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The New York Environmental Lawyer

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Message from the Chair

At this writing, I am proud to report that the work of the Environmental Law Section has continued unabated through the summer months.

Three August 2015 Environmental-Public Health Calamities

Three major environmental disasters arose during this period: the mining waste spill into the Animas and San Juan Rivers; the Legionnaires' Disease outbreak in NYC; and the hazardous chemical explosion and fire in China.

In Colorado and downstream states, the water supply and environment were threatened when an old Colorado dam holding back mining wastes collapsed during USEPA testing. The resulting spill released large quantities of heavy metals, including arsenic, into the Animas River and connected waterways of the Colorado River basin.[1]

Closer to home, a deadly outbreak of Legionnaires' Disease struck the Bronx and took at least twelve lives. This bacteria-based respiratory ailment is often associated with infected, but mostly untested, HVAC units on older commercial and residential buildings. At this writing, the outbreak appears to be under control despite some unfortunate political gamesmanship between the political powers that be in New York City and Albany.[2]

Michael Lesser

Finally, Tianjin, China suffered an outright human and environmental catastrophe when a large hazardous chemical storage facility exploded and burned. Pictures of the extreme and widespread carnage in this normally teeming port city are sobering. The causes and long-term impacts remain unknown at this time but the loss of life currently numbers over 100. Many victims were injured or are still missing (including many firefighters).[3]

Inside

NYSBA

If there is a common thread that runs through these disparate incidents, it is that better environmental regulatory vigilance and disaster planning may have prevented or mitigated these terrible events.

New Lawyer Trends—Section Membership and Diversity Efforts

Three current trends may impact the ability of all legal service organizations to attract young attorneys. According to statistics cited in a recent *Bloomberg Business Week* article, bar passage rates dropped significantly for the summer 2014 bar exam.[4] The same article also cites to the statistically significant drop in both law school applications and enrollments in recent years.[5] The New York State bar passage rate also declined in July 2014, from 69% for all test takers to 65%.[6] Finally, it is worth noting that starting with the summer 2016 bar exam, New York will join other states in administering the Uniform Bar Exam (UBE) in lieu of individual state bar exams.[7] The ultimate result will be that law school graduates in UBE participating states will be able to apply for bar admission in all the other UBE states.

NYSBA and other state and national legal organizations have pontificated at length on these issues and the long-term impacts on the legal profession. However, I think it is fair—although grossly simplistic, I admit—to say that the numbers and location of young attorneys will be in flux in the near term. Therefore, bar association membership in general and our own Environmental Law Section membership cannot rely solely on new attorneys to maintain our membership. Membership retention must be part of the equation. This means Section leaders must provide value and quality services to our members on a regular and consistent basis. To put it another and perhaps more crass way, we are now in a membership competition for limited numbers of potential members based on the quality of our product.

However, in more relevant and immediate good news, our overall Section membership appears to be rebounding. As of December 22, 2015, the Environmental Law Section has 1,027 members. It is worth noting that approximately fifty new members have joined this year alone. The Section cabinet is also working with NYSBA membership staff to send membership information to those NYSBA members who indicated that the environment is their practice area even though they are not current Section members. This category is estimated to consist of about 3,000 NYSBA members. Long-term Section members will recall that such an initiative has been discussed in the past, but never implemented.

Finally, the Section cabinet has followed up with our new members by sending each new Section member a welcome letter containing an event schedule, Section benefit menu and communications/publications information. Approximately fifty such letters have been sent thus far in 2015. To our credit, the NYSBA Membership Department has noticed this simple but effective innovation and it may be adopted by other NYSBA sections.

Section Committee Initiative and Other News

Those who follow such issues will know that the past few Section cabinets have tried various methods to reinvigorate our committees. Many have been dormant in recent years. Building on past efforts, committee chairs or co-chairs recently received a cover email and attached model committee report form. The simple form can be completed and used as the basis of a committee report to the Section which will then be published in our various media formats.

The Brownfields Task Force met throughout the summer to meet tight state deadlines for the submission of comments on draft Brownfields regulations. In particular, the comments focused on the thorny issue of defining an underdeveloped site. In any event, NYSDEC staff and the other stakeholders greatly appreciated the Task Force's guidance and scholarship on brownfields issues.

In what I hope is the new normal, the Section's budget issues for the 2016 fiscal year were quietly and quickly resolved by our Treasurer Kevin Bernstein with the help of NYSBA staff. The projected 2016 budget is approximately $79,000. Currently, a surplus is possible for fiscal 2015, although that all depends on the expenses incurred and revenues received for our fall 2015 activities. The current Section surplus (not including 2015 adjustments) stands at approximately $43,000. This is more than a 100% increase since 2012. Credit and compliments are due to the past several Section cabinets, event co-chairs, sponsor coordinator Phil Dixon, and NYSBA staff for these financial improvements.

Publications and Media

The Section's media outlets also continue to grow and improve. Most recently, more than 150 members have joined the Section's private LinkedIn page to current news and information. Credit for this innovation must be directed to Section Vice Chair Larry Schnapf and NYSBA Section Liaison Lisa Bataille.

To further enhance our social media footprint, more than 1,000 users have enjoyed our Section blog, Envirosphere, since 2014. In particular, the Section has received many positive comments about the unique NY Environmental Enforcement Update which will celebrate its third anniversary in January 2016. Blog editor Sam Campasso has overseen our success in this endeavor since 2012.

Astute observers will also notice that new information about the Section's activities and functions are being added on a regular basis to the content of the ELS homepage. For example, NYSBA staff has started to add the excellent reports drafted by our House of Delegates Representa-

tive Linda Shaw and Alternate David Quist. The Section must continue to utilize this tool to enhance services and information for our members.

Finally, it goes without saying that the Section's signature publication, *The New York Environmental Lawyer*, continues to represent the highest standards of professionalism and legal scholarship. The recently published Spring/Summer 2015 edition (Vol. 35/No. 1) contains eight major scholastic articles in addition to the usual Section news and legal and government update features. Congratulations to the members of the Student Editorial Board, Issue Editor Keith Hirokawa, and Editor-in-Chief Miriam Villani for a job well done.

The 2015 Fall Meeting

The October 2-4, 2015, Fall Section Meeting and associated MCLE program were a great success. In pursuit of our goals of increasing membership and enhancing diversity, the Section designed a unique two-tier registration program. New attorneys in search of transitional MCLE credits and budget relief had the option of registering for a Friday-only program focused on administrative trial practice training.

Those who registered for the full weekend experienced MCLE sessions addressing current issues in state oil and gas activities, crude oil train regulation and the revised state Brownfield Opportunity Area (BOA) program. There also was a special Sunday morning program devoted to regulatory developments and the protection of threatened state bat species.

In addition to the MCLE programming, the Section enjoyed the presentations of two distinguished dinner speakers: Neil Gifford, the Conservation Director of the Albany Pinebush Preserve Commission (Friday); and Bruce Gyori, of Manatt Phelps and Philips, on politics and climate change. This unique and well-programmed event was the result of the hard work and creativity of the three co-chairs: Alita Giuda, Gene Kelly, and Genevieve Trigg.

November 2015 Brownfields CLE Programs

In a new and exciting venture, program co-chairs Alan Knauf, Maureen Leary, and Larry Schnapf, along with others, presented in November 2015 a dual upstate-downstate program addressing the recent and significant changes in the New York Brownfield Cleanup Program (BCP) and related statutes, regulations, and policies. The recent changes have created both opportunities for redevelopment and confusion in matters such as BCP site eligibility and tax credit calculations.

The 2016 Annual Meeting

The planning and programming for the Annual Section Meeting in conjunction with the NYSBA Annual Meeting is well under way. Co-chairs Susan Brailey, Dan Chorost, John Parker and Nicholas Ward-Willis are planning an exciting program, including: the Section's first ever in-depth look at solar energy law; the legal and planning intricacies of the recent changes to the Clean Water Act; and the status of urban environmental enforcement in New York. Of course, our USEPA Section members will present the usual comprehensive USEPA rundown on Thursday evening thanks to the organizing efforts of our Section Secretary and USEPA attorney Marla Wieder. The program is scheduled for January 28-29, 2016, as part of the NYSBA Annual Meeting that week in New York City.

Please note that the information and schedules above are subject to change. So, be sure to check the NYSBA Environmental Law Section homepage for all information on Section events and activities.

In closing, I wish to thank NYSBA staff for helping the Section in its endeavors. In particular, we all must thank Lisa Bataille, Kathy Plog, and Lori Nicoll for their guidance and patience. Of course, our work remains possible due to the contributions of our 2015-16 officers, Larry Schnapf, Kevin Bernstein, and Marla Wieder as well as the extended Section cabinet.

Finally, I hope to meet many of you at our upcoming events. If you have any suggestions or comments, please do not hesitate to contact me or any of the Section's officers. Remember, to quote the late great radio talk show host Bob Grant, "Your influence counts! Use it!"

Best wishes to all,
Michael J. Lesser
Environmental Law Section Chair, 2015-2016

Endnotes

1. Emergency Response to August 2015 release from Gold King Mine, U.S. Env't Protection Agency, http://www2.epa.gov/goldkingmine (last updated Oct. 19, 2015).
2. Claire Hughes, *State to Deploy Teams to South Bronx for Legionnaires' Testing*, Albany Times Union (August 7, 2015, 10:39 PM), http://www.timesunion.com/local/article/State-to-deploy-teams-to-South-Bronx-for-6432296.php.
3. Andrew Jacobs, *Death Toll in Chinese Fire Rises, Along With Anger at Apparent Safety Lapses*, NY Times (August 14, 2015), http://www.nytimes.com/2015/08/15/world/asia/rising-anger-but-few-answers-after-explosions-in-tianjin.html?_r=0.
4. Natalie Kitroeff, *Are Lawyers Getting Dumber?*, Bloomberg Bus. Week (August 20, 2015), http://www.bloomberg.com/news/features/2015-08-20/are-lawyers-getting-dumber-.
5. *Id.*
6. NYS Board of Bar Examiners, *Bar Exam Pass Rates, 2010–2014,* http://www.nybarexam.org/ExamStats/NYBarExam_PassRates%20_2010-2014.pdf.
7. Stephanie Clifford & James C. McKinley Jr., *New York to Adopt a Uniform Bar Exam used in 15 Other States*, NY Times (May 5, 2015), http://www.nytimes.com/2015/05/06/nyregion/new-york-state-to-adopt-uniform-bar-exam.html.

Message from the Editor-in-Chief

On October 5, 2015, General Electric announced that it had successfully completed its Hudson River PCB Superfund dredging project. Over a six-year period, GE removed more than 2.75 million cubic yards of sediment from the Hudson River including 310,000 pounds of PCBs. The project was completed in less time than expected with fewer secondary impacts than anticipated, like re-suspending sediments into the water column during dredging. The project was the most extensive dredging project undertaken in the country. Its success is of historic proportions for the Hudson River, for the local economy, and because of the cooperative efforts of the government, the company, and the communities. The lawyers who worked together on this project, many of whom are members of NYSBA and this Section, should be applauded for their achievement.

A Little Bit of History

Starting in the late 1930s, or early 1940s, GE used polychlorinated biphenyls (PCBs) in the manufacturing of capacitors at two plants on the banks of the Hudson River, north of Albany. Those operations continued for more than thirty years until the use of PCBs was banned in 1979, pursuant to the Toxic Substances Control Act (TSCA).

In the late 1970s, GE entered into agreements with the State of New York to study the impact of PCBs on the Hudson River, as well as to conduct remediation at the two source sites. In 1980, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) was enacted, and in response to a request from the state, EPA added the Hudson River to the National Priorities List in 1983. The next year, a decision was issued rejecting dredging as a remedy and recommending capping of shoreline areas.

EPA began a reassessment of the Hudson contamination around five years later, but it would take twelve years before a conclusion was reached and a Record of Decision (ROD) was issued in 2002. The ROD called for dredging 2.65 million cubic yards of sediment from a 40-mile stretch of the river. GE entered into an agreement with EPA in 2002, to undertake the first phase of a dredging project. This phase included mapping the river bottom and collecting and analyzing over 30,000 samples. Ultimately GE would collect and analyze over 60,000 sediment samples. The phasing process—unusual in CERCLA remedies—was designed to assess the effectiveness of mapping and dredging techniques, as well as to review whether the dredging process itself would benefit the river.

Several technical and logistical challenges arose, including the acquisition of an abandoned 110-acre farm for construction and placement of a massive dewatering facility, construction of rail lines and roadways, and contracting for and acquiring dredging equipment. As a result, dredging did not commence until 2009. Over the course of six months of mostly continuous work, 288,000 cubic yards of sediment were removed. That amount exceeded EPA's target for removal, but an independent panel of experts determined that the dredging did not, and could not, meet the Agency's performance criteria. Subsequently, EPA amended its standards, and in 2010, GE agreed to perform the second phase of the project. EPA predicted it would take five to seven years to complete this phase, and estimated that GE would be able to remove approximately 350,000 cubic yards of sediment each year.

Over the next five years, GE exceeded EPA's expectations and more than once removed over 600,000 cubic yards of sediment in a single year. One hundred percent of the PCBs targeted by EPA for removal—more than 2.7 million cubic yards of sediment from a 40-mile stretch of river between Fort Edward and Troy, NY—have been addressed. Of great significance is the removal of more than 300,000 pounds of PCBs from the river, which amount is more than twice what was originally anticipated. EPA is calling the project "enormously successful" and a national model.

Next Steps

There is more work to do. GE's environmental cleanup work on and along the Hudson River will continue. GE will restore underwater vegetation to areas of the river that have been dredged, and will monitor environmental conditions in the river for the foreseeable future. The data will be used to assess the benefits of the dredging project. GE also will continue the cleanups of its Hudson Falls and Fort Edward plant sites, which cleanups already have eliminated the sites as significant sources of PCBs to the river.

As with all big projects, issues remain. The Natural Resource Damages Trustees have not identified further claims they might pursue. Environmental NGOs have demanded that GE be prevented from dismantling the

dewatering facility, and some are pushing for GE to undertake additional dredging.

GE and EPA will continue to assess the effectiveness of the remedy.

All-in-All, a Success Story

It is worth pausing for just a moment to celebrate the achievements of the many who have worked together on this project. Our legal system developed a means to remedy historic environmental contamination. Our regulatory agencies effectively enforced applicable laws, regulations, and policies. A New York company spent more than a billion dollars in response. The result was a massive cleanup with a significant environmental benefit. Views of the ultimate outcome may differ, but this is a success story and all those involved, including those members of the Section who have been working tirelessly on the Hudson River dredging project, deserve recognition for their achievements.

Miriam E. Villani

http://www.epa.gov/hudson

http://www.hudsondredging.com

From the Issue Editor

This issue focuses on the recent amendments to the Brownfield Cleanup Program ("BCP"). We have included three articles that explain the changes, explain some of the likely consequences of the changes, and take a closer look at some of the provisions. The BCP plays a major role in the remediation of contaminated sites and these changes, particularly the changes to site eligibility and to the tax credit provisions, will play an important role in future cleanups.

The first article, by David J. Freeman and Larry Schnapf, co-chairs of the Section's Brownfield Task Force, reviews key elements of the amendments. The article describes areas where the amendments will create greater certainty and clarity, as well as areas where the search for greater clarity may have to wait until the New York State Department of Environmental Conservation ("NYSDEC") promulgates regulations.

The article by Steve Barnett examines whether the changes will increase the number of sites eligible for the program. Mr. Barnett's article provides a history of the BCP, including the number and location of the sites that have benefitted from the program. Addressing the changes in eligibility, the article attempts to draw some conclusions regarding how the scope of the program will change. As someone who has been involved with brownfield sites, the statistics were something of an eye-opener. I tended to look at sites individually and this article provides a statewide view.

An article co-authored by Linda Shaw and Dwight Kanyuck provides an in-depth analysis of how the changes in the definitions of certain terms will affect the treatment of the costs of a foundation that serves as a cover system. The article starts by noting that there is an exclusion from site preparation costs for "the costs of foundation systems that exceed cover system requirements" and that costs eligible for the tangible property component includes costs of foundations that are not included in site preparation costs. The article analyzes statutory language, regulations, and guidance documents to assess how cap and cover remedies should be treated.

The substantive legal portion of this issue also includes student reviews of recent cases and legislation. We appreciate the work of the students in identifying relevant recent decisions as well as the work of Keith Hirokawa, a Section member and one of the issue editors for *TNYEL*, in assisting the students.

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

Aaron Gershonowitz

Message from the Student Editorial Board

Trying to Go Green—A Law Student's Perspective on Careers in Environmental Law

> Dear Ms. Roberts,
>
> Thank you for your application. While your credentials are impressive, our firm does not hire associates straight out of law school. I would advise you to get some experience, and then reapply to be considered for a position with us.
>
> Sincerely,
> almost every hiring attorney I have heard back from regarding my application for a post-graduate position.

Before writing this editorial, I asked a few of my classmates about how their post-graduate job-search was going. I was both surprised and comforted (because misery loves company) to hear that the majority of my classmates have been receiving almost identical responses from potential employers. It is unfortunately a fact that the job market for students coming out of law school today is less than flourishing. In 2013 alone, forty-three percent of law school graduates did not have full-time legal jobs nine months after graduation.[1] Chief Judge Lippman himself recently noted that "employment prospects for recent graduates are still grim" and that enrollment in New York law schools has dropped.[2]

A teacher of mine once told me that an education is the best investment you can make. To this day I believe that statement holds true. However, as I now stand in the midst of my job search, knee deep in student debt, I find it discouraging to realize that I might not get the quick return I expected from my investment in law school. And, being a student interested in pursuing a career in environmental law, a specified area, can be particularly unnerving because the career opportunities are even fewer and farther between.

I recently had the opportunity to speak with an environmental attorney, who works for a global nonprofit environmental law organization, about attaining a career in environmental law. I asked him about his career path—how he got to be in the position he is in today—hoping to get some reassurance that there are plenty of opportunities out there. Unfortunately, his answer did little to settle my nerves. Essentially, he told me that he came out of law school at a time when environmental litigation was first taking off, and that he and many of his colleagues were able to fall into positions at law firms that were taking advantage of the growing field. Realizing that I was not coming out of law school with the same economy for environmental lawyers (or any type of lawyer for that matter), I asked for his advice—what should a young lawyer do, coming out of law school now, to begin her career in environmental law? He hit me with the same discouraging answer I've become accustomed to hearing. He said, "Get a year or two of experience and then more firms will consider hiring you."

Thinking back on this conversation now, I regret not asking the looming question that has been on my mind throughout my application process. The question I want to ask every law firm that gives me this answer: where are young lawyers, fresh out of law school, supposed to get "a year or two" of legal experience if no one will hire us?

Careers in environmental law generally lie in three categories: government (i.e., EPA, DEC, Environmental Protection Bureau of the New York State Attorney General), private firms, and not-for-profits (i.e., Sierra Club, Earthjustice, NRDC). From the responses I have received, all of these jobs are generally seeking to hire candidates who have both an understanding of environmental issues and litigation experience. The problem that arises is that students fresh out of law school who are interested in pursuing a career in environmental law are forced to take any job that they can, in any area of law, both to gain experience and pay off their debt. Then, once they finally do have the few years' experience they need to be a "qualified" candidate for a position in environmental law, they have shifted their career focus and become out of touch with the environmental law issues.

But we, the students coming out of law school today, are the future of this career. Seasoned attorneys are best fit to help train us to combat the environmental issues we as human beings face, and will continue to face. We need guidance and we need experience. Specifically, while we are in law school, it would be beneficial to hear from local environmental lawyers to see what internships, career paths, and job opportunities there are. Even receiving information on CLEs or other events related to environmental law could help students become more knowledgeable about the field.

The environmental challenges we are facing today, as both New York State and global citizens, are larger and more complicated than ever. And, these challenges are only going to continue getting larger and more complicated. Law students who are interested in pursuing a career to deal with these challenges need to be given the opportunity.

