailed or submitted on a CD, preferably in Microsoft Word or WordPerfect. Please spell-check and grammar-check submissions.

Editorial Policy: The articles in this *Journal* represent the authors' viewpoints and research and not that of the *Journal* Editorial Staff or Section Officers. The accuracy of the sources used and the cases cited in submissions is the responsibility of the author.

Non-Member Subscriptions: *The New York Environmental Lawyer* is available by subscription to law libraries. The subscription rate for 2013 is $155.00. For further information contact the Newsletter Dept. at the Bar Center, (518) 463-3200.

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

Miriam E. Villani, Editor-in-Chief

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

THE NEW YORK ENVIRONMENTAL LAWYER

Accommodations for Persons with Disabilities:
NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at (518) 463-3200.

NEW YORK STATE BAR ASSOCIATION
ENVIRONMENTAL LAW SECTION
One Elk Street, Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

NEW YORK STATE BAR ASSOCIATION

Save the Dates

Environmental Law Section

FALL MEETING

October 25-27, 2013

Jiminy Peak Mountain Resort
Hancock, MA

(Joint Meeting with the Municipal Law Section)