Kate Roberts on behalf of the Student Editorial Board
Albany Law School '16

Endnotes

1. The Editorial Board, *The Law School Debt Crisis* (Oct. 24, 2015), http://www.nytimes.com/2015/10/25/opinion/sunday/the-law-school-debt-crisis.html?_r=0.
2. Stephanie Clifford & James C. McKinley Jr., *New York to Adopt a Uniform Bar Exam Used in 15 Other States* (May 5, 2015), http://www.nytimes.com/2015/05/06/nyregion/new-york-state-to-adopt-uniform-bar-exam.html.

***Response from the Editor-in-Chief: We hear you Kate. Come on Section members! Let's hire the recent grads. Not just those who want to enter the field of environmental law. Let's hire all the recent grads!*—MEV**

EPA Update

By Mary McHale, Chris Saporita, Joseph A. Siegel and Marla E. Wieder

Mary McHale

Chris Saporita

Joseph A. Siegel

Marla E. Wieder

Introduction

2015 has been a banner year for EPA (and it's not over yet!), with, among other things, the dredging of PCBs from the Hudson coming to a successful conclusion, a significant strengthening of the national ambient air quality standard for ozone, the establishment of carbon dioxide limits for existing power plants, and a new, more clear and ecologically grounded definition of "waters of the United States." This article attempts to summarize those and other highlights from the past nine months and points to further resources for those whose practice takes them deeper.

Superfund/RCRA/Brownfields

1. New Guidance on Comfort/Status Letters

On August 25, 2015, EPA issued its "Revised Policy on Issuance of Superfund Comfort/Status Letters." The revised policy discusses the background of the EPA's issuance of Superfund comfort/status letters, describes the purpose and intended use of these letters under CERCLA, and includes three updated model Superfund comfort/status letters and a handy table regarding the use of comfort/status letters. For more information, see: http://www2.epa.gov/enforcement/guidance-revised-policy-issuance-superfund-comfortstatus-letters.

2. The New Vapor Intrusion Guides

On June 11, 2015, EPA issued two final vapor intrusion technical guides to support assessment and mitigation activities at contaminated sites where vapor intrusion (VI) is a potential or real concern. The documents present EPA's current recommendations for identifying, evaluating and managing VI. The First document, *Technical Guide for Assessing and Mitigating the Vapor Intrusion Pathway from Subsurface Vapor Sources to Indoor Air,* applies to all sites being evaluated under federal land cleanup statutes by EPA, other federal agencies, state and tribal governments and brownfield grantees. The Second document, *Technical Guide for Addressing Petroleum Vapor Intrusion at Leaking Underground Storage Tank Sites*, a companion document, addresses any sites where VI related to petroleum contamination from underground storage tanks is a potential concern. EPA hopes that the guides will help foster more consistent and uniform approaches to addressing VI nationwide. To view or download the documents, go to: http://www.epa.gov/oswer/vaporintrusion. For more on VI issues see, EPA Region 2's VI homepage at: www.epa.gov/region02/superfund/npl/vaporintrusion/.

3. Welcome to the NPL…

In the waning days of September, EPA added five more hazardous waste sites to the Superfund National Priorities List (NPL) and proposed seven more. None of the new sites were in EPA Region 2; however, the former Kil-Tone Company, a pesticide manufacturer in Vineland, N.J., was proposed for listing.[1]

It is worth noting that contrary to what was once the case, adding a site to the NPL stimulates economic revitalization. A 2011 study by researchers at Duke and Pittsburgh Universities found that once a site has all cleanup remedies in place, nearby property values reflect a significant increase as compared to their values prior to the site being proposed for the NPL.[2] We witnessed a rise in property values first-hand in the aftermath of the listing of the Gowanus Canal Superfund Site in Brooklyn. Cleanups also increase tax revenue for local communities and state governments, including helping to create jobs during and after cleanup. For example, at 450 of the 800 sites supporting use or reuse activities, EPA found, at the end of fiscal year 2014, that there were ongoing operations of approximately 3,400 businesses, generating annual sales of more than $31 billion and employing more than 89,000 people.[3]

4. Hudson River PCBs Dredging Project

By the time you read this article, the sixth and final dredging season associated with the Hudson River dredg-

ing project will hopefully have been completed. While the required dredging itself proved quite successful, issues regarding the proper sampling of the fish, dismantling the 110-acre dewatering plant site (which includes the plant, several buildings, and valuable infrastructure such as roads, rail lines, and stormwater pipes), calls for additional dredging (including the Champlain Canal), and the natural resource damage claim kept the spotlight on the site throughout the season.

In September 2015, EPA sought public comment on a draft plan for dismantling GE's PCB processing facility. Various groups plus the National Oceanic Atmospheric Administration and the U.S. Fish and Wildlife Service are pushing for GE to leave the site operational, so that it could be used for future dredging efforts. No doubt this will be on ongoing dialogue. For more information on the Hudson River dredging project, visit http://www.epa.gov/hudson.

In October 2014, EPA announced that GE has agreed to conduct a comprehensive study of contamination in the shoreline areas of the upper Hudson River that are subject to flooding, called floodplains. Under the agreement GE will investigate the PCB contamination in a 40-mile stretch of the Hudson River floodplain from Hudson Falls to Troy and will develop cleanup options. This investigation is expected to cost about $20 million. The project area covers 6,000 acres of floodplain. Over 7,000 soil samples have already been collected.[4]

5. Fulton Avenue Superfund Remedy Modified

In September 2015, EPA finalized its decision to modify an interim cleanup plan originally issued in 2007 to address a portion of the contaminated groundwater at the Fulton Avenue Superfund Site in the Towns of North Hempstead and Hempstead, N.Y.[5] The Site groundwater is contaminated with volatile organic compounds, including perchloroethylene, that resulted in part from previous dry cleaning operations. The modified plan requires continuing to operate existing treatment systems for two Village of Garden City drinking water supply wells, but eliminates plans for a separate treatment system for the groundwater. This separate system is not needed, at this time, in part because contamination levels in area groundwater have been declining since EPA issued its 2007 cleanup decision. The Site also includes trichloroethylene groundwater contamination that is being addressed as part of a second phase of work. EPA is performing an investigation to evaluate the problem and to develop a proposed plan for the second phase. For more on this Site, see: http://www.epa.gov/region02/superfund/npl/fulton/.

6. EPA Finalizes Changes to Cleanup Plan at Olean Well Field Site

In September 2015, EPA finalized its changes to a cleanup plan originally issued in 1996 to address soil and groundwater at the AVX property at the Olean Well Field Superfund Site in Cattaraugus County, Olean, NY. Soil and groundwater at the AVX property are contaminated with volatile organic compounds, solvents, aerosol sprays, cleaners, disinfectants, automotive products and dry cleaning fluids. The modified plan calls for building a groundwater collection trench and continuously pumping the AVX production well to contain the groundwater contamination and using existing barriers such as the building and pavement to contain the soil contamination. AVX Corporation, which is responsible for the AVX property, performed the initial cleanup and additional studies under an agreement with EPA and EPA expects it will enter into an agreement with AVX, or otherwise require it, to perform the work being planned. For more on this complex Site, see http://www.epa.gov/region02/superfund/npl/olean/.

7. Bankruptcy Matters—Tronox Funds Distributed

Funds from a historic settlement reached with Anadarko and Kerr-McGee have been disbursed for cleanups across the country, including $438 million that will go toward paying for past and future cleanup work at two New Jersey Superfund sites. The settlement funds will be used at the Welsbach Superfund site in Camden and Gloucester City, New Jersey and reimburse the federal government for substantial cleanup costs at the Federal Creosote Superfund site in Manville, New Jersey.[6]

The Tronox settlement provides $5.15 billion to resolve claims that Anadarko and Kerr-McGee fraudulently moved assets to evade liability for contamination at Superfund sites around the country. Of this total, approximately $4.4 billion will be used toward cleaning up contaminated sites. This is the largest sum ever awarded in this type of a bankruptcy-related environmental settlement with the federal government.[7]

On April 3, 2014, the U.S. Department of Justice announced this settlement for public comment and judicial approval. On November 10, 2014, the court for the SDNY approved the agreement. The deadline for any appeals from the district court's decision passed on January 20, 2015. More information on this settlement can be found at: http://www2.epa.gov/enforcement/case-summary-settlement-agreement-anadarko-fraud-case-results-billions-environmental.

8. E-Waste Settlement in Vestal, New York

EPA has reached an agreement with ECO International, LLC of Vestal, New York, which will ensure the proper disposal of more than 26 million pounds of lead-containing crushed glass. Until 2013, ECO International was a recycler of discarded electronic devices ("e-waste"), such as older televisions and computer monitors, which can contain lead. Under federal hazardous waste law, hazardous wastes must be stored, handled and disposed of properly to safeguard public health and the environment. Older televisions and computers contain cathode ray tubes ("CRTs"), which typically contain significant

amounts of lead. When CRTs are broken or crushed during the recycling process, a large percentage of these materials is classified as hazardous wastes.

EPA inspections in 2012 of ECO International's Vestal processing facility, and the company's Hallstead, Pennsylvania storage facility, revealed that the company was in possession of about 13,000 tons of lead-containing CRTs and crushed glass. Much of this glass had been accumulating since 2010, when the international demand for many recycled electronics began to decline. Under the agreement, ECO International will complete disposal of the remaining glass by shipping it to a properly licensed and permitted facility by November 2015. ECO International will also clean the areas where the CRT glass had been handled and stored, will provide the EPA with periodic reports on the progress of the clean-up efforts, and will pay a nominal penalty.[8] For more information about electronics recycling and sustainable management of electronics, visit: http://www2.epa.gov/ssm-electronics.

9. Hazardous Waste Regulations—Healthcare Sector

In August 2015, EPA announced that it was looking to change two hazardous waste regulations related to the healthcare sector and waste producers within that sector. The first rule is designed to protect waterways by banning healthcare facilities from flushing waste pharmaceuticals down toilets or sinks. EPA has estimated that measure would prevent more than 6,400 tons of hazardous waste from entering the water supply. The second rule would seek to improve the labeling of materials that ultimately produce hazardous waste and give healthcare facilities clearer information about how to deal with the waste products.[9] The proposed rules are subject to a 60-day public comment period. For more on these proposed rules, see: https://blog.epa.gov/blog/2015/08/making-hazardous-waste-regulations/. To review these proposed rules, visit: www2.epa.gov/hwgenerators.

10. Acute Methyl Bromide Exposure in the Virgin Islands

On March 20, 2015, EPA was notified of a potential chemical substance exposure that occurred in St. John, U.S. Virgin Islands (VI). A Delaware family of four vacationing at Sirenusa, a condominium resort, began showing symptoms consistent with pesticide poisoning. The family was briefly hospitalized in St. Thomas before being transferred to stateside hospitals for treatment.

Subsequent investigations confirmed that the condo unit below the one in which the family had been staying had been fumigated with methyl bromide by Terminix days earlier. EPA coordinated with the relevant VI agencies to isolate canisters of methyl bromide owned by the exterminator in order to avoid further exposures. EPA simultaneously launched a successful multi-week response effort to clear the affected units of methyl bromide and a civil investigation into the origin of the pesticide used in the application.

Methyl bromide, a highly toxic restricted use pesticide and ozone-depleting substance, was banned for indoor residential use in the 1980s. Pursuant to the Montreal Protocols, the production and use of quantities of methyl bromide are subject to strict limitations, which are further defined by individual pesticide product labels. Acceptable uses are primarily restricted to agriculture and commodity applications.

As the VI, through the Department of Planning and Natural Resources, has primacy for enforcing pesticide use violations, EPA cannot initiate investigations or enforcement without a referral from the VI or a finding of inadequacy of the VI's enforcement efforts. As of the drafting of this article, the VI continues to develop enforcement actions against methyl bromide applicators in the VI, including Terminix. Given that the methyl bromide involved in the Sirenusa incident was sent from a distributor in Puerto Rico, EPA's civil investigation stemming from the incident currently centers on sales of methyl bromide by distributors in Puerto Rico.

Terminix is believed to have commenced mediation with the family. The mediation is being led by Kenneth Feinberg, who negotiated the settlements for the victims of the September 11th attacks.[10]

As for the family's condition, their recovery has been described as slow and agonizing. The two teenage sons, who were in medically induced comas for weeks, are conscious, but remain hospitalized. Their father's condition continues to improve; however he suffers from severe tremors and has trouble speaking. Their mother has made the most progress towards recovery, but struggles to care for her family.[11]

11. Strengthening Pesticide Safety on Farms

In September 2015, EPA announced that it was strengthening 20-year-old rules designed to protect farmworkers from toxic pesticides. The rules will bar almost anyone under 18 from handling pesticides and require buffer zones around treated fields to protect workers from drift and fumes. Under the new standards, workers would have to be trained annually on the risks of pesticides (instead of every 5 years), including how to protect their families when they return home with contaminated clothing. Farms would also be required to post signs when the most toxic pesticides are applied.[12] EPA has estimated that between 1,800 and 3,000 cases of pesticide exposure are reported each year at farms, nurseries and other agricultural operations covered by the current standards. Administrator McCarthy said those rules haven't been working and that many cases of exposure aren't reported.

Farmworkers are in a unique position in that many of the workplace protection standards issued by the Occupational Safety and Health Administration for other industries do not apply to them. Additionally, many farmwork-

ers are migrants who move from farm to farm, making it difficult to track health problems associated with pesticide exposure.[13]

12. Brownfields Funding Awarded to Niagara County

In May, EPA provided $400,000 in brownfields funding to Niagara County, New York, to assess abandoned and contaminated properties. The county will use a $200,000 community-wide hazardous substance assessment grant and a $200,000 community-wide petroleum assessment grant to determine the nature and extent of environmental contamination at some of the county's 338 brownfields sites. These include the locations of former dry cleaners, chemical manufacturers, automotive repair facilities, gas stations and other contaminated properties. The funds will also be used to determine the public health and environmental impacts of these sites, and to support community outreach activities. Additional information on EPA Brownfields activities is available at http://epa.gov/brownfields.[14]

Air Quality

1. Supreme Court Decision on Mercury Air Toxics Rule

On June 29, 2015, in *Michigan et al. v. Environmental Protection Agency*, the United States Supreme Court, in a 5-4 decision, reversed and remanded to the D.C. Circuit, but did not vacate, the National Emission Standards for Hazardous Air Pollutants from Coal-and Oil-fired Electric Steam Generating Units (EGUs).[15] The rule is commonly referred to as the "Mercury Air Toxics Standards" or "MATS."[16] New or reconstructed EGUs were required to comply with the MATS by April 16, 2012, or upon startup, whichever is later; existing EGUs were required to comply by no later than April 16, 2015.[17]

The Clean Air Act (CAA) directs the EPA to regulate emissions of HAPS from EGUs (which the Court referred to as "power plants") if the EPA finds regulation "appropriate and necessary."[18] The question before the Court was whether it was reasonable for EPA to not consider costs in determining whether it is "appropriate and necessary" to regulate HAPs emitted by EGUs.[19] The D.C. Circuit, in *White Stallion Energy Center, LLC v. EPA,* 748 F.3d 1222 (D.C. Cir. 2014), had upheld the Agency's interpretation of costs under CAA § 112(n)(1)(A).[20] The Supreme Court, in reversing and remanding to the D.C. Circuit, held that EPA interpreted Clean Air Act (CAA) §112(n)(1)(A) "unreasonably when it deemed cost irrelevant to the decision to regulate power plants."[21] The dissent noted that the EPA established emissions limits following a lengthy regulatory process during which the Agency carefully considered costs and said that "the Agency acted well within its authority in declining to consider costs at the opening bell of the regulatory process given that it would do so in every round thereafter—and given that the emissions limits finally issued would depend crucially on those accountings."[22] The remand is pending before the D.C. Circuit.[23]

2. Transport Rule Litigation

In April, 2014, in *EPA v. EME Homer City Generation, L.P.,* the Supreme Court rendered a favorable decision on the Cross State Air Pollution Rule (CSAPR or Transport Rule) but remanded certain aspects of the rule to the D.C. Circuit.[24] On July 28, 2015, in *EME Homer City Generation, L.P. v. EPA,* the United States Court of Appeals for the D.C. Circuit issued its decision on the remand.[25]

The D.C. Circuit substantially upheld those aspects of the Transport Rule that were on remand from the Supreme Court, denying the petitions with respect to "a number of petitioners' broader challenges to the Transport Rule that we did not have occasion to address in the prior case."[26] The D.C. Circuit noted that the Supreme Court "stated that over-control of individual upwind States could be contested through 'particularized, as-applied challenge[s].'"[27] The D.C. Circuit considered "several as-applied over-control challenges to EPA's 2014 emissions budgets."[28] Petitioners challenged the 2014 SO_2 emissions budgets for four states and the 2014 ozone-season NO emissions budgets for 11 states, including New Jersey and New York."[29] The D.C. Circuit found petitioners' as-applied challenges to be meritorious and those 2014 emissions budgets to be invalid.[30] It went on to "grant the petitions to that limited extent" and remanded the 2014 emission budgets at issue, without vacatur, to the EPA for reconsideration.[31]

3. Final Startup, Shutdown, Malfunction Rule

On May 22, 2015, the Administrator took final action on a petition for rulemaking concerning "how provisions in EPA-approved state implementation plans (SIPs) treat excess emissions during periods of startup, shutdown or malfunction (SSM)."[32] The rulemaking indicates that the EPA is "clarifying, restating and revising its guidance concerning its interpretation of the Clean Air Act… requirements with respect to treatment in SIPs of excess emissions that occur during periods of SSM."[33] The EPA "evaluated existing SIP provisions in a number of states for consistency with the EPA's interpretation of the CAA and in light of recent court decisions addressing this issue."[34] Through the SSM rulemaking, the EPA found that "certain SIP provisions in 36 states are substantially inadequate to meet CAA requirements."[35] States subject to this SIP call must submit corrective SIP revisions by November 22, 2016.[36]

4. Ozone Rule

On October 1, 2015, the Administrator signed a final rule revising both the primary and secondary National Ambient Air Quality Standards (NAAQS) for ground level-ozone to 0.070 parts per million (ppm).[37] The standard is frequently referenced as 70 parts per billion (ppb).[38] The EPA is retaining existing indicators (ozone), forms

(fourth-highest daily maximum, averaged across three consecutive years), and averaging times (eight hours).[39] An area will meet the primary and secondary standard if the fourth-highest maximum daily 8-hour ozone concentration per year, averaged over three years, is equal to or less than 70 ppb.[40]

Relying on "an expanded body of scientific evidence that includes thousands of studies on the effects of ozone on health, the EPA Administrator has concluded that the 2008 standard of 75 ppb is not requisite to protect public health with an adequate margin of safety, as required by law."[41] The EPA revised the level of the primary standard to 0.070 ppm "to provide increased public health protection against health effects associated with long and short-term exposures."[42] The rulemaking states, "This action provides increased protection for children, older adults, and people with asthma or other lung diseases, and other at-risk populations against an array of adverse health effects that include reduced lung function, increased respiratory symptoms and pulmonary inflammation; effects that contribute to emergency department visits or hospital admissions; and mortality."[43] The EPA also revised the level of the secondary standard to 0.070 ppm "to provide increased protection against vegetation-related effects on public welfare."[44]

As the CAA requires, the EPA "anticipates making attainment/nonattainment designations for the revised standards by late 2017."[45] Those designations "likely will be based on 2014-2016 air quality data."[46] Areas designated as nonattainment "will have until 2020 to late 2037 to meet the health standard, with attainment dates varying based on the ozone level in the area."[47]

Climate Change

1. The United States and China Release Joint Statement in Advance of Paris Climate Change Summit

Building on last November's historic joint U.S./China announcement pledging more ambitious efforts on climate change,[48] on September 25, 2015 President Obama and President Xi Jinping of China released another Joint Presidential Statement on Climate Change.[49] It articulated a common vision for the Paris climate change summit, domestic actions in both countries, and enhanced bilateral cooperation.[50] Included in the list of domestic actions are the U.S. Clean Power Plan finalized by EPA on August 3, 2015 and China's plans for enhanced green power dispatch and commencement of an emissions trading system in 2017 for multiple sectors including iron and steel, power generation, chemicals, building materials, papermaking, and nonferrous metals.[51]

2. EPA Issues Final Power Plant Rules

On August 3, 2015, EPA released its final Clean Power Plan for existing power plants under Section 111(d) of the Clean Air Act, 42 U.S.C. §7411(d).[52] The rule establishes a CO2 emission rate for two subcategories of fossil fuel-fired electric generating units that expresses the best system of emission reduction adequately demonstrated ("BSER").[53] When the Clean Power Plan is fully implemented in 2030, carbon pollution from the power sector will be 32 percent below 2005 levels and emissions of co-pollutants from power plants will also be reduced by 90 percent for SO_2 and 72 percent for NOx, even while reducing electric bills by $7 per month.[54] The rule sets state-specific interim and final CO2 goals for each state beginning in 2022. New York's rate-based goal for 2030 is 918 lbs CO2/mwh, which equates with a mass-based goal of 31,257,429 tons CO2/year, a moderate goal compared to the other states.[55] EPA made adjustments to the final rule after receiving an unprecedented 4.3 million comments on the proposal.[56] For example, EPA took additional steps to ensure the reliability of the electric grid and provided more time for states and utilities to begin complying with the requirements while introducing an incentive program for early action.[57] The rule includes a "state measures plan" approach, in addition to an emissions standards approach, in order to afford existing market-based emission budget trading programs, such as RGGI, appropriate flexibility in meeting the statutory requirements in Section 111(d).[58]

Even before the rule was finalized, opponents challenged the proposal in the D.C. Circuit. The challenge was unsuccessful because the court ruled that it did not have authority to review proposed agency rules.[59] Immediately following issuance of the final rule, on August 5, 2015 sixteen states petitioned EPA for an administrative stay of the rule pending completion of impending litigation.[60] Most of those states then filed an Emergency Petition for Extraordinary Writ in the D.C. Circuit on August 13 seeking an emergency stay of the final rule even before it was published in the Federal Register.[61] The Petition was denied in a *Per Curiam* Order of the court on September 9, 2015. Renewed attempts to obtain a stay are expected after the rule is published in the Federal Register. New York joined the Attorneys General of fifteen states, New York City, and the District of Columbia in a statement expressing their intent to oppose a stay.[62]

On August 3, 2015, along with the Clean Power Plan for existing power plants, EPA issued two additional rules that address greenhouse gases from the power sector. One rule was a proposed federal plan for the Clean Power Plan and model trading rules.[63] The other was a final rule for new, modified, and reconstructed power plants.[64] The proposed federal plan and model rules serve two main purposes: (1) the model rules provide a cost-effective pathway for states to adopt a trading program as their own state plan, supported by EPA, in order to meet their obligations under the Clean Power Plan; and (2) the federal plan will be implemented by EPA in states that fail to submit an approvable plan to EPA by the relevant dead-

lines.[65] The proposed rule contains four discrete proposals, including a rate-based and mass-based federal plan and a rate-based and mass-based model rule.[66]

In the final rule for new, modified, and reconstructed sources, EPA set the emission standard for both electric steam generating units and stationary combustion sources. The emission standard for new electric steam generating units was set based on emissions of highly efficient new coal units implementing a basic version of partial carbon capture and storage.[67] The standard is 1,400 lb CO2/MWh-gross and is less stringent than the proposed standard of 1,100 lb CO2/MWh-gross, reflecting comments on the costs of achieving the proposed standard.[68] The final rule for new, modified, and reconstructed sources was promulgated under Section 111(b) of the Clean Air Act, 42 U.S.C. §7411(b). Like the Clean Power Plan for existing sources, the final rule for new, modified, and reconstructed sources reflects the degree of emission limitation achievable through application of the Best System of Emission Reduction that has been adequately demonstrated.[69]

3. EPA Proposes Measures to Reduce Methane Emissions from the Oil and Gas Sector

On August 18, 2015, EPA announced proposed standards to reduce emissions of greenhouse gases from the oil and gas industry.[70] These standards apply to emissions of methane, a greenhouse gas that is over 25 times more potent than carbon dioxide. The standards are designed to achieve the President's Climate Action Plan goal of reducing methane emissions from the oil and gas sector by 40-45 percent from 2012 levels by 2025.[71] President Obama's Climate Action Plan on methane was issued in March 2014 to address methane emissions from landfills, coal mines, and agriculture, in addition to the oil and gas sector. In the Plan, the President calls upon EPA to issue final regulations for methane emissions from the oil and gas sector by the end of 2016.[72] The regulations proposed on August 18 will update the 2012 New Source Performance Standards under Section 111 of the Clean Air Act, 42 U.S.C. §7411 for volatile organic compound emissions (VOCs) from oil and gas operations by adding methane as a regulated pollutant and expanding the range of covered sources for VOCs and methane.[73] The proposal requires regulated sources to find and repair leaks, capture natural gas from the completion of hydraulically fractured oil wells, limit emissions from new and modified pneumatic pumps, and limit emissions at natural gas compressor stations.[74]

The President's Climate Action Plan for methane also calls upon EPA to use the voluntary Natural Gas STAR program to achieve reductions of methane in the oil and gas sector. In July 2015, EPA proposed the voluntary Methane Challenge Program, an expansion of the Natural Gas STAR program. According to the proposal, the Methane Challenge Program will go into effect on January 1, 2016.[75] The Methane Challenge Program asks companies to make ambitious, transparent, and continuous reductions by either establishing a best management practices commitment or setting a future emissions intensity commitment.[76]

More information on EPA's efforts to reduce methane emissions from the oil and gas sector is available at http://www.epa.gov/airquality/oilandgas/actions.html.

4. EPA Issues Proposed Rules to Reduce Methane Emissions from Landfills

On August 14, 2015, EPA issued two proposed rules to reduce emissions of methane gas from municipal solid waste landfills.[77] Like the oil and gas sector proposal, the landfill actions are designed to implement the President's Climate Action Plan for reducing methane emissions. Municipal solid waste landfills are the third-largest source of human-related methane emissions in the U.S., accounting for 18 percent of methane emissions in 2013.[78] By 2025, the proposed rules would reduce methane emissions by 487,000 tons per year, which is the equivalent of carbon emissions from more than 1.1 million homes.[79] The proposals update a 1996 emission guideline for existing landfills and strengthens a 2014 proposal for existing landfills. If finalized, the two proposals would require new, modified and existing landfills to capture and control landfill gas at emission levels nearly one-third lower than current requirements.[80]

More information about the landfill methane proposals is available at: http://www.epa.gov/ttn/atw/landfill/landflpg.html.

5. EPA Issues Two Final Rules on Climate Friendly Refrigerants

EPA issued two rules that implement the goals of Section 612 of the Clean Air Act, 42 U.S.C. § 7671k, to prohibit the use of a substitute for ozone depleting substances where there are other substitutes that pose less overall risk to human health and the environment. EPA effectuates Section 112 through its Significant New Alternatives Program (SNAP). One of the two rules, which was finalized on April 10, 2015,[81] carries out the President's call in the Climate Action Plan for EPA to use its authority under SNAP "to encourage private sector investment in low emissions technology by identifying and approving climate-friendly alternatives."[82] The final rule approves substitutes for specific new refrigeration and air conditioning equipment.[83]

The second rule, finalized on July 20, 2015,[84] limits the use of previously approved alternatives by invoking the President's Climate Action Plan directive for EPA to use its authority to prohibit "certain uses of the most harmful chemical alternatives."[85] Among the SNAP criteria used by EPA to evaluate the alternatives to ozone-depleting substances is the global warming potential of the alternatives. The July 20 rule reflects the beginning of a reevaluation process to consider whether substitutes added to the

approved list early in the program pose more risk than substitutes that have been added more recently.[86] In this final rule, EPA determined that some of the older substitutes are either unacceptable in some sectors/end-uses or acceptable only if subject to use restrictions.[87]

6. EPA and DOT Propose Phase 2 of Greenhouse Gas and Fuel Economy Standards for Heavy-Duty Trucks

In June of 2015, EPA proposed standards for heavy-duty trucks that would go into effect in model year 2018 for trailers and 2021 for other heavy-duty vehicles. The new standards would culminate in 2027 with a reduction of one-billion tons of greenhouse gases while at the same time conserving 1.8 billion barrels of oil on vehicles sold during the course of the program.[88] The proposal builds on the phase 1 heavy-duty vehicle greenhouse gas standards which cover model years 2014-2018. The proposal represents a harmonization of EPA's greenhouse gas emissions standards with the National Highway Traffic Safety Administration's fuel economy standards, in coordination with the California Air Resources Board, with the goal of establishing one national program for the vehicle manufacturers.[89] The proposed standards, if finalized, would result in $230 billion in net benefits over the life of vehicles sold during the program compared with $25 billion in costs over the same period.[90]

7. EPA Proposes Endangerment Finding from Aircraft Greenhouse Gas Emissions

On July 1, 2015, EPA proposed to determine that greenhouse gases endanger the public health and welfare within the meaning of Section 231(a) of the Clean Air Act, 42 U.S.C. § 7571 on aircraft emissions.[91] The proposed finding includes the same six well-mixed greenhouse gases that were defined as the "air pollution" in the 2009 endangerment finding under Section 202(a) of the Clean Air Act.[92] The proposal also finds that greenhouse gas emissions from aircraft engines are contributing to air pollution that endangers public health and welfare.[93]

EPA concurrently issued an Advanced Notice of Proposed Rulemaking to seek input on a variety of issues related to an international standard for CO2 from aircraft to be established by the International Civil Aviation Organization (ICAO).[94] The aircraft covered by the proposed finding would be those that would be subject to the ICAO international standard, such as certain kinds of subsonic jets and subsonic propeller-driven aircraft.[95] EPA expects that ICAO will adopt final CO2 emissions standards in February 2016 and notes in its proposal that the proposed endangerment finding is in preparation for domestic standards that will be developed following the adoption of ICAO's final international standards.[96] The domestic standards will have to be at least as stringent as the ICAO final standards.[97] EPA has indicated that U.S. aircraft emit roughly 11 percent of GHG emissions from the U.S. transportation sector and 29 percent of GHG emissions from all aircraft globally.[98] More information about the finding and the advance notice of proposed rulemaking is available at http://epa.gov/otaq/aviation.htm.

8. EPA Releases Its 20th Annual Inventory of Greenhouse Gases and Sinks

On April 14, 2015, EPA published its 20th annual Inventory of U.S. Greenhouse Gas Emissions and Sinks.[99] The Inventory is an annual requirement of parties to the United Nations Framework Convention on Climate Change. The Inventory showed a two percent increase in greenhouse gas emissions from 2012 to 2013 and a nine percent drop from 2005 to 2013. Also included in the Inventory are sector-specific emissions, which highlighted power plants as the largest source of emissions with 31 percent of total U.S. greenhouse gas emissions, followed by the transportation sector at 27 percent and industry and manufacturing at 21 percent. Energy consumption and greater use of coal-fired power was the cause of increased emissions from 2012 to 2013. EPA published the key data this year in an online Greenhouse Gas Inventory Data Explorer tool which is available at http://www.epa.gov/climatechange/ghgemissions/inventoryexplorer/. The tool allows viewers to view, graph and sort data by sector, year and specific greenhouse gas.[100] More on the U.S. Greenhouse Gas Inventory Report can be found at: http://www.epa.gov/climatechange/ghgemissions/usinventoryreport.html.

9. EPA Reports That Auto Manufacturers Are Outperforming National Greenhouse Gas Standards for Light Duty Vehicles

On March 26, 2015, EPA released its second annual "Greenhouse Gas Emissions Standards for Light Duty Vehicles: Manufacturer's Performance Report.[101] The Report finds that light-duty vehicle manufacturers beat the national greenhouse gas standards for model year 2013 by 12 grams/mile, the equivalent of 1.4 miles per gallon. According to EPA Administrator McCarthy, "these findings are a terrific early success story for President Obama's historic effort to reduce the pollution that contributes to climate change."[102] This is the second consecutive year that the manufacturers outperformed the standard. The optional flexibilities built into the standards, such as improved air conditioning systems and the use of fleet averaging, have been used by the auto industry in achieving a fleet-wide average better than required by the light-duty vehicle rule. The Performance Report indicates that "there are more than three times as many 30 mpg vehicles than just five years ago, and fuel economy for SUVs has been increasing faster than for any other vehicle types."[103]

More information on the Manufacturers' Performance Report is available at: http://www.epa.gov/otaq/climate/ghg-report.htm. Information on the Light Duty Vehicle Standards is available at: http://www.epa.gov/

otaq/climate/regs-light-duty.htm. And information on greenhouse gases and fuel economy trends is available at: http://epa.gov/otaq/fetrends.htm.

10. EPA Issues Rules Responding to *UARG v. EPA* Decision on Tailoring Rule

On August 15, 2015, EPA issued a good cause final rule removing certain portions of its June 3, 2010 greenhouse gas permitting regulations for the Prevention of Significant Deterioration (PSD) and Title V programs. The rule was issued in response to the Supreme Court's 2014 decision in *UARG v. EPA,* 134 S.Ct. 2427 (2014), which invalidated EPA's approach in Step 2 of the Tailoring Rule. Following the Supreme Court decision, the D.C. Circuit issued an Amended Judgment in *Coalition for Responsible Regulation v. EPA* specifically identifying as vacated the regulations invalidated by the Supreme Court. EPA issued the good cause final rule without notice and comment because it was a ministerial action. The regulatory language removed by the action includes a requirement to consider phasing in lower greenhouse gas emissions thresholds. EPA plans to further revise the Tailoring Rule regulations in a separate rulemaking to fully implement the D.C. Circuit's Amended Judgment. EPA also issued a final rule on April 30, 2015 providing a regulatory mechanism for federal and delegated-state PSD permitting authorities to rescind a Step 2 permit under 40 C.F.R §52.21(w)(2) upon request of a source and to make clear that Step 2 sources are no longer required to obtain PSD permits.[104]

Water Quality

1. Guidance on Considering Environmental Justice During the Development of Regulatory Actions

On May 29, 2015, EPA released final Guidance on Considering Environmental Justice During the Development of a Regulatory (rulemaking) Action to ensure understanding and foster consistency with efforts across EPA's programs and regions to consider and integrate environmental justice into their work and to make a visible difference in America's communities. http://www3.epa.gov/environmentaljustice/resources/policy/ej-rulemaking.html. The final guidance supersedes the agency's 2010 interim guidance by the same name, builds on the progress made under that guidance, and outlines critical steps that every rule-making team can take. The guidance also offers specific strategies for giving vulnerable populations a voice in shaping EPA rules and regulations, and supports EPA's implementation of Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.

The new guidance improves the definition of the populations of concern; refines discussion of the factors that contribute to potential environmental justice concerns; refines direction on when and to what extent environmental justice needs to be considered in the rulemaking process; adds recommendations for how to meaningfully engage minority, low-income and indigenous populations and tribes; adds suggestions on overcoming barriers to considering environmental justice in the rulemaking process; and adds several new tools, including EJ legal Tools and EJSCREEN, the Agency's new GIS platform that helps screen actions for potential environmental justice impact and opportunities.

In addition, the new guidance reminds rule-writers and decision-makers that they must provide transparency and meaningful participation for vulnerable communities throughout the Action Development Process, identify and address existing and new disproportionate environmental and public health impacts on minority populations, low-income populations and indigenous peoples, and explain how those actions impact the outcome or final decision.

2. The "Clean Water Rule"

On June 29, EPA and the Department of the Army issued the final "Clean Water Rule," which revised the definition of the "waters of the United States" that are protected from pollution under the Clean Water Act ("CWA").[105] The rule was precipitated by a trio of recent cases that have cast the scope of the law into doubt, creating regulatory uncertainty, and hampering CWA enforcement.[106] As a result of the confusion caused by those cases, members of Congress, state and local officials, industry, agriculture, environmental groups, scientists, and other members of the public called for a rulemaking to ensure that waters protected under the Clean Water Act are more precisely defined and predictably determined.

The rule is based on the latest science, including a literature survey of more than 1,200 peer-reviewed, published scientific studies, written by EPA's Office of Research and Development and reviewed and largely endorsed by the agency's Science Advisory Board, which showed that small streams and wetlands play an integral role in the health of larger downstream water bodies, and thus meet the "significant nexus" test articulated by Justice Kennedy in his concurring opinion in *Rapanos*. Under that test, a wetland or water body is jurisdictional if, either by itself or in combination with other similarly situated wetlands or water bodies, it significantly affects the physical, biological, and chemical integrity of a downstream navigable water body. The Clean Water Rule applies the significant nexus test to the science, and describes three categories of waters: (1) those that are categorically jurisdictional, or "jurisdictional by rule," (2) those that are jurisdictional if they have a significant nexus to certain categorically jurisdictional waters, and (3) those that are not jurisdictional (i.e., those for which a significant nexus is not present, or is not supported by the currently available science).

In the first category, as in the previous (and still current) definition, the new rule treats traditionally navigable waters (TNWs), interstate waters, the territorial seas, and impoundments of those waters, as jurisdictional by rule. It

also defines, for the first time, "tributaries," and categorically includes waters meeting that definition, namely, having a bed, bank and ordinary high water mark, and contributing flow directly or indirectly to a TNW, interstate water or the territorial seas. In addition, the rule defines, and categorically includes, "adjacent" waters as those "bordering, contiguous [with], or neighboring" a TNW, interstate water or the territorial seas, and defines "neighboring" as (1) waters located in whole or in part within 100 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment of a jurisdictional water, or a tributary, (2) waters located in whole or in part in the 100-year floodplain and that are within 1,500 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment, or a tributary (''floodplain waters''), or (3) waters located in whole or in part within 1,500 feet of the high tide line of a TNW or the territorial seas and waters located within 1,500 feet of the ordinary high water mark of the Great Lakes.

The second category consists of three sub-categories of isolated, or non-adjacent, waters, that can be jurisdictional, on a case-by-case basis: (1) Prairie potholes, Caroline and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands that are in the same watershed of, and have a significant nexus to, a TNW, an interstate water, or the territorial seas, (2) waters within the 100-year floodplain of a TNW, interstate water, or the territorial seas, and (3) waters with a significant nexus to a TNW, an interstate water, or the territorial seas, that are within 4,000 feet of a TNW, an interstate water, the territorial seas, an impoundment of those waters, or a tributary of any of the previous four waters.

The final category are waters that are categorically excluded from the definition of waters of the U.S., including, as in the previous rule, waste treatment systems and prior converted cropland, and, under the new rule, include normally dry or hydrologically isolated ("upland") ditches, groundwater, gullies, rills and non-wetland swales, constructed components for municipal separate storm sewer systems, and water delivery/reuse and erosional features. The rule has no effect on the exclusion of agricultural stormwater discharges from the definition of "point source" in CWA § 502(11), or the exemptions to the fill discharge permit requirement in CWA § 404(f).

The rule was to go into effect on August 28, but, on August 27, was stayed by the District Court for the Southeastern District of North Dakota, as to the plaintiff states of North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, South Dakota, and Wyoming.[107] And, on October 9, the Sixth Circuit Court of Appeals issued a nationwide preliminary injunction while it considers the merits of the challenge to the rule.[108] For more information, visit: www.epa.gov/cleanwaterrule and http://www.army.mil/asac.

3. Final Updated Ambient Water Quality Criteria for the Protection of Human Health

On June 29, EPA issued final updated recommended ambient water quality criteria for the protection of human health for ninety-four chemical pollutants to reflect the latest scientific information and implementation of existing EPA policies found in *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (2000).* Under CWA section 304(a), EPA publishes recommended water quality criteria guidance that consists of scientific information regarding concentrations of specific chemicals or levels of parameters in water that protect aquatic life and human health. The criteria provide advisory technical information for states and authorized tribes to use in establishing water quality standards to protect human health under the Clean Water Act.

4. The "Drinking Water Protection Act"

On August 7, Congress passed the "Drinking Water Protection Act," which amended the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300f et seq,. "to provide for the assessment and management of the risk of algal toxins in drinking water…"[109] In particular, the Act added a new section to the SDWA § 1459, 42 U.S.C. § 300j-19, that calls for EPA, in consultation with other federal agencies, the states, public water system (PWS) operators, and others, to develop, and update as appropriate, "a strategic plan for assessing and managing risks associated with algal toxins in drinking water provided by public water systems…." The plan will describe the steps and timelines for (1) evaluating the public health risk posed by public water systems contaminated with algal toxins, (2) promulgating a list of harmful types and quantities, (3) summarizing their causes and adverse effects, (4) determining whether to issue health advisories and guidance on monitoring technology, methods, and frequency, (5) recommending options for source protection, mitigation and treatment, (6) and providing technical assistance to states and PWS operators to help manage risks associated with the identified harmful algal toxins. In addition, the Act requires the Comptroller General to report to Congress on the funds used in recent years to address harmful algal blooms and recommend steps for reducing duplication and improving interagency coordination.

5. Water Quality Standards Regulatory Revisions

On August 21, 2015 (with a minor correction on September 25, 2015), EPA updates the federal water quality standards (WQS) regulation to provide a better-defined pathway for states and authorized tribes to improve water quality and protect high quality waters.[110] The revisions establish a strong foundation for water quality management programs, including water quality assessments, impaired waters lists, and total maximum daily loads, as well as water quality-based effluent limits in National Pollutant Discharge Elimination System (NPDES) discharge permits. In the rule, EPA is revising six program areas to improve the WQS regulation's effectiveness, increase

transparency, and enhance opportunities for meaningful public engagement at the state, tribal and local levels. Specifically, the rule clarifies what constitutes an Administrator's determination that new or revised WQS are necessary; refines how states and authorized tribes assign and revise designated uses for individual water bodies; revises the triennial review requirements to clarify the role of new or updated Clean Water Act section 304(a) criteria recommendations in the development of WQS by states and authorized tribes, and applicable WQS that must be reviewed triennially; establishes stronger antidegradation requirements to enhance protection of high quality waters and promotes public transparency; adds new regulatory provisions to promote the appropriate use of WQS variances; and clarifies that a state or authorized tribe must adopt, and EPA must approve, a permit compliance schedule authorizing provision prior to authorizing the use of schedules of compliance for water quality-based effluent limits (WQBELs) in NPDES permits. In total, these revisions enable states and authorized tribes to more effectively address complex water quality challenges, protect existing water quality, and facilitate environmental improvements. The final rule also leads to better understanding and proper use of available CWA tools by improving public participation.

6. Vessel Sewage No Discharge Zone Created for Seneca Lake, Cayuga Lake, and the Seneca River

On September 9, 2015, EPA approved New York State's petition to prohibit all vessel sewage discharges into Seneca Lake, Cayuga Lake, and the Seneca River. As part of an ongoing joint effort by EPA and New York State to eliminate the discharge of sewage from boats into the state's waterways, New York petitioned EPA under Clean Water Act section 312(f)(3) to create a "no discharge zone" in the subject waters, by demonstrating the availability of sewage "pumpout" stations in the affected waters and certifying that the protection and enhancement of those waters requires greater environmental protection than the applicable Federal standards provide.

EPA reviewed New York's petition and determined that the state had demonstrated that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the proposed no discharge zone, thus allowing the State to completely prohibit the discharge from all vessels of any sewage, whether treated or not, into those waters. The prohibition became effective immediately upon EPA's determination, so boaters must now dispose of their sewage at specially designated pump-out stations in the no-discharge zone.

Discharges of sewage from boats can contain harmful levels of pathogens and chemicals such as formaldehyde, phenols and chlorine, which have a negative impact on water quality, pose a risk to people's health and impair marine life, and Cayuga Lake and Seneca Lake are water bodies of unique ecological, economic and public health significance as well as drinking water sources. The establishment of a "no discharge zone" for these waters will help protect water quality, human health, and marine life, and adds to a list of New York state no-discharge zones that includes Lakes Erie, Ontario, Champlain, and George, the New York State Canal System, the Hudson River, Jamaica Bay, the Long Island Sound, the Huntington-Northport Bay Complex, Hempstead Harbor, the Oyster Bay/Cold Spring Harbor Complex, Mamaroneck Harbor, the Peconic Bay and the South Shore Estuary Reserve.

For more information on no discharge zones in New York, go to: http://www2.epa.gov/vessels-marinas-and-ports/no-discharge-zones-ndzs-state#ny.

7. NPDES E-Reporting Rule

On September 24, 2015, EPA finalized a rule to modernize Clean Water Act reporting for municipalities, industries, and other facilities. The final rule was published in the Federal Register on October 22, and becomes effective on December 21.[111] The rule requires regulated entities and state and federal regulators to use existing, available information technology to electronically report data required by the National Pollutant Discharge Elimination System ("NPDES") program instead of filing written paper reports. EPA estimates that, once the rule is fully implemented, the 46 states and the Virgin Islands Territory that are authorized to administer the NPDES program will collectively save approximately $22.6 million each year as a result of switching from paper to electronic reporting. The final rule will make facility-specific information, such as inspection and enforcement history, pollutant monitoring results, and other data required by NPDES permits accessible to the public through EPA's website.

The Clean Water Act requires that municipal, industrial or commercial facilities that discharge wastewater directly into waters of the United States obtain a permit. The NPDES program requires that permitted facilities monitor and report data on pollutant discharges and take other actions to ensure discharges do not affect human health or the environment. Currently, some facilities subject to these reporting requirements submit data in paper form to states and other regulatory authorities, where the information must be manually entered into data systems. Through the e-reporting rule, these facilities will electronically report data directly to the appropriate regulatory authority.

This rulemaking is part of EPA's Next Generation Compliance strategy, as well as the E-Enterprise for the Environment strategy with states and tribes, to take advantage of new tools and innovative approaches to increase compliance and reduce pollution. The shift toward electronic reporting in the NPDES program and others will help make environmental reporting more accurate, complete, and efficient. It will also help EPA and co-regulators better manage information, and improve effectiveness and transparency.

8. Steam Electric Power Plant Effluent Limitation Guidelines

On September 30, 2015 EPA finalized a rule that will reduce the discharge of toxic pollutants into America's waterways from steam electric power plants by 1.4 billion pounds annually, as well as reduce water withdrawal by 57 billion gallons per year, resulting in an estimated benefit of $463 million per year to Americans across the country. Toxic pollutants include mercury, arsenic, lead, and selenium, which can cause neurological damage in children, lead to cancer, and damage the circulatory system, kidneys, and liver.

EPA estimates that about 12 percent of the 1,080 steam electric power plants in the U.S. (an estimated 134) will have to make improvements in technology to comply with the rule. Many of these facilities are found in the states of the Mid-Atlantic and Mid-West. The standards provide flexibility in implementation through a phased-in approach, allowing plant owners to pursue integrated strategies to meet these requirements. Which plants will need to update technologies will be determined by the plants themselves once they have had the opportunity to study and understand the rule's new requirements. The new requirements do not apply to plants that are oil-fired or smaller than 50 megawatts. The rule will become effective 60 days after publication in the Federal Register.

For more information: http://www2.epa.gov/eg/steam-electric-power-generating-effluent-guidelines-2015-final-rule.

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Mary McHale is an Assistant Regional Counsel with the U.S. Environmental Protection Agency, Region 2, Air Branch; Chris Saporita is an Assistant Regional Counsel in Region 2's Water and General Law Branch; Joseph A. Siegel is an Assistant Regional Counsel in the Region's Air Branch and an Alternative Dispute Resolution Specialist; and Marla E. Wieder is an Assistant Regional Counsel in the Region's New York and Caribbean Superfund Program.

Any opinions expressed herein are the authors' own, and do not necessarily reflect the views of the U.S. Environmental Protection Agency. This Update is based on select EPA press releases (available at http://www2.epa.gov/newsroom) and other public information from approximately December 1, 2014 through September 30, 2015, and is not intended to be inclusive or comprehensive.

DEC Update

By Randall C. Young

Revised DEC Bulk Storage Regulations Take Effect

Revised regulations governing petroleum and chemical bulk storage took effect October 11, 2015, and revised used oil storage regulations became effective November 10, 2015. The revisions to the petroleum storage regulations are generally intended to align the requirements of state and federal regulations to comport with provisions of the Energy Policy Act of 2005, including operator training and authority to prohibit deliveries to tanks that are in significant noncompliance, are leaking, or may be leaking. The regulations also reflect changes to the definition of "petroleum" and "facility" made in the 2008 revisions of Title 10 of Article 17 of the Environmental Conservation Law. Similarly, changes to the used oil and chemical bulk storage regulations updated the regulations to align the different state and federal programs.

The announcement of the regulatory changes with a summary and links to the revised regulations and background documents can be found on the DEC website at http://www.dec.ny.gov/chemical/92526.html. The draft operator training manual can be found at http://www.dec.ny.gov/docs/remediation_hudson_pdf/tankiq.pdf.

Final Revised Regulation on Emissions of Toxic Air Contaminants.

Revisions to 6 NYCRR Part 212, streamlining the existing regulatory process and requiring facilities to implement pollution control technologies and prevention measures to limit toxic air emissions, took effect on June 14, 2015. The revised regulation applies to manufacturing, industrial, commercial, and other facilities. The revised rule integrates state and federal reporting requirements for air toxics. The regulation also improves air quality protections by requiring new facilities and those renewing permits to evaluate the potential for emission reductions of high toxicity air contaminants; establishing a Toxics Best Achievable Control Technology (T-BACT) program; incorporating pollution prevention opportunities; and requiring air cleaning for contaminants that may cause serious adverse effects on people or the environment. More information is available on DEC's website at: http://www.dec.ny.gov/regulations/26402.html.

Clean Air Interstate Rules

DEC is proposing to repeal and replace the New York State Clean Air Interstate Rules ("CAIR") as currently embodied in 6 NYCRR Parts 243, 244, and 245. The new proposed regulations will include a Transport Rule NOx Ozone Season Trading Program, Transport Rule NOx Annual Trading Program, and Transport Rule SO2 Trading Program, respectively. These proposed rules incorporate the federal Cross-State Air Pollution Rule ("CSAPR") and allow the Department to allocate CSAPR allowances to regulated entities in New York. The Department is proposing these changes because CSAPR has superseded New York's CAIR regulations. More information is available at http://www.dec.ny.gov/regulations/103194.html.

Personnel Changes

Administrative Law Judge (ALJ) Edward Buhrmaster retired from the Department's Office of Hearings and Mediation Services on August 13, 2015. In his long tenure with the Department, ALJ Buhrmaster presided over numerous significant enforcement and permit hearings. He became known particularly for his handling of complicated proceedings related to the permitting of solid waste management facilities throughout the state.

John Byrne, a veteran attorney who served in many different roles with the DEC's Office of General Counsel during his long career, retired from his position as Assistant Regional Attorney for DEC Region 2. Mr. Byrne began his DEC career at the Region 1 Office in Stony Brook on Long Island. He later moved on to the Eastern Field Unit in Westchester County where he handled Superfund cases and the criminal investigation of environmental violations in DEC Regions 1, 2, and 3. He transferred to DEC Region 2 to help handle an influx of cases resulting from implementation of the Clear Air Act Title V operating permit program. During his career, Mr. Byrne handled many high-profile cases, but he took the greatest pride in his work with aspiring lawyers. During his career in Region 2, he helped with the hiring of innumerable law-student interns for whom he acted as role model and mentor.

Zackary Knaub left his position as Regional Attorney Region 3 of DEC to become the Assistant Counsel to the Governor for Agriculture, Energy and the Environment.

Major Joseph H. Schneider has been appointed to the position of director of the Division of Law Enforcement within DEC. Although empowered to enforce all laws of the state, the officers of the law enforcement division focus on protecting the public and the state's natural resources by enforcing the Environmental Conservation Law and its implementing regulations. Major Schneider is a 29-year veteran of law enforcement who has served as a Park Patrol Officer with the NYS Office of Parks, Recreation and Historic Preservation, Director of Law Enforcement for the Lake George Park Commission, Supervising Environmental Conservation Officer, Regional Captain, Bureau of Environmental Crime Investigations Captain, and Major in charge of Administration, Communications and Training before being appointed as Director.

Carrie Meek Gallagher has been appointed the new Regional Director for Region 1. Region 1 is responsible for administration of the Department's programs in Nassau and Suffolk Counties. Ms. Gallagher previously served as the Chief Sustainability Officer at Suffolk County's Water Authority. Before becoming Chief Sustainability Officer, Ms. Gallagher served as the Commissioner of the Suffolk County Department of Environment and Energy for five years. Ms. Gallagher also served as the Deputy Director of Planning for Suffolk County. She holds a B.A. in Sustainable Development and Latin American Studies from Amherst College, an M.S. in Conservation Biology and Sustainable Development from the University of Maryland at College Park, and an MBA from the Frank G. Zarb School of Business at Hofstra University.

Dena Putnick has assumed the position of Bureau Chief of the General Enforcement Bureau in the Office of General Counsel in Albany. The Bureau is responsible for carrying out enforcement proceedings for all programs except the Division of Air and the Division of Environmental Remediation. Ms. Putnick joined DEC in 2008, as the FOIL Appeals Officer and subsequently served as counsel to the Remediation Section, working on both programmatic and enforcement matters. Before joining DEC, she was a family court litigation attorney who represented clients in matters across many counties.

Sita Crounse has joined the DEC Office of General Counsel in Albany as a Senior Attorney in the Bureau of Energy and Air Resources where she works on a variety of energy and natural resource matters, including those related to natural gas pipelines, hydroelectric power, and nuclear energy. Ms. Crounse comes to the Department from private practice where she developed experience in energy law and related fields.

Randall C. Young is Regional Attorney for Region Six of the New York State Department of Environmental Conservation.

This column is the work of the author and is not prepared or endorsed by NYSDEC.

Member Profiles

Long-Time Member: David Freeman

For this issue of *The New York Environmental Lawyer*, the Environmental Law Section is proud to profile Mr. David J. Freeman as an esteemed long-time member. David has exemplified the spirit of this Section through his diverse contributions to the field of environmental law, as well as his dedication to civic duty. He is a former chair of the Section, and is currently a co-chair of the Committee on Hazardous Waste/Site Remediation and of the Brownfields Task Force.

As a Director in the Real Property and Environmental Law practice group at Gibbons, P.C., David represents buyers, sellers, and developers of contaminated properties. He also represents parties in Superfund and other litigation concerning the remediation of hazardous real estate. He was awarded the 2012 Burton Award for his distinguished legal writing (law firm), an acknowledgment of the time and energy he has contributed to enhancing the legal community's understanding of environmental law topics. David is also a frequent speaker at professional events.

Mr. Freeman's foray into the field of environmental law was "by accident," as he puts it. When he was in law school, environmental law was just a burgeoning practice area with the studies limited to the Rivers and Harbors Act of 1859, and the newly enacted National Environmental Policy Act, concerning which no case law had yet developed. At first, environmental law was focused on litigation and enforcement of federal statutes. Such a large amount of real estate had been touched by the Superfund that by the 1990s, environmental issues became central to transactional terms regarding lender liability. These developments carved a pathway for redevelopment of contaminated sites. Brownfield sites are not easy to redevelop, and their success requires flexible dealmakers and creative strategies in order to reap value from the project. Although it hasn't quite come full circle yet, Mr. Freeman noted that environmental law has gone from a very obscure area of law to something increasingly affecting a broad range of social and policy issues.

Mr. Freeman has been honored for his contributions and pro bono work, which include being President of the New York City Brownfield Partnership, the Vice Chair of the New York State League of Conservation Voters Education Fund, and Special Legal Counsel to the United Nations Environment Programme for North American Environmental Affairs. He also sits on the Board of Trustees of the New York League of Conservation Voters Education Fund, of the Sarah Neuman Nursing Home, and of the Jewish Home and Hospital for Aged.

Mr. Freeman is admitted in the State of New York, the Commonwealth of Massachusetts, and the District of Columbia. He is admitted to the United States District Court for the Southern District of New York, the United States District Court for the Eastern District of New York, the United States Court of Appeals for the Second Circuit, the District of Columbia Court of Appeals, and the Supreme Court of the United States. Mr. Freeman earned his BA from Harvard University (*cum laude*) and his J.D. from Harvard Law School (*cum laude*).

Justin Birzon

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New Member: Alita J. Giuda

For this issue of *The New York Environmental Lawyer*, the Environmental Law Section focuses its new member profile on an outstanding attorney, Ms. Alita J. Giuda of Couch White, LLP. Of course, many if not most Section members know Alita well. She recently co-chaired the fall meeting in Saratoga Springs, and is moderating a panel at the Section's upcoming "Redeveloping Contaminated Properties in New York Under the 2015 Brownfield Cleanup Program Amendments." She has been honored as one of the Super Lawyers Rising Stars in 2013 (Energy & Natural Resources), in 2014 (Environmental), and in 2015 (Environmental). She has published thoughtful articles on environmental issues and is a frequent professional lecturer.

Alita's insight and passion for environmental issues has long informed her intellectual pursuits. Alita graduated *magna cum laude* from Colgate University in 2002. She attributes her pragmatic approach to environmental regulation to her focus on environmental economics. After a year off of her studies, Alita entered Albany Law School and followed her interests into internships with General Electric, the Department of Environmental Conservation,

and the Albany County District Attorney's Office. She also adds to this list her meaningful learning experiences with Joan Matthews, a professor for two courses and mentor for preparing her note. During law school, she was a member and article editor of the *Albany Outlook Environmental Journal* and authored a note entitled, "The Central Valley Project Improvement Act: Who Says Environmental Uses Aren't Beneficial?" Alita's note analyzes the impacts federal legislation addressing the benefits of ecosystem protection on water allocation and was published in 2007. She was also the recipient of the Gary M. Peck '79 Memorial Prize for her commitment to environmental law. She has been deeply engaged in environmental problems and solutions ever since.

Alita began her legal career as an Associate Attorney at Gilberti, Stinziano, Heintz, and Smith, P.C., where she spent six years engaged in environmental and land use matters, including zoning, environmental review and permitting, SEQRA, brownfields, eminent domain, and commercial litigation. One project that she remembers as a favorite involved the design for a Generic EIS for an E911 communication system (emergency services) on behalf of two counties. One of these projects resulted in unexpected litigation with neighbors to the county's proposed E911 tower. The county ultimately prevailed on the litigation; however, it was the creativity in defending the lawsuit that made this case particularly memorable. Through this and other projects, she realized that her practice areas were the perfect fit for her interests: the constantly changing regulatory landscape, public involvement across disciplines, the mix of technical and theoretical applications of law, and the sheer excitement of engaging the many perspectives of community, law, and ethics.

Alita later moved to The West Firm as a member of its regulatory and litigation practice groups, where she worked on a number of significant development projects, and gained additional experience in both environmental law and commercial litigation. Examples of significant work that she completed include representing clients completing substantial environmental review, and later hearings before the Department of Environmental Conservation involving major modifications to landfills, and developing strategies to assist a county in utilizing the *County of Monroe* doctrine to obtain exemption from unfavorable zoning. Alita also spearheaded the significant environmental review and land use approval process required for a proposed Capital District gaming facility, and developed a strategy for a client to benefit from the Brownfield Cleanup Program tax credits as part of its long-term lease, as well as advised the client on obtaining entry into the BCP and navigating the BCP cleanup. Outside of the environmental realm, she dedicated significant time to representing a tourist railroad in landlord and tenant litigation in defense of its lease, and assisting the firm with other commercial litigation.

Alita has just started at Couch White, re-joining her mentor and continuing to grow her experience in the type of work she loves—environmental review, land use and zoning, brownfield and other remediation projects, and related permitting, compliance, and enforcement. She looks forward to representing clients in a diverse range of commercial and industrial projects that complement Couch White's existing practice, including energy infrastructure, governmental facilities, oil and gas and mining projects, solid waste landfills, mixed use facilities, property remediation and redevelopment, along with general commercial and residential development. Her experience in balancing strategy necessary to accomplish the client's goals and meeting the demanding requirements of environmental and land use laws with preparing to address potential opposition to the project will be a valuable asset to Couch White. She also anticipates continuing to expand her commercial litigation practice by joining Couch White's experienced commercial and construction litigation team. She is excited to bring her pragmatic, proactive approach to lawyering to the firm.

Alita presents with confidence and professional competency, she is also extremely likeable. It was an honor and a pleasure to get to know Alita J. Giuda a little better. She is an enormous asset to the Section.

Keith Hirokawa

Member News

Justin Birzon, one of the issue editors for this publication, and his wife Alison, welcomed their first son, Adlai Kane Birzon, on June 22, 2015. Congratulations, Justin and Alison!

Adlai Kane Birzon

The Department of Environmental Law and Land Law of Masaryk University in the Czech Republic presented David Ganje of Ganje Law Offices with a Certificate of Appreciation for his guest lecture series on "A Review of Environmental Law and Natural Resources Law in the United States." David has taught as an adjunct professor in both the U.S. and Germany, and he sits on the South Dakota State Bar Natural Resources and Environment Committee. He practices natural resources and environmental law in New York and North and South Dakota and is a graduate of the University of South Dakota School of Law.

Scenes from the Environmental Law Section
FALL MEETING
October 2-4, 2015 • Saratoga Springs, NY

Secretary Marla Wieder with her family enjoying the fall meeting in Saratoga Springs.

Chair Michael Lesser and David Quist.

Miriam Villani, Chair of the William R. Ginsberg Memorial Essay Contest, congratulates essay contest first-place winner Gregg Badichek.

Tel Putsavage and fall meeting Co-Chair Alita Giuda.

NYSBA President-elect joins the Environmental Law Section at the Section's fall meeting in Saratoga Springs. From left to right: Vice Chair Larry Schnapf, NYSBA President-elect Claire Gutekunst, Chair Michael Lesser, Secretary Marla Wieder, and Treasurer Kevin Bernstein.

Save the Dates for Next Year's Fall Meeting: *October 14-16, 2016*
The Otesaga Resort Hotel • Cooperstown, NY

The Otesaga is reminiscent of a more genteel era when a gracious welcome was the standard. It exudes the charm and gracious hospitality of a bygone era. It blends perfectly with Cooperstown. Combining natural beauty with an unhurried pace, Cooperstown is the ideal place to re-discover our nation's past.

Cooperstown houses an unspoiled repository of America's heritage, rich in history, art, architecture and natural beauty. Some of the village's key attractions include the National Baseball Hall of Fame and Museum, Fenimore Art Museum, The Farmers' Museum, the Glimmerglass festival and the Leatherstocking Golf Course. A convenient getaway distance from New York, Boston, Philadelphia and other Northeastern and mid-Atlantic cities, Cooperstown is easily accessible by car, rail and air.

Join your colleagues next Fall at this family-friendly resort to earn some CLE credits, network and enjoy beautiful Cooperstown, NY.

ENVIRONMENTAL LAW SECTION COMMITTEE REPORTS

Committee Name: Adirondacks, Catskills, Forest Preserve & Natural Resource Management

Committee Co-chairs: Thomas Ulasewicz and Claudia Braymer

Date of Report: September 25, 2015

Significant legislation affecting our committee specialty in the current year includes:

- Possible amendments to the Adirondack Park State Land Master Plan
- Draft NYS Open Space Conservation Plan and Draft Generic EIS
- Federal Clean Power Plan

Significant case law/administrative decisions affecting our committee specialty in the current year includes:

- Protect the Adirondacks! Inc., *Sierra Club et al. v. Adirondack Park Agency*, NYS Department of Environmental Conservation, Preserve Associates, LLC., et al. 121 AD3d 63 (July 3, 2014); Motion for Leave to Appeal denied 24 N.Y. 3d 1065 (December 17, 2014)—Adirondack Club & Resort, Big Tupper Ski Area, Tupper Lake, N.Y.
- July 10, 2015 DEC Commissioner Martens Decision and Ruling on the proposed Belleayre Resort in the Catskill Park (aka: Crossroads Ventures, LLC) http://www.dec.ny.gov/hearings/102608.html.

Significant regulations affecting our committee specialty in the current year includes:

- Ongoing Unit Management Planning in the Adirondack/Catskill Parks
  - Essex Chain Lakes
  - Vanderwhacker Mountain Wild Forest (Community Connector Trail Plan)
  - Remsen-Lake Placid Travel Corridor
  - Jessup River
- Emergency project regulations

Significant government policies affecting our committee specialty in the current year includes:

- potential storage of discarded oil tank cars on the Forest Preserve

Are there any other issues that would be interest to the general members of the Section?

- *Friends of Thayer Lake v. Brown*, 126 A.D.3d 22 (3d Dept. 2015), appeal pending before the Court of Appeals, case re navigable rivers and streams and public right of navigation, including right to portage over posted private land.

* * *

Committee Name: Coastal and Wetland Resources

Committee Co-chairs: Dominic Cordisco, Reed Super, Amy Kendall

Date of Report: 9/25/15

The Committee has undertaken and/or completed the following projects in the current year.

Significant legislation affecting our committee specialty in the current year includes:

State: On September 22, 2014, Gov. Cuomo signed the Community Risk and Resiliency Act. From NYSDEC's website, the two key provisions are:

- Applicants to certain State programs must demonstrate that they have taken into account future physical climate risks caused by storm surges, sea-level rise or flooding.
- By January 1, 2016, DEC must establish in regulation State-adopted sea level rise projections, which will be used as the basis for State adaptation decisions and will be available for use by all decision makers.

Proposed legislation: A5128, SS25-0402 & 24-0703

Relates to requiring notice to neighboring landowners within one thousand feet of intention to develop in

wetland areas; requires a public hearing on a wetland application.

Federal: None

Significant case law affecting our committee specialty in the current year includes:

State:

In *Green Earth Farms Rockland LLC v. Town of Haverstraw Planning Bd.*, the court held that a Town's planning board's grant of final site plan approval of shopping center was arbitrary and capricious when, after final environmental impact statement had been adopted, the site plan was changed to include gasoline station. 45 Misc. 3d 1209(A), 3 N.Y.S.3d 285 (N.Y. Sup. Ct. 2014).

In *In re New Creek Bluebelt, Phase 4*, the court held that a city's imposition of wetlands regulations on a landowner's property was a regulatory taking, that a 75% increment applied to value of the property was based on sufficient evidence, and that the trial court was within its discretion in crediting city expert's estimate that extraordinary costs to develop the property would total $723,000. 122 A.D.3d 859, 997 N.Y.S.2d 447 (2014).

In *Acquest Wehrle, LLC v. Town of Amherst*, the court held that an owner whose property is located partially in a designated wetland had a cognizable property interest in a town board's request to EPA to allow the owner to tap into a federally subsidized sewer, which the town subsequently rescinded, but fact issues barred summary judgment on its substantive due process claim, and the defendants did not violate the owner's equal protection rights. 129 A.D.3d 1644, 11 N.Y.S.3d 772 (N.Y. App. Div. 2015).

Federal:

In *Peterson v. U.S. Dep't of Agric.*, the court granted a plaintiff's summary judgment motion that sought judicial review of a final determination of the USDA that he violated the Swampbuster provisions by deepening natural drains on farmland that he operated, because the agency's interpretation of a converted wetland conflicted with the plain statutory definition. No. 3:13-CV-34, 2014 WL 4809398, at *4 (D.N.D. Sept. 26, 2014).

In *Bass v. Vilsack*, the court held that owners of farmland who brought an action seeking judicial review of a final administrative decision of the USDA, finding that they converted wetlands to agricultural use without authorization in violation of Food Security Act, failed to exhaust their administrative remedies with respect to the claim that USDA did not correctly perform minimal effects determinations, and that the owner's request for new wetland determination did not render owner's prior request for wetland determination invalid. 595 F. App'x 216 (4th Cir. 2014).

In *Davis Wetlands Bank, LLC v. United States,* the court held that the breach of contract claim by the wetlands mitigation bank against the United States was time barred. The bank sued seeking $1,395,000 in damages based on Army Corps of Engineers' refusal to issue additional wetlands credits to bank for sale to third parties as compensation mitigation for unavoidable impacts to wetlands permitted under Clean Water Act (CWA), after agricultural fields restored by bank matured into forested wetlands. 119 Fed. Cl. 96 (2014).

In *Pioneer Reserve, LLC v. United States*, the court held that wetlands mitigation banking instrument signed by mitigation bank sponsor and district engineer for Corps of Engineers, creating wetlands mitigation bank on two parcels of sponsor's property and authorizing sponsor to sell mitigation credits, pursuant to Clean Water Act (CWA), constituted a contract with government, rather than mere regulatory action by Corps. 119 Fed. Cl. 201 (2014).

In *United States v. Smith*, the court held that an owner discharged dredged or fill material into waters of the United States without a permit, in violation of Clean Waters Act, and that the United States was entitled to an award of costs as sanction for the property owner's partial denial in response to United States request for admission, and the award of $10,000 was reasonable. 303 F.R.D. 630 (S.D. Ala. 2014).

In *United States v. Nicastro*, the court held that the defendant violated the CWA, and that the government did not need to prove that the defendant knew that filling his wetlands violated a specific provision of the Clean Water Act, only that such filling was illegal and that he intended to fill the wetlands. 586 Fed. Appx. 60 (2d Cir. N.Y. 2014).

In *Precon Dev. Corp. v. Army Corps of Engineers*, the court held that 4.8 acres of wetland, located about seven miles away from other wetlands, which are linked to the Northwest River through a series of drainage ditches, was subject to the Army Corps' jurisdiction under the CWA because the Corps produced evidence that the wetlands' functions of storing water and slowing flow were significant and that the wetlands performed beneficial functions for food-chain support and wildlife, and thus the "significant nexus" test was satisfied. 603 F. App'x 149 (4th Cir. 2015).

In *Jones Creek Investors, LLC v. Columbia Cnty., Ga.*, the court ruled against a golf course owner and environmental organizations claiming that a railroad's upstream activities caused significant damage to their businesses and property because a creek, its tributary, and pond formed by damming the creek were not "navigable waters" under the CWA, and it held that a county's lax enforcement of its MS4 permit did not violate the terms of that permit. No. CV 111-174, 2015 WL 1541409 (S.D. Ga. Mar. 31, 2015).

In *St. Bernard Parish Gov't v. United States*, the court held that property owners, claiming a Fifth Amendment taking by the Army Corps of Engineers in constructing, expanding, operating, and failing to maintain a navigational channel that significantly increased storm surge and caused flooding on owners' property during hurricanes, had a protectable property interest, investment-backed expectations, and that their injury was substantial and severe. 121 Fed. Cl. 687 (2015).

In *Tri-Realty Co. v. Ursinus Coll.*, the court held that pollutants from an Impoundment that discharge into a wetland by either traveling over the edge of the Impoundment or by penetrating the Impoundment wall are not actionable discharges under the CWA because these pathways are contained entirely within the alleged wetland, and thus, cannot be a discharge into a navigable water. No. CV 11-5885, 2015 WL 5013729, at *37 (E.D. Pa. Aug. 24, 2015).

Significant regulations affecting our committee specialty in the current year include:

State: NYSDEC has proposed a new 6 NYCRR Part 490, Projected Sea-level Rise, to comply with requirements of Community Risk and Resiliency Act. Summary is available at: http://www.dec.ny.gov/docs/administration_pdf/part490websummary.pdf.

Federal: On May 27, 2015 the Environmental Protection Agency (EPA) and the Army Corps of Engineers jointly announced a final rule defining the scope of waters protected under the Clean Water Act (CWA). The Clean Water Rule: Definition of "Waters of the United States" on June 29, 2015. http://www2.epa.gov/sites/production/files/2015-06/documents/epa-hq-ow-2011-0880-20862.pdf. The rule became effective on August 28, 2015. Click here for EPA and the Department of Army's statement on the relevance of recent court rulings.

Significant government policies affecting our committee specialty in the current year include:

State: On August 28, 2015, the New York State Department of Environmental Conservation (NYS DEC) announced it was revising the policy memorandum which establishes the length of time freshwater wetland determinations and surveyed delineation of freshwater wetlands will be considered fixed. The new policy establishes a five (5) year time period, which is a change from the three (3) year time period established in paragraph 10 of Policy Memorandum FW 87-1. This change provides for consistent treatment of jurisdictional determinations and delineation by NYS DEC and the United States Army Corps of Engineers (US ACE). Implementation of this policy will provide greater certainty to the regulated public during the permitting process.

Federal: On September 14, 2015, USACE proposed updates to National Wetland Plants list. 80 FR 55103.

Are there any other issues that would be interest to the general members of the Section?

USEPA's Office of Research and Development has finalized the report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*. http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414.

On January 30, 2015, the President issued **Executive Order (EO) 13690**, Establishing of a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input. The EO amends existing EO 11988: Floodplain Management originally issued in 1977, to include the Federal Flood Risk Management Standard (FFRMS).

* * *

Committee Name: Continuing Legal Education

Committee Co-chairs: Leary/Rigano/Young/Trigg

Date of Report: August 26, 2015

The Committee has undertaken and/or completed the following projects in the current year:

With the assistance of Co-Chairs Leary, Knauf and Schnapf, and Section Coordinator Lisa Bataille, the Section held a Brownfield Cleanup Program in Albany on November 12 and in New York City on November 20, 2015.

Significant legislation affecting our committee specialty in the current year includes:

State: New Brownfield Cleanup Amendments, ECL Article 27, title 14.

Significant regulations affecting our committee specialty in the current year includes:

State: DEC implementing regulations for the new Brownfield amendments.

Are there any other issues that would be interest to the general members of the Section?

We are looking to hold Section sponsored programs in Spring 2016 on energy issues and in Fall 2016 on practical skills for new environmental lawyers. Anyone interested in co-chairing either of those programs in an upstate or NYC location should email the CLE committee co-chairs.

* * *

Committee Name: Environmental Insurance

Committee Co-chairs: Gerald P. Cavaluzzi and Daniel W. Morrison

Date of Report: November 10, 2015

The Committee has undertaken and/or completed the following projects in the current year:

On October 30, 2014, our Committee hosted a CLE program entitled "Emerging Issues in Environmental Insurance." The program, which was held at the New York City offices of Latham & Watkins, LLP, featured panels comprised of insurance industry executives and attorneys. The topics included an overview of the market for environmental insurance products and trends from the perspectives of insurers, policy holders and brokers, and practical tips for utilizing environmental insurance products in transactions. The program was well-attended both online and in person. The program was the latest in a series of programs hosted by our Committee every two years.

Significant legislation affecting our committee specialty in the current year includes:

Legislation aimed at addressing recent legionella outbreaks contemplates mandatory inspections and monitoring of cooling towers.

Significant regulations affecting our committee specialty in the current year includes:

Recently, the New York State Department of Health (NYSDOH) lowered the indoor air guideline for Trichoroethene (TCE) from 5 micrometers per cubic meter (µm/m^3) to 2 µm/m^3. TCE is a man-made chemical which is used as a solvent to remove grease in adhesives, in paint stripper, and in manufacturing. The main source of exposure to TCE is through indoor air.

The NYSDOH set this guideline at a concentration that is significantly below levels that are known to have direct negative impacts on human health. When TCE levels exceed this guideline, actions should be taken to reduce exposure. The guideline is used to determine how urgently actions are needed to reduce exposure. As with any chemical found in indoor air, the NYSDOH, along with CA RICH Consultants, Inc., recommend taking steps to reduce exposure whenever levels are detected above background concentrations (typically 1 µm/m^3 for TCE).

* * *

Section's Past Chair, Walter Mugdan, Is a Recipient of the 2015 Presidential Rank Award

This award was established by the Civil Service Reform Act of 1978 to recognize a select group (less than 1 percent!) of career members of the United States government's Senior Executive Service (SES) for exceptional performance over an extended period of time. It is one of the highest honors that can be bestowed upon a Senior Executive in the federal government and recognizes Walter's "sustained extraordinary" accomplishments.

The U.S. Office of Personnel Management's Acting Director Beth Cobert says it best: "The executives who have been selected as this year's PRA winners represent the very best in public service, innovation, and commitment to accomplishing the mission of the Federal government. Each one of you serves as a model and a source of inspiration for your colleagues in Federal service and the American people."

Congratulations to our friend and Section member, Walter Mugdan!

* * *

Environmental People in the News

By Michael J. Lesser; Original Blog Items Edited by Sam Capasso

With the exception of the first item, the following excerpts are taken from The NY Environmental Enforcement Update as originally posted in Envirosphere, the official blog of the Environmental Law Section of the New York State Bar Association. All information is derived from public sources as referenced by the embedded hyperlinks in each item.

August 2015

Upstate Super Lawyers Revealed

A number of Environmental Law Section members were recognized for their legal excellence and environmental practice achievements in the 2015 Upstate New York Edition of *Super Lawyers Magazine*. Among those recognized were Past Section Chairs Terresa M. Bakner, John Greenthal, John Hanna, Philip H. Gitlen, Alan Knauf, Barry R. Kogut, Virginia C. Robbins and current Section Treasurer Kevin M. Bernstein. Also honored were Richard R. Capozza, Scott Fein, David P. Flynn, Thomas Fucillo, Ronald C. Hull, Kenneth Kamlet, Peter Ruppar, Linda Shaw, Doreen A. Simmons, Craig Slater, Dean S. Sommer, Scott M. Turner, Kevin M. Young, Douglas H. Zamelis, Robert J. Alessi, John Privitera, Yvonne E. Hennessey, Ruth E. Leistensnider and Thomas S. West (See *Super Lawyers Magazine*, 2015, Thompson Reuters, p. 22).

July 2015

NYSDEC Commissioner Resigns

NYSDEC Commissioner Joe Martens left the agency at the end of July to return to the non-profit sector with the Open Space Institute. The Environmental Law Section wishes him well in his new endeavors. Deputy Commissioner Marc Gerstman will assume leadership of the agency as Acting Commissioner. http://www.timesunion.com/news/article/DEC-chief-leaving-second-in-command-stepping-up-6362019.php.

Judge Read Retires

Associate Judge Susan Read retired early from her term on the NY Court of Appeals. Appointed to the state's highest court by Governor George Pataki, Judge Read previously held several environmental positions both in government and private practice. She often rendered the Court's environmental decisions. http://www.timesunion.com/news/article/Judge-Susan-Phillips-Read-retiring-from-state-6346159.php.

New USDOJ Appointments

Assistant Attorney General John C. Cruden announced new leadership staff positions in the Environment and Natural Resources Division (ENRD) with the appointments of Varu Chilakamarrias as Chief of Staff and Patricia McKenna as General Counsel and Attorney Educational Coordinator. http://www.justice.gov/opa/pr/assistant-attorney-general-john-c-cruden-announces-leadership-staff-positions-environment-and.

June 2015

RIT Engineer New EPA Region 2 Division Director

USEPA Region 2 announced that Rochester Institute of Technology engineer Dr. Anahita Williamson will be the new Director of the Region's Division of Environmental Science and Assessment in Edison, NJ.

May 2015

New Director for Sierra Club

Capital Region environmentalist Aaron Mair is the new president of the national board of directors of the Sierra Club.

April 2015

New Attorney for EDNY

Kelly T. Currie has been appointed Acting U.S. Attorney for the Eastern District of NY. His does not suggest extensive environmental experience.

March 2015

USDOJ's Cruden to Focus on Bringing Bad Actors

The new USDOJ ENRD Director John Cruden will have a full agenda as he assumes supervision of the 400 attorneys of the Environment and Natural Resources Division (ENRD) and the 6,000 open environmental cases or investigations now before the USDOJ.

February 2015

DEC Employee Named Forester of the Year

The New York Society of American Foresters (NYSAF) named NYS Department of Environmental Conservation (DEC) Region 5 Natural Resource Supervisor Tom Martin as its 2014 Forester of the Year.

January 2015

New Chairs of NY Legislature Environmental Committees Named

Both houses have named new chairs to their environmental committees.

NYS Senator Thomas F. O'Mara (R, C) has been named new chairman of NY Senate Environmental Conservation Committee. He will also serve as a member on nine additional committees including Agriculture, Energy, and Transportation. He represents the 58th Senate District in the Finger Lakes and Southern Tier regions of New York.

NYS Assemblyman Steven Englebright (D) has been named the new chairman of the NY Assembly Environmental Conservation Committee. He represents the 4th Assembly District on the north shore of eastern Long Island which includes the NYSDEC Region 1 office and SUNY Stony Brook.

An Analysis of the 2015 Amendments to the New York State Brownfield Cleanup Program

By David J. Freeman and Larry Schnapf

Since its inception in 2003, the New York State Brownfield Cleanup Program (BCP) has enrolled over 750 sites and is estimated to have generated investment of more than $15 billion of private capital in the cleanup and redevelopment of contaminated sites. Many of these sites are in areas of high poverty or unemployment and have lain dormant or been underutilized for decades. However, the Program has been criticized for offering what some have characterized as overly generous tax credits that are not sufficiently targeted to sites which really need them.

With the tax credit aspects of the BCP set to expire in December 2015, Governor Andrew Cuomo and the state legislature recently reached agreement on extending and reforming the Program.[1] The BCP amendments address the state's cost concerns while ensuring that the Program will continue to catalyze redevelopment and produce high-quality cleanups.

This article reviews the key elements of the amended statute, evaluates their significance, and identifies some of the important unresolved issues that will need to be addressed in implementing the new law.

1. Extension of Deadlines for Obtaining Certificates of Completion; Grandfathering of Existing Sites

Under the BCP prior to its amendment, all sites in the Program needed to obtain Certificates of Completion (COCs) of cleanup from the New York State Department of Environmental Conservation (NYSDEC) prior to December 31, 2015, in order to receive tax credits earned for qualifying cleanup and development expenses. These tax credits can be quite substantial; over the life of the Program, they have averaged over $10 million per site.[2]

The amended statute extends the eligibility for tax credits to all sites which are accepted into the Program[3] by December 31, 2022, and obtain their COCs by March 31, 2026. However, as noted below, the BCP amendments revise the tax-credit scheme to make it less generous. Sites currently in the Program are grandfathered into the existing tax credit scheme, but only if they receive their COCs by certain intermediate deadlines. Sites which entered the BCP[4] prior to June 23, 2008, must obtain their COCs by December 31, 2017. Sites entering the Program between June 23, 2008, and the later of (a) July 1, 2015, or (b) the date by which NYSDEC proposes a rule, required by the new amendments, defining the term "uderutilized," must obtain their COCs by December 31, 2019.

To the great relief of Program participants, these deadlines are relatively reasonable and should allow most sites making reasonable progress towards cleanup to remain eligible for tax credits. By contrast, the legislation proposed last year by Governor Cuomo would not only have denied tax credits for sites which had not obtained their COCs by December 31, 2017, but would also have terminated those sites from the Program, thereby denying them even the release and covenant not to sue that accompanies a COC. The Governor's program bill proposed in January would have grandfathered sites in the Program prior to June 23, 2008, only if they obtained their COCs by the end of 2015; all other sites in the program as of April 1, 2015, would have had only until December 31, 2017 to obtain COCs.

As reasonable as these new deadlines are for most sites, they may still create problems for some of the older and more complicated "legacy" sites, which now must complete their cleanups relatively promptly or lose the benefits of the more generous tax credit provisions for which they originally qualified.

2. Definition of Brownfield Site

The current definition, based on federal law, is a site "which may be complicated by the presence or potential presence" of a contaminant. That definition has proved problematical for two reasons: (1) what "may complicate" the development of a site is far from clear, and in any event NYSDEC does not have the real estate expertise necessary to make that determination; and (2) the "potential presence" component means, at least theoretically, that a site can qualify based on the *possibility* that it is contaminated even if later testing shows that it is not.

The new definition is much more straightforward: a site which has contamination in excess of standards, criteria, or guidance adopted by NYSDEC that are applicable based on the reasonably anticipated use of the property. Since NYSDEC has already adopted standards that are protective of public health and the environment based on proposed end uses,[5] the new definition should be a relatively bright-line test as to which sites will qualify for admission to the Program.

One important feature of the new definition is that it makes obsolete NYSDEC's rule-of-thumb that contamination must be due to an onsite source for a site to qualify for the BCP. NYSDEC has for years used this standard to deem ineligible sites which are contaminated by "historic

fill" brought in from offsite or contaminated solely by vapors or groundwater migrating from offsite sources. These sites should now qualify, as long as the contaminants are in excess of NYSDEC standards. However, sites accepted into the BCP based on the presence of groundwater contamination or vapor intrusion from offsite sources will not be eligible for tangible property tax credits.

Another feature of this definition is what it does not say: who gets to decide the "reasonably anticipated site use," which in turn determines what cleanup standards will apply. The Governor had proposed that reasonably anticipated use be determined by NYSDEC. The Senate bill provided that the reasonably anticipated use be determined by the BCP applicant. The amendments, as enacted, are silent on this issue. In our view, this resolution favors the applicant: if the applicant states that it intends to develop the site for a specific purpose, that should presumptively be the "reasonably anticipated use" of the site.

A third aspect of the new definition is elimination of the "maybe" (suspicion of contamination) component: applicants will have to demonstrate, by submission of a Phase II report or other sampling data, that the site is actually contaminated above NYSDEC standards. This change comports with NYSDEC's current procedures but will cause difficulty for prospective purchasers who cannot obtain the existing owner's permission to perform intrusive testing prior to closing.

3. New Categories of Eligible Brownfield Sites

The amended BCP law now allows Class 2 sites[6] that are owned by, or under contract to be purchased by, a party that qualifies as a Volunteer[7] to be eligible for the BCP where, at the time of the application, NYSDEC has not identified a responsible party with the ability to pay for the investigation or cleanup of the site. In addition, the legislation also allows interim status or permitted RCRA facilities that are owned by, or under contract to be transferred to, a Volunteer to be eligible for the BCP where, at the time of the application, NYSDEC has not identified a responsible party with the ability to pay for the investigation or cleanup of the site. The RCRA exemption should be particularly useful for abandoned RCRA-regulated properties in upstate or western New York, and for the redevelopment of downsized RCRA-regulated facilities, by allowing portions of these sites subject to RCRA permits to be sold to developers.

4. Eligibility Criteria for Tangible Property Tax Credits

Under current law, all BCP applicants are entitled to claim tangible property tax credits (TPCCs) based on the cost of constructing a new development on a brownfield site. Such credits are subject to a cap of $35 million for non-industrial projects or three times the site preparation costs, whichever is less. These caps were added in 2008, to address concerns about the overall costs of the BCP.

Despite studies that indicate that the caps have achieved this goal, the Governor's budget proposal would have eliminated the TPCC as an "as of right" feature. Instead, all applicants would be required to meet a second set of criteria to be able to claim tangible property credits: (i) at least half of the site is located in an environmental zone (En-Zone)[8]; (ii) the property is utilized for affordable housing; or (iii) the property is "upside-down" – i.e., remediation is projected to cost more than the value of property if it were uncontaminated.

The legislation as enacted included a modified version of these criteria, or "gates," to qualify for TPCCs. The most significant change was that the gates apply only to properties in New York City. Outside of New York City, eligibility for TPCCs will remain available to all developers that otherwise qualify under the BCP, as per existing law. The upside-down gate was also modified so that a property can qualify if remediation is projected to cost over 75% (rather than 100%) of the appraised value of the property at the time of the application. The appraised value must be based on an "as if" hypothetical assumption that the property is not contaminated. It should be noted that there are a variety of ways to calculate property value (e.g., income stream, cost to repair, and comparison sales), and the law does not specify which approach is to be used.

To soften the impact on New York City brownfield sites that might not meet the upside-down test, the legislation adds what amounts to a fourth gate: that the property is "underutilized." Representatives of the Governor and the Legislature were unable to agree on a definition of "underutilization" prior to the April 1 budget deadline. Consequently, the law instructs NYSDEC to propose a definition by July 1, 2015 after consultation with New York City and the business community. If NYSDEC fails to publish the draft rule by July 1, the effective date of the certain of the new tax credit provisions is delayed until such time as the definition is published. The rule must be finalized by October 1, 2015 (although the statute does not specify what happens if the October 1 deadline is not met).*

Another casualty of the budget deadline was that no agreement was reached on a definition of "affordable housing." Instead, NYSDEC is required to publish a definition of that term by June 8.*

[Editor's Note: There have been further developments since this article was first published by BNA. Since that date, DEC met the July 1, 2015 deadline when it published proposed definitions of "underutilized" and "affordable housing" in the June 10, 2015 State Register. The Department then received adverse comments to its "underutilized" definition, withdrew the proposed rule and is in the process of proposing new rulemaking. As a result, it failed to meet the October 1, 2015 final adoption deadline.]

The amendments specify that sites are not eligible for tangible property tax credit where the property was previously remediated under the BCP, the state superfund program, the Environmental Restoration Program for municipal sites, the Oil Spill Program of the Navigation Law or RCRA, such that the site could be developed for its then-intended use. It is unclear how this provision will be interpreted in circumstances where, for example, a prior cleanup achieved a track 4 cleanup qualifying the site for restricted residential use, and the applicant would like to perform a track 1 or track 2 cleanup to support a multi-family development.

5. Changes to Tangible Property Tax Credit Calculation

Under current law, the base percentage for TPCCs was either 10% (for individual taxpayers) or 12% (for corporate taxpayers), but applicants could qualify for a TPCC percentage of up to 24% depending on certain site-specific criteria. The legislation reduces the base percentage for all applicants to 10% and retains the 24% cap but changes the formula for the TPCC bonus. Applicants will now be eligible for an extra 5% for affordable housing projects as defined in the regulations to be promulgated by NYSDEC; sites located in Environmental Zones; sites located within a Brownfield Opportunity Area (BOA)[9] where the development conforms to the plan for a BOA certified by the Department of State, and sites used primarily for manufacturing activities.

The amendments also limit TPCCs to tangible property with a useful life of at least 15 years. This change was adopted to exclude costs of artwork and furniture that applicants were claiming for hotels or rental property. TPCC-eligible costs now expressly include demolition and foundation costs that are not included in the site preparation cost (SPC) component, as well as costs associated with non-portable equipment, machinery, and associated fixtures and appurtenances used exclusively on the site regardless of their depreciable life for federal income tax purposes.

6. Changes to Definition of Site Preparation and Groundwater Remediation Costs

Under the current law, applicants are entitled to two categories of SPCs. The first category includes those costs necessary to qualify the site for a Certificate of Completion (COC), signifying actual or anticipated site cleanup to the satisfaction of NYSDEC. The second category is those costs to prepare the property for development. Thus, the SPC includes not only cleanup costs but also demolition, soil excavation, scaffolding, support of excavation, and dewatering expenses. Depending on the cleanup track achieved, applicants may claim between 28% and 50% of their SPCs and five years of groundwater remediation costs.

Because of the perception that SPCs were being earned by excavation and foundation costs unrelated to contamination, the legislation restricts SPCs to those expenses necessary to implement a site investigation or remediation, or to qualify for a COC. For example, if a site has five feet of contaminated soil but the soil is excavated to a depth of 15 feet to accommodate the development, it is conceivable that NYSDEC (and, therefore, the New York State Department of Taxation and Finance, which audits tax credit applications) will take the position that only the expenses related to excavating the first five feet of contaminated soil will be eligible for SPCs. Furthermore, eligible SPCs will not include foundation costs in excess of those required for cover systems required by regulations applicable to the site.

The amendments also expand, in certain respects, the types of remedial costs that qualify for SPCs. It is now clear that applicants may claim costs for abatement of asbestos-containing building materials, lead-based paint, or PCBs for existing buildings that will remain onsite. In addition, SPCs can be claimed for up to five years after issuance of a COC for costs of implementing institutional and engineering controls, an approved site management plan, and an environmental easement.

7. Discontinuation of Real Property and Insurance Premium Tax Credits

BCP applicants have been eligible to receive two additional types of tax credits: (1) credits against eligible real property taxes based on the number of jobs at a brownfield site;[10] and (2) environmental remediation insurance credits.[11]

These two types of credits, which have been relatively rarely used, will no longer be available to sites entering the program after the later of July 1, 2015, or the date by which NYSDEC proposes regulations defining "underutilized."

8. Payments to Related Parties

It is not unusual in real estate development projects for work to be performed through entities that have common ownership with the developers and contractors whose services are critical to the organization, financing, and construction of the project. Concerned that applicants were artificially inflating service fees to increase their SPCs, the Governor proposed eliminating all "related party" (10 percent or more common ownership) payments from the calculation of tax credits.

The law as enacted is far less Draconian, restricting only related-party service fees (defined as fees calculated as a percentage of project or acquisition costs) from being claimed for SPC or groundwater remediation cost tax credits. However, they may be claimed as TPCCs to the extent to which they are earned and actually paid.

9. BCP-EZ Program

The new amendments satisfy a longstanding call to establish a streamlined cleanup program for sites that are willing to waive tax credits. Such a program, NYSDEC's Voluntary Cleanup Program, existed prior to the BCP but was never statutorily authorized and was closed to new applications when the BCP was established.

The legislation authorizes but does not require NYSDEC to promulgate rules that will govern administration of the BCP-EZ program. However, cleanups under BCP-EZ must still satisfy the requirements of §§ 27-1415 and 1417 of the Environmental Conservation Law. These sections specify the major elements of the BCP, including the submissions required, cleanup tracks, and requirements for citizen participation. NYSDEC is expressly permitted to waive certain public participation requirements, and to allow applicants to petition the NYSDEC for more permissive cleanup standards under certain circumstances. However, given the remaining statutory requirements, it is unclear how much the NYSDEC will be able to streamline the existing BCP requirements, and whether those changes will be enough to make it worthwhile for sites to forego the tax credits to which they would otherwise be entitled under the BCP.

10. Waiver of State Hazardous Waste Disposal Taxes and Fees

New York State law imposes both a program fee and a special assessment tax on those who generate and dispose of hazardous waste. Designed originally to incentivize manufacturers to reduce the use of hazardous substances in their operations, these taxes and fees have been, counter-intuitively, construed also to apply to those who are excavating hazardous waste in the context of site cleanups. The taxes and fees can be substantial, sometimes running into the hundreds of thousands of dollars.

Exemptions are provided for cleanups conducted under specific state programs, including the BCP, or under a written agreement with NYSDEC. However, sites cleaned up under municipal programs such as the New York City Voluntary Cleanup Program (VCP) are not covered by those exemptions.

The amendments address this anomaly by providing an exemption for state hazardous waste taxes and fees for materials generated in connection with cleanups overseen by a municipality that has a memorandum of agreement (MOA) with NYSDEC governing such cleanups as of August 5, 2010. This date happens to be the effective date of the MOA between NYSDEC and the New York City Office of Environmental Remediation regarding the VCP. Thus, it appears that this exemption applies retroactively to remediation waste generated by projects enrolled in the VCP since August 5, 2010.

11. Waiver of State Oversight Costs

The requirement to reimburse NYSDEC for it oversight costs has been a sore subject among some BCP applicants. The amendments address this issue by providing that, after July 1, 2015, oversight fees will be waived for Volunteers. Other participants will still be required to pay oversight costs, but NYSDEC can negotiate a flat fee based on projected future costs of negotiating and implementing the site cleanup agreement.

12. Additional Changes to the Program

The legislation makes a number of "fixes" to the BCP that are not headline-grabbing, but will affect certain sites, eliminate statutory glitches, and/or conform the statute to current NYSDEC operating practices. These changes include:

- Extending the time, from 10 to 30 days, by which NYSDEC must inform the applicant that its application is deemed complete, and trigger the time frame for an eligibility determination from the receipt of a "complete application";
- Requiring every report to include a schedule for the next submission;
- At sites where an environmental easement is needed, mandating execution of the easement at least three months prior to the anticipated date of COC issuance;
- Authorizing issuance of COCs where remediation has not yet been completed but will be achieved in accordance with schedules provided to NYSDEC;
- Clarifying that COCs can be transferred by either the original or subsequent holder of the COC, to a successor having any real property interest (including a leasehold interest) in all or a portion of the site;
- Authorizing NYSDEC to require that it be provided site access for inspection, monitoring, maintenance, or sampling;
- Allowing TPCCs to be earned for up to 120 months (rather than 10 tax years) after the issuance of a COC, to address the situation where an applicant may have one or more tax years shorter than 12 months;
- Allowing expenses deducted under the now-expired Internal Revenue Code §198, rather than capitalized, to be counted in computing limitations for TPCCs; and
- Clarifying TPCCs are available for sites "placed in service" before the issuance of a COC.

Conclusion

The BCP amendments, as enacted, preserve much of what is valuable about the State's Brownfield Cleanup Program, while providing additional certainty and clarity to both the environmental community and developers regarding the remediation of brownfield sites in New York State. The main accomplishments are the extension of deadlines for obtaining COCs, with relatively reasonable grandfathering provisions, and the maintenance of the structure of the Site Preparation Credits while cutting back on some areas where there was a potential for excess credits. The creation of a BCP-EZ program for sites when applicants are willing to waive tax credits could be significant, provided that NYSDEC is able to make the program sufficiently streamlined.

New restrictions on the ability of New York City sites to obtain TPCCs are more problematic. While some limitation on these credits was inevitable, the specific provisions enacted may go too far in restricting their availability. Much will depend on the regulations to be promulgated by NYSDEC regarding sites that qualify for such credits because they are "underutilized."

On the whole, however, the amendments represent a thoughtful and well-designed extension of a program that has proven to be of significant benefit in the cleanup and redevelopment of New York State's many brownfield sites.

Endnotes

1. Assemb. S02006-B, 2015 Leg. (N.Y. 2015) (hereinafter S02006-B).
2. *See* B. Hersh, *New York State Brownfield Cleanup Tax Analysis* (New York University Schack Institute of Real Estate, 2014). The study indicates that the average tax credit for sites admitted after the statute was amended in 2008 were much lower, averaging about $1 million per site as of the date of the report, than the pre-2008 sites, whose tax credits averaged about $14 million per site.
3. For purposes of determining tax credit eligibility, the key date is that on which DEC issues a letter advising a site that it is accepted into the Program.
4. For purposes of determining which category a site falls under for purposes of grandfathering, the key date is the effective date of the Brownfield Cleanup Agreement between NYSDEC and the applicant, which can be several weeks after the site's acceptance into the Program.
5. *See* N.Y. Comp. Codes R. & Regs. tit. 6, § 375-6 (2006).
6. A Class 2 Site is one that is listed on the State Registry of Inactive Hazardous Waste Disposal Sites as being a "significant threat to the public health or environment—action required."
7. A Volunteer is a Program applicant whose liability for site contamination arises solely as of result of its involvement with the site subsequent to the disposal of hazardous waste or discharge of petroleum and who otherwise exercises appropriate care with respect to such substances at the site. N.Y. Envtl. Conserv. Law § 27-1405(1)(b) (McKinney 2013).
8. An En-zone is a census tract with a poverty rate of at least twenty percent and unemployment rate of at least one and one-quarter times the statewide unemployment rate based on the most recent five-year American Community Survey (ACS) or areas with poverty rate of at least two times the poverty rate for the county in which the areas are located based on the most recent five-year ACS.
9. The BOA Program, established in the original BCP legislation, provides municipalities and community-based organizations with assistance, including up to 90 percent of the eligible project costs, to complete revitalization plans and implementation strategies for designated areas or communities affected by the presence of brownfield sites, and to perform site assessments for strategic brownfield sites in those areas.
10. This tax credit is calculated by multiplying the average number of full-time non-executive employees (FTEs) who are employed at the site during a taxable year, including employees employed by lessees of the developer, by a percentage that varies depending on the number of employees at the brownfield site and if the site is located in an En-Zone. The maximum credit allowed is $10,000, multiplied by the average number of FTEs for the taxable year. Because this tax credit is geared towards the creation of jobs, it does not provide an incentive for residential development.
11. This credit is the lesser of $30,000 or 50% of the premium paid after the date of a Brownfield Cleanup Agreement. It is a one-time credit that is generally allowed in the year that the COC is issued.

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What Portion of a Foundation's Cost Should Count Toward a Site Preparation Remedial Cover System Costs?

By Linda Shaw and Dwight Kanyuck

A. Introduction

The recent revisions to the Brownfield Cleanup Program ("BCP") in Environmental Conservation Law Article 27 Title 14 and associated Brownfield Tax Credits in Tax Law Section 21 modified the definitions of the costs eligible for the site preparation tax credits and the tangible property tax credits with respect to the applicable cost of a foundation that serves as a cover system.

The new site preparation cost definition in Tax Law §21(b)(2) includes the following sentence:

> Site preparation cost ***shall not include the costs of foundation systems that exceed the cover system requirements in the regulations applicable to the qualified site***.

The new tangible property eligible cost definition in Tax Law §21(a)(3)(iv) reads:

> eligible costs for the tangible property credit component are limited to costs for tangible property that has a depreciable life for federal income tax purposes of fifteen years or more, costs associated with demolition and excavation on the site and ***the foundation of any buildings constructed as part of the site cover that are not properly included in the site preparation component*** and costs associated with non-portable equipment, machinery and associated fixtures and appurtenances used exclusively on the site, whether or not such property has a depreciable life for federal income tax purposes of fifteen years or more.

When these two definitions are read together, it appears the New York State Department of Environmental Conservation ("DEC") and/or the New York State Tax & Finance Department ("T&F") would be hard pressed to legitimately argue that no costs associated with a foundation can count toward the site preparation costs when a cover system is a required component of a remedy since both definitions clearly state that at least some of the foundation costs do count as a cover system by referencing part of the foundation as a cover system within the statutory language. The issues that will be analyzed in this article are: (1) how thick does a foundation system have to be to serve as a cover system; and (2) when is a cover system required?

B. Word on the Street

Before beginning the statutory and regulatory analysis, sources familiar with agency deliberations indicate that DEC and T&F do not intend to count *any* part of the costs associated with a foundation system as part of a cover system. There are also several cases related to sites in the pre-July 1, 2015 program where foundation costs are being excluded from the site preparation costs category even though the foundation was included as the cover system required in the remedial program described in approved Remedial Action Work Plans and Final Engineering Reports, particularly in Track 2 restricted remediation scenarios.

The alleged reasoning of DEC and/or T&F is that a foundation is part of the building and, as such, costs associated with a foundation installation should be charged to only the tangible property costs. Instead, the "word on the street" is that, instead of the foundation cost, only the equivalent cost of a two-foot "clean" soil cover would count as a remedial cover system toward site preparation costs. Clearly, at least a soil cover system is required at a Track 4 and Track 2 restricted cleanup site pursuant to 6 NYCRR §§375-6.6; 6.7(d). However, the analysis in this article will reveal that constructed foundation or pavement cover systems are preferable cover systems to a soil cover, and, of course, are frequently the "cover system" or "cap" implemented at a brownfield redevelopment site since the entire point of a "remedial program" on a brownfield site is to integrate the planned reuse into the remediation as illustrated in the analysis below.

In addition, the recent unannounced change of policy by DEC that foundations are not required for any Track 2 "restricted" cleanup is unfounded since some contamination is still being left at the site at "restricted levels," and the foundation serves as the "cap" or "cover" to either: (a) prevent storm water infiltration into a site; (b) prevent direct exposure to the residual soil contamination; or (c) prevent vapor intrusion by incorporation of a vapor barrier or a vapor mitigation system into the foundation itself. The regulations require a cover system at a restricted remediation site and DEC's own guidance document, analyzed below, states that a slab is required to address a site with potential soil vapor intrusion exposure pathways.[1]

Therefore, it is unclear how all foundation costs can be prohibited from counting toward the site preparation costs when the new Tax Law provisions state some of these costs do count, and the DEC's own guidance documents indicate that a foundation and pavement cover system is preferable to a soil cover system.

C. Statutory and Regulatory Analysis

1. A BCP Remedial Program Includes the Construction of a Cap in the BCP Law and Regulations

Environmental Conservation Law (ECL) §27-1405(5) defines a "Brownfield Site Remedial Program" or "Remedial Program" to mean:

> all remedial activities or actions undertaken to eliminate, remove, treat, abate, control, manage, or monitor contamination at or emanating from a brownfield site, including, but not limited to, the following:
>
> (a) remedial investigation and remedy selection activities needed to develop such a program;
>
> (b) design activities;
>
> (c) ***construction activities including without limitation*** *grading, contouring, trenching, grouting,* ***capping***, excavating, transporting, incinerating, thermally treating, chemically treating, biologically treating, constructing leachate collection and treatment systems or application of innovative technologies approved by the department.[2]

The definition of "Remedial program" pursuant to 6 NYCRR §375-1.2 (ap)(4) states:

> Remedial actions, including, but not limited to, ***construction related activities*** and the implementation of remedial treatment technologies, including without limitation grading, contouring, trenching, grouting, ***capping***, excavation, transporting, incineration and other thermal treatment, chemical treatment, biological treatment, or construction of groundwater and/or leachate collection and treatment facilities.[3]

2. A Cap or Cover Is an Engineering Control That Acts as a Physical Barrier to Ensure Long-Term Effectiveness of the Remedial Program

Both ECL §27-1405(11) and 6 NYCRR §375-1.2(o) define an "Engineering Control" as:

> ***any physical barrier*** or method employed to actively or passively contain, stabilize, or monitor contamination, restrict the movement of contamination ***to ensure the long-term effectiveness of a remedial program***, or eliminate potential exposure pathways to contamination. Engineering controls include, but are not limited to, ***pavement, caps, covers, subsurface barriers, vapor barriers, slurry walls, building ventilation systems***, fences, access controls, provision of alternative water supplies via connection to an existing public water supply, adding treatment technologies to such water, supplies, and installing filtration devices on private water supplies.[4]

Therefore, a "cap" or "cover system" is defined in both the BCP law and regulations as an engineering control, and can consist of "any physical barrier." Most remedial programs require engineering controls, including Track 2-4 cleanups.[5] Even a Track 1 cleanup site, which otherwise cannot include an engineering control, may require such control for groundwater remediation when "the long-term employment of institutional or engineering controls after the bulk reduction of groundwater contamination to asymptotic levels has been achieved" and which otherwise has achieved the Track 1 soil cleanup objectives.[6]

3. Regulations Only Define Soil Cover Systems Even Though Any Constructed Physical Barrier Can Be a Remedial Engineering Control

Even though the BCP Law and regulations define any physical barrier serving as a cap to be part of a remedial program in the form of an engineering control, the regulations do not specifically define a "cap" or "cover system," but do define a "soil cover" system in 6 NYCRR §375-6.7(d):

> (d) Soil covers and backfill.
>
> (1) Soil brought to the site for use as a soil cover or backfill must:
>
> (i) be comprised of soil or other unregulated material as set forth in Part 360 of this title;
>
> (ii) not exceed the applicable soil cleanup objectives for use of the site, as set forth in Tables 375-6.8(a) or (b), as follows:
>
> *(a)* for unrestricted use sites, as set forth in Table 375-6.8(a);
>
> *(b)* for residential, restricted-residential, and commercial use sites use the lower of the protection of groundwater or the protection of public health soil cleanup objectives, for the identified use of the site as set forth in Table 375-6.8(b);

> *(c)* for industrial use sites, use the lower of the protection of groundwater or the protection of public health soil cleanup objectives for commercial use as set forth in Table 375-6.8(b);
>
> (*d*) for restricted use sites where an ecological resource that constitutes an important component of the environment is determined to be present, the protection of ecological resources soil cleanup objective must also be considered, so as not to preclude the growth and development of plants and soil dwelling organisms nor inhibit the activity of burrowing organisms; or
>
> (*e*) a site specific modification to a soil cleanup objective, as set forth in subdivision 375-6.9(c), may also be utilized in compliance with clauses (ii) (a) through (d) above.[7]

While a soil cover is defined in the regulations, the soil cover definition above does not define the thickness required for a soil cover, but merely the quality of the soil in comparison to the cleanup standards based on the site's use.

D. Guidance Document Analysis

Since neither the BCP or Tax Law statutes nor applicable regulations define the thickness required for either a soil or constructed cover system, a review of DEC's guidance documents is required. It is important to note that neither applicable guidance document, including DER-10 and CP-51, entitled "Soil Cleanup Guidance," dated October 2010, are regulations. However, DEC treats these guidance documents in the same manner as regulations. This may be the reason why Tax Law §21(b)(2) references "regulations" that define the cover system requirements.

As noted above, Tax Law §21(b)(2) excludes from site preparation costs "***the costs of foundation systems that exceed the cover system requirements in the regulations applicable to the qualified site***." However, Tax Law §21(a)(3)(iv), defines tangible property costs as including only "***the foundation of any buildings constructed as part of the site cover that are not properly included in the site preparation component***." When these two foundation provisions are compared, it seems completely obvious based on the plain language in the updated Tax Law that some of the foundation costs count toward the site preparation costs as a "cover system." The question is how much of the foundation costs are considered site preparation costs since there are no BCP or Tax Law regulations that define the "cover system requirements" other than what type of soil is required for a soil cover system.

The analysis below of DEC's guidance documents highlights the provisions related to caps and cover systems, which do define the required thickness of a soil cover system, but do not define the thickness of a foundation or pavement cover system. However, the guidance documents clearly state that when a building foundation or pavement cap is in place, this type of cover system eliminates the need for a soil cover system, suggesting this form of a constructed cap is more permanent and less permeable, and, therefore, provides more environmental benefit than a less permanent, more permeable soil cover system given that the goal of any cap is either to: (a) prevent the infiltration of storm water into the site's groundwater; (b) eliminate direct contact with remaining residual contaminated soils; or (c) serve as part of an engineering control to prevent vapor intrusion.[8]

DER-10 §5.8(b)(8), entitled "Construction Completion Report and Final Engineering Report," clearly states that a "structure," which typically includes a foundation, is a cap, which must be illustrated through as-built drawings to be included in the Final Engineering Report ("FER"); which is the document summarizing the remedial program implemented on the site at the completion of the work:

> ***any permanent structures including, without limitation, caps, slurry walls***, treatment units, piping and instrumentation diagrams or other remedial structures which will remain in place after completion of the remedial action, as well as document areas of changed conditions or removals, as well as mitigation measures in place to address exposures related to soil vapor intrusion.

DER-10 §4.1(f)(2) further provides:

> A soil cover is required as an element of any remedy where contamination is present in the exposed surface soil above the appropriate use-based soil SCG. Exposed surface soil is the soil which will be present at the surface of a site which is ***not otherwise covered by the development at the site (e.g., buildings, pavement, etc.)***.

This section continues by stating that the thickness a soil cover system from the surface of the ground down shall be "two feet" for unrestricted residential use, restricted residential use or when an ecological resource has been identified, as set forth at 6 NYCRR 375-6.6, and "one

foot" for commercial or industrial use at sites not otherwise covered with buildings or pavement.

This entire section of DER-10 inherently implies that a site covered by a building or pavement is "capped" since it does not need a soil cover because such a site is better protected than a site covered by soil cover since no minimal thickness is required.[9] Therefore, one can reasonably assume any thickness of a building or pavement system is preferable to a soil cover since it has much lower permeability and is permanent.[10] However, this begs the question of how to interpret the new language in Tax Law §21(b)(2), which specifically excludes from site preparation costs "***the costs of foundation systems that exceed the cover system requirements in the regulations applicable to the qualified site***." In other words, there must be some minimal thickness of what is required for a building or pavement cover system based on the type of use at a site, but this is not specifically defined in the BCP or Tax Law, applicable regulations, or even either of the two applicable remediation guidance documents. While a foundation or pavement system may arguably be thinner than a soil cover system, based on this analysis, due to its lower permeability than even low permeability soil, a hardscape foundation or pavement can only properly serve as a cap if it does not crack, since cracks allow for infiltration of storm water into the site or vapor back into the on-site structures. DER-10 §6.2.1.(b)(3), entitled the "Institutional Control and Engineering Control Plan" requires "Plans for the installation, inspection and maintenance of a final cap, cover system or other engineering controls."[11]

Therefore, in order for a foundation or pavement system to effectively serve as a cap, it must be thick enough based on site conditions to not crack for a long period of time to meet the long-term maintenance requirements required in the BCP through implementation of the Site Management Plan and Environmental Easement.

E. Building Code Analysis

Since Tax Law §21(b)(2) does not specify the "regulations applicable to the qualified site apply," the regulatory analysis must extend outside of the BCP and Tax Law regulations to applicable regulations contained in the New York State Building Code (the "Building Code")[12] and New York State Department of Transportation Standard Specifications ("NYSDOT Specifications")[13] to identity the structural requirements to ensure that the cover system does not crack. Therefore, for building floor slabs, a licensed Professional Engineer would certify the concrete slab thickness required, based on Building Code requirements, to prevent cracking based on anticipated loads, soil bearing characteristics, and other considerations, and the applicable site preparation cost would be allocated accordingly. Similarly, a licensed Professional Engineer would certify the required thickness of paved parking areas or sidewalks, based on NYSDOT Specifications, to ensure the cover system will not crack based on anticipated loads, soil characteristics and other factors, and allocate these costs to the site preparation costs accordingly. For example, the NYSDOT Specifications indicate that for an asphalt paving system for a "minor" commercial driveway where heavy trucks may be present, the asphalt thickness is up to ten inches with a twelve-inch subbase course, and the costs associated with such construction should be considered BCP site preparation costs.[14]

Based on my experience in the field, during actual remedial projects in the past, NYSDEC has been consistent with these Building Code and NYSDOT Specification provisions and has typically required approximately 6 inch pavement caps or one foot building floor slabs to serve as a "remedial cap," However, since many brownfield sites consist of historic fill, which is structurally unstable, geotechnical investigations have determined building floor slabs often are at least two feet thick and paved areas one foot thick, to avoid cracking on these sites. Therefore, it appears the New York State Building Code and DOT Specifications, as applied by a licensed Professional Engineer, should be used to define the applicable thickness of a construction cap based on the soil conditions and anticipated loads at the site.

F. Conclusion

Based on 24 years of experience working on contaminated sites, the most common engineering control employed during the vast majority of remedial projects after source removal of "hot spot" contaminated areas is a cap or cover system. Even for Track 2 restricted residential cleanup projects, cover systems of either soil or a constructed foundation and/or pavement has always been required because a cover system including a demarcation barrier is required to alert future workers that contaminated soil remains present under the barrier and particularly where soil vapor remains an issue post-remediation.[15] If a residential restricted use cleanup site requires a two-foot soil cover, it is certainly preferable for the long-term maintenance of the restricted use at the site to instead have a one foot floor slab or six inch paved surface on such sites and is required where vapor intrusion is a potential issue.

In the BCP, which is not only a remediation, but also a redevelopment program, a new building structure, including a foundation and associated paved parking lot, typically serves as the remedial cap or cover system as opposed to a soil cover system. In fact, the entire purpose of the BCP is "to encourage persons to voluntarily remediate brownfield sites for reuse ***and redevelopment*** by establishing within the department a statutory program to encourage cleanup ***and redevelopment*** of brownfield sites."[16] Therefore, it is a very significant policy change if constructed cover systems, including foundations, are no longer going to be treated as part of a valid remedy program other than possibly for Track 4 cleanups. Taking this policy to its ultimate extreme, parties in the program may elect to implement fewer Track 1 and 2 cleanups, and instead implement Track 4 cleanups so that a portion of the foundation costs will in fact count towards site prepara-

tion costs. Such a policy would be contrary to the purpose of the BCP Law to encourage more permanent cleanups.[17]

The new Tax Law §21(b)(2) and §21(a)(3)(iv), read together, clearly recognize there needs to be an allocation between site preparation costs associated with the portion of foundation costs required for a cover system, and tangible property costs for where the foundation exceeds cover system requirements. Since some of the costs must count as site preparation costs when a constructed foundation is implemented at a brownfield site, the only applicable regulations addressing the issue of how thick a foundation has to be to effectively function as a cover system (i.e., will not crack) are found in the applicable Building Code and DOT Specifications. These regulations should be applied to determine the thickness required at a given site based on its geotechnical considerations.

Endnotes

1. *See* N.Y. Comp. Codes R. & Regs. tit. 6, §375-6.7(d) (2006); N.Y. State Dep't of Envtl. Conservation, *DER-10/Technical Guidance for Site Investigation and Remediation* (May 3, 2010), *available at* http://www.dec.ny.gov/docs/remediation_hudson_pdf/der10.pdf (see § 4.1(f)(2)) (hereinafter *DER-10*).
2. N.Y. Envtl. Conserv. Law §27-1405(5) (McKinney 2013) (emphasis added).
3. N.Y. Comp. Codes R. & Regs. tit. 6, §375-1.2 (2006) (emphasis added).
4. N.Y. Envtl. Conserv. Law §27-1405(11); and N.Y. Comp. Codes R. & Regs. tit. 6, §375-1.2(o) (emphasis added).
5. *See* N.Y. Envtl. Conserv. Law §27-1415(4).
6. *Id.*
7. N.Y. Comp. Codes R. & Regs. tit. 6, §375-6.7(d).
8. *See e.g., DER-10*, *supra* note 1 (see §4.1(e)(1)(iii) and (iv) ("a new slab" is defined as an engineering control to address soil vapor environmental or building factors)).
9. *See* similar provision in CP-51 Section V(B)(2) at 7: "Soils which are not otherwise covered by structures such as buildings, sidewalks or pavement (i.e., exposed surface soils) must be covered with soil that complies with the use-based SCOs in 6 NYCRR Table 375-6.8(b) levels for the top one foot (non-residential uses) or top two feet (restricted residential use)." *DER-10*, *supra* note 1.
10. It is important to note DER-10 also clearly distinguishes the phrases "soil cover" and "site cap," suggesting these are two different types of cover systems. *See id.* (look at §§1.9(c)(3)(i), 6.2.1(b)(i)(1). "DEC can only provide a site-specific exemption for backfill…(ii) for Track 4 cleanups, for soils beneath buildings, pavement and other improvements or for soils beneath the soil cover system or soil cap over exposed surface soils." *See also id.* (looking at § 9).
11. *See* N.Y. Envtl. Conserv. Law §§27-1431(1)(c), 71-3601 ("The legislature further finds that when an environmental remediation project leaves residual contamination at levels that have been determined to be safe for a specific use, but not all uses, ***or includes engineered structures that must be maintained or protected against damage to be effective***, it is necessary to provide an effective and enforceable means of ensuring the performance of maintenance, monitoring or operation requirements, and of ensuring the potential restriction of future uses of the land, including restrictions on drilling for or pumping groundwater for as long as any residual contamination remains hazardous" (emphasis added)).
12. *2010 Building Code of New York State*, N.Y. State Dep't of State (August 2010), *available at* http://publicecodes.cyberregs.com/st/ny/st/b200v10/index.htm.
13. *Standard Specifications (US Customary Units)*, N.Y. State Dep't of Transp. (January 9, 2014), https://www.dot.ny.gov/main/business-center/engineering/specifications/english-spec-repository/espec1-9-14english_0.pdf; *US Customary Standard Sheets*, N.Y. State Dep't of Transp. (last visited Oct. 25, 2015), https://www.dot.ny.gov/main/business-center/engineering/cadd-info/drawings/standard-sheets-us.
14. *US Customary Standard Sheets*, *supra* note 13 (see sheet 608-03, Residential and Minor Commercial Driveways).
15. *See* N.Y. Comp. Codes R. & Regs. tit. 6, §375-6.7(d); *DER-10, supra* note 1 (see §4.1(f)(2)).
16. *See* N.Y. Envtl. Conserv. Law §27-1403.
17. *Id.*

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New York State Brownfield Cleanup Program (BCP) Revised Definition of "Brownfield Site"—Will the Revised, Bright-Line Definition Increase the Scope and Universe of Available Properties, Sites and Projects for Consideration and Qualification into the BCP?

By Steve Barnett

This article looks at the scope of sites eligible for the New York State Brownfield Program (BCP), in particular whether the revised definition may increase the universe of potentially eligible BCP sites. The definition has essentially been revised from sites for which redevelopment may be "complicated by" contamination to sites where contaminants are present above cleanup standards. The revised definition appears to be more straightforward than the old definition and more subject to an objective, data-driven determination, i.e., either contaminants exist above cleanup standards or they do not.

BCP Sites from BCP Inception to Date

The New York State Department of Environmental Conservation (NYSDEC) "2015 Enacted Budget Brownfield Cleanup Program Reforms" website reports, "[i]n the ten years since it was established, the Brownfield Cleanup Program (BCP) has cleaned up more than 190 contaminated sites statewide and incentivized redevelopment."[1] One hundred ninety sites in the ten years since establishment of the NYSDEC regulatory framework and program would equate to 19 sites per year and over the 13 years since enactment by the Legislature in 2003 would average 15 sites per year. One would think that given the size of the state, the more than 200 years' history of industrial and other anthropogenic activities in the state, ever-increasing scientific knowledge, and ever-lowering cleanup levels, that more than this number of properties would have benefitted from incentivized environmental investigation and remediation. We will take a look back at the number and types of BCP sites before the 2015 BCP amendments, and look forward to the universe of eligible properties and projects in light of these recent amendments.

There are no official inventories of "brownfield" sites, projects or properties in New York, or inventory of BCP-eligible sites. Efforts to create inventories or marketplaces for brownfield properties have been met with mixed results in other jurisdictions. In New Jersey, the 1998 Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-1.1, et seq. ("BCSRA"), created the New Jersey Brownfield Redevelopment Task Force, originally in the Office of State Planning in the Department of Community Affairs, now in the Office for Planning Advocacy in the Department of State. BCSRA mandates the Task Force to "prepare and update an inventory of brownfield sites in the State [New Jersey]…[to among other things] actively market sites on the inventory to prospective developers."[2] Pursuant to BCSRA, the Task Force maintains its inventory of brownfield sites on the New Jersey Brownfields Site Mart website formerly at www.njsitemart.com and now at www.njbrownfieldsproperties.com.[3]

Interestingly, and perhaps understandably, property owners and occupants often object to inclusion of their properties in a brownfield inventory, such as the New Jersey Brownfields Site Mart. The properties may not be for sale. Inclusion in such inventories more often than not is a source of concern for employees, customers, and neighbors. And the criteria for inclusion in such inventories may not always be clear or consistent. Concepts of due process come into play whenever a government agency takes actions that may affect property values or constitute a taking. For example, including a property in a government brownfield inventory may cause a diminution in value due to stigma relating to a property's actual or perceived environmental contamination.[4]

In any event, and for better or worse, New York does not have a brownfield site mart or inventory of potential or eligible brownfield sites, projects or properties. New York does have various listings and inventories of cleanup sites, as well as sites that have applied for and/or entered the BCP to date, available online via the NYSDEC Environmental Site Database Search webpage at www.dec.ny.gov/chemical/8437.html. That webpage allows searching properties by search criteria of Site Name, Program, Site Class, County, Region, City, Street, as well as Deed Restriction, Environmental Easement, Environmental Notice, Engineering Controls and Institutional Controls. Programs searchable as criteria include: BCP, Voluntary Cleanup Program, State Superfund Program, Resources Conservation and Recovery, Environmental Restoration Program, and Current Registry State Superfund Program.

A search performed September 13, 2015, on the Environmental Site Database Search webpage, using Program=BCP, yielded 841 sites in New York, state-wide. These include sites that applied for and were not accepted into the BCP Program, sites currently being investigated and remediated in the BCP program, and those that have

received a Certificate of Completion. With the BCP having been initiated 13 years ago in 2003, there is an average of about 65 sites per year. Figures 1 through 3, below, are screen shots of the September 13, 2015 results for BCP criteria search mapped using Google Earth for: 1) New York State, 2) southern New York, and 3) a portion of Manhattan, Bronx, Brooklyn and Queens. What is striking to this author is the sparsity of BCP sites, particularly in areas of dense population and historical industrial, urban, commercial and other uses for hundreds of years. Most or all industrial, urban and heavily developed areas may include historic fill and other anthropogenic and even naturally occurring constituents and impacts that likely exceed federal screening levels, risk-based concentrations and/or New York Soil Cleanup Objectives,[5] Water Quality Standards,[6] or other applicable or relevant and appropriate requirements. And yet, seemingly few of the developers of these potentially eligible locations have availed themselves of the BCP.

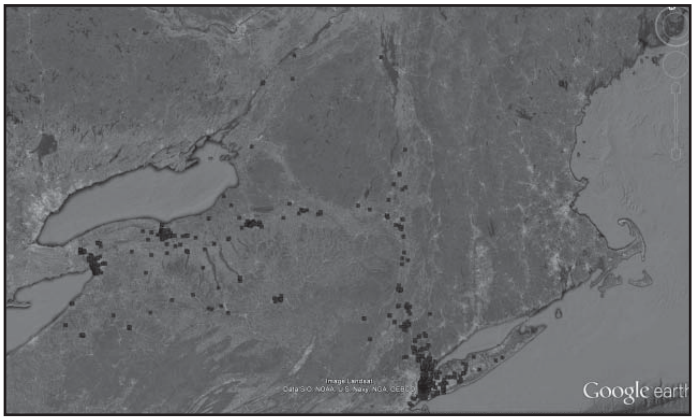

Figure 1—New York State BCP sites (841 sites as per September 13, 2015 search of NYSDEC Environmental Site Database Search webpage, mapped using Google Earth).

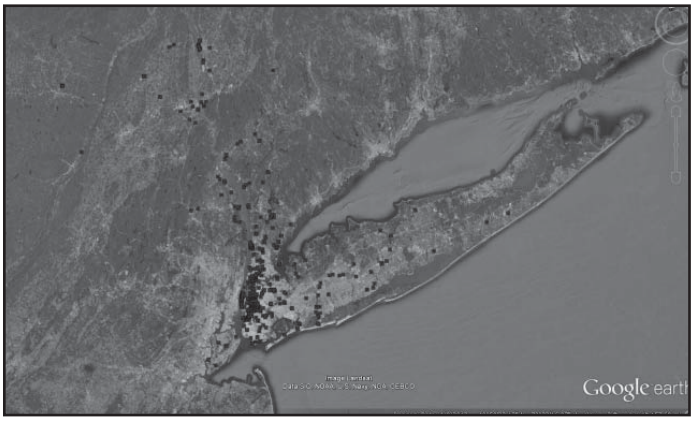

Figure 2—Southern New York State BCP sites (as per September 13, 2015 search of NYSDEC Environmental Site Database Search webpage, mapped using Google Earth).

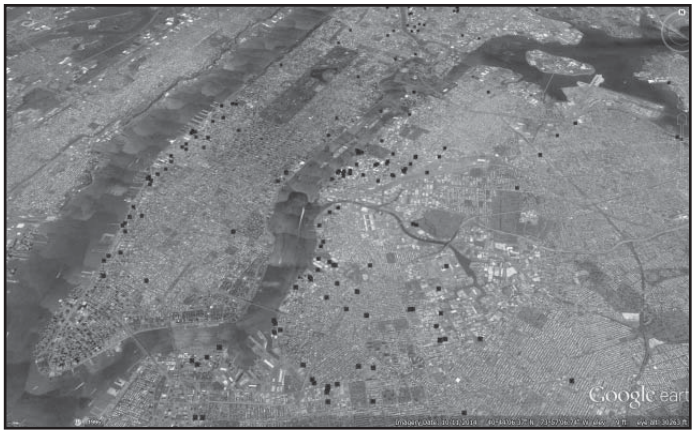

Figure 3—BCP sites in portions of Manhattan, Bronx, Brooklyn, and Queens (as per September 13, 2015 search of NYSDEC Environmental Site Database Search webpage, mapped using Google Earth).

BCP-Eligible Sites

In order to better understand the potential scope of eligible properties before and after the 2015 amendments, we can compare the criteria for eligibility and statutory and regulatory exclusions, given there is no listing or inventory of BCP-eligible properties or projects before or after the 2015 BCP amendments.

Prior to the 2015 amendments, "brownfield" for the purpose of the BCP was defined as "any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant."[7] This statutory definition allowed—even required—interpretation by the applicant and ultimately NYSDEC. In particular, it may have been a basis to deny BCP status for certain properties even though they exhibited exceedances of cleanup standards, i.e., were contaminated.[8]

The revised definition is much clearer from a technical scientific basis. The amendments changed the statutory definition of "brownfield" to "any real property where a contaminant is present at levels exceeding the soil cleanup objectives or other health-based or environmental standards, criteria or guidance adopted by the Department that are applicable based on the reasonably anticipated use of the property in accordance with applicable regulations."[9]

The 2015 amendments modified, but did not delete or add to, the existing ineligibilities that would disqualify a property from being entered into the BCP. The following sites are ineligible for the BCP pursuant to the 2015 BCP amendments:[10]

- Sites listed as Class 1 or 2 in the Registry of Inactive Hazardous Waste Disposal Sites (Class 1 sites are "causing or presenting an imminent danger of causing irreversible or irreparable damage to the public health or environment—immediate action re-

quired," and Class 2 sites are those with a "significant threat to the public health or environment—action required")[11] **where a viable responsible party has been identified**;

  - Prior to the 2015 amendments, Class 1 sites could not qualify for BCP regardless of whether a responsible party was identified. So this represents an expansion of eligible sites. If there is no responsible party and if a volunteer (i.e., developer) will take over the site, that developer may apply for the site to be entered into the BCP.

- Sites on the USEPA National Priorities List (NPL);
- Hazardous waste treatment, storage, or disposal facilities (TSDFs) permitted under the Resource Conservation and Recovery Act (RCRA) that are **owned by a viable responsible party** ("interim status" facilities are eligible);

  - Prior to the 2015 amendments, these sites could not qualify for the BCP regardless of whether a responsible party was identified. So this represents an expansion of eligible sites. If there is no responsible party and if a volunteer (i.e., developer) will take over the site, that developer may apply for the site to be entered into the BCP.

- Sites subject to a cleanup order under Article 12 of the Navigation Law (oil spill prevention, control, and compensation) or under Title 10 of ECL Article 17 (control of the bulk storage of petroleum); or
- Sites subject to any on-going state or federal enforcement actions regarding solid/hazardous waste or petroleum.

Soil Cleanup Objectives, Groundwater Quality Standards, and the New Definition of Brownfield

According to NYSDEC's website, it has issued 197 Certificates of Completion (COCs) for BCP sites since the BCP was established in 2003.[12] The revised definition of "brownfield" may expand the scope or universe of potentially qualified sites and allow many more properties to enter and go through the program.

The revised definition states "any real property where a contaminant is present at levels exceeding the soil cleanup objectives or other health-based or environmental standards, criteria or guidance adopted by the Department that are applicable based on the reasonably anticipated use of the property in accordance with applicable regulations."[13] The New York Legislature has authorized NYSDEC to promulgate soil cleanup objectives and other standards protective of public health and the environment.[14] And NYSDEC has done so.[15]

As authorized and directed by the Legislature, NYSDEC has promulgated Soil Cleanup Objectives (SCOs) for unrestricted use, residential, restricted residential, commercial, industrial, protection of ecological resources, and protection of groundwater.[16] NYSDEC has promulgated unrestricted use SCOs for 84 substances. Of those 84 cleanup objectives, NYSDEC provides footnotes to its unrestricted use SCO table that state that 30 of the objectives are either the Contract Required Quantitation Limit (CRQL), i.e., the sampling and analytical detection limit, or they are set at the rural soil background concentration as determined by NYSDEC and the Department of Health rural soil background concentration, i.e., background. Therefore, 30 of 84 objectives, or about 36% of the objectives, are set at either the lowest detectable level or the naturally occurring background. This includes 10 of the 15 heavy metals listed in the unrestricted use SCO table.

New York State is about 54,556 square miles in size. Assuming a random distribution statewide of the 84 substances listed in the unrestricted use SCO table, and given that cleanup levels for 30 of those 84 (36%) are set at detection limits or natural background, it can be hypothesized that at least 36% of the state, or about 19,640 square miles, might be estimated to exhibit soil concentrations at or above unrestricted use SCOs, i.e., at or above detection limits or background, and therefore potentially qualify for the BCP. As a practical matter, where a cleanup standard is set to monitoring equipment detection limits or to natural background, it is reasonable to expect that sampling will yield results at or above such standards.[17] 19,640 square miles is about 12.6 million acres. The average acreage of the 20 largest BCP tax credit projects is 6.9 acres, according to a 2014 report by Hersh.[18] 12.6 million acres divided by 6.9 acres would yield more than 1.8 million potential BCP sites. Such manipulation of numbers is hypothetical, even bordering on moot or fanciful. Numbers such as these may be as much a comment on risk assessment and standard setting processes not only for SCOs, but a wide range of federal and state standards protective of public health and the environment. As sampling and analytical instruments achieve lower detection limits and as more and more toxicological, human health and environmental research is conducted, regulatory standards approach detection limits and natural background levels. These bring up issues of risk tolerance, public health, environment and economic policies that are decided by any number or combination of means, including legislatures, popular vote, courts, or administrative agencies. There is little risk that defining brownfields as properties exhibiting exceedances of cleanup standards will yield undesirable results. There are plenty of gatekeeping mechanisms in place that will prevent sites from being entered into the BCP solely to remediate background or low levels of hazardous substances above SCOs or groundwater quality standards. Not the least of which is financial. Property owners and developers have little incentive to investigate and remediate conditions unnecessarily. A BCP tax credit is only a set-off against an expense and not an income.

And further, NYSDEC Restricted Use Soil Cleanup Objectives, which are less stringent, do not contain as many SCOs that are based on detection limits or background. Of the 173 Restricted Use Soil Cleanup Objectives, 29 have notation "e" meaning set at the detection limit for that substance or "f" which means background as per the NYSDEC and the Department of Health rural soil survey. Twenty-nine of 173 equates to about 17%, instead of the 36% of the unrestricted use SCOs. Exceedances of restricted-use standards would require either removal or remediation of the contaminant concentrations, or an institutional or engineering control, such as a deed restriction, environmental easement or an engineering control such as a cap, or both. Again it is unlikely that this will lead to unintended consequences, because it is unlikely that any owners or developers will seek to enter the BCP to unnecessarily remove, remediate or control exceedances of SCOs for the benefit of tax credits or liability release. The revised definition, however, does appear to be clearer and more of a bright line test that should expand the scope and universe of properties, sites, and projects that can be considered for qualification into the BCP.

To the author's knowledge, there is no way to easily search, or search at all, for New York State properties with exceedances of SCOs. In New Jersey, the New Jersey Department of Environmental Protection (NJDEP) offers a service by which anyone can submit a request to NJDEP for sampling results. It is called NJDEP Hazsite and the website is http://www.nj.gov/dep/srp/hazsite/. The requester provides the NJDEP Hazsite desk with the NJDEP case number or state plane coordinates, and NJDEP will respond with database files of all sampling data within a half-mile, or other distance. The data can be imported into Access or another database for sorting, or into ARC-GIS or other mapping software for mapping. The data is taken from Electronic Data Deliverable (EDD) submissions that all parties have been required to submit with their reports to NJDEP since 1997. Therefore, the data goes back only to 1997. It is not a perfect system, as likely not all parties submit required EDDs and likely NJDEP may not have entered all EDDs received into the Hazsite system, but it is one method by which exceedances of cleanup standards could be searched at a particular location or within a distance of a location in New Jersey.

Estimates and predictions of numbers and types of BCP sites and projects have been made. In 2014, Barry Hersh, Clinical Associate Professor of Real Estate, New York University Schack Institute of Real Estate, published his study, "New York State Brownfield Cleanup Program and Tax Credit Analyses." The study was undertaken by the New York University (NYU) Schack Institute of Real Estate, at the initiation of, and with support from, the New York City Brownfield Partnership. According to Hersh's 2014 study report:[19]

- 21 projects accepted after the 2008 BCP changes have received tax credits;
- 60,000 NYS sites are noted in databases and reported potentially environmentally challenged;
- BCP applications are relatively consistent at 30-40 per year;
- As of the end of 2013, 385 projects have been accepted into the BCPsince the inception and a total of 146 out of these projects have received a Certificate of Completion (COC), with 94 projects projected to receive COCs through 2014;
- There are 87 USEPA Superfund Sites (these are not eligible for BCP because sites on the EPA National Priorities List (NPL), which is synonymous with being a Superfund site, are statutorily not eligible);
- There are 104 RCRA sites (these are not eligible except if NYSDEC has not identified a responsible party);
- There are 76 Brownfield Grants;
- There are 58,269 EPA tracked sites as per Enviromap database;
- There are 212 NYSDEC Voluntary Cleanup Program sites;
- There are 180 NYSDEC Environmental Remediation Program;
- There are 389 BCP sites;
- There are 4,362 NYSDEC Environmental Site Remediation Database sites;
- There are 74 NYSDEC spill response program incidents 10-1-2011 to 9-30-2012;
- There are 129 NYSDEC Brownfield Opportunity Areas;
- There are 160 New York City Brownfield Program sites;
- There are 3,150 New York City SPEED Database of vacant industrial/commercial sites.

Searches of NYSDEC's Environmental Site Remediation Database at the time of this writing yielded:[20]

- 841 BCP sites;
- 728 NYSDEC Voluntary Cleanup Program sites;
- 2,487 NYSDEC State Superfund sites (some of these sites are ineligible for BCP, for example if they are "subject to any on-going state or federal enforcement actions regarding solid/hazardous waste or petroleum," which is a statutory ineligibility for BCP);
- 173 RCRA sites (ineligible except if NYSDEC has not identified a responsible party);

- 365 Environmental Restoration Program sites;
- 886 Current Registry State Superfund Sites (ineligible for BCP if they are "subject to any on-going state or federal enforcement actions regarding solid/hazardous waste or petroleum" which is a statutory ineligibility for BCP).

These properties and sites are all potential candidates for qualification into the BCP, subject to statutory ineligibilities. There seems to be little doubt that the revised definition of brownfield in the 2015 BCP amendments has the potential to expand the scope and universe of eligible sites, to the benefit of public health, the environment, jobs and the economy. Whether cleanup standards are exceeded is something that is both objectively verifiable and a determination that spans all properties regardless of what regulatory programs they may be subject to as well as properties that are not in any program.

Types of Tax Credits Available as Related to Scope of BCP Eligibility

The 2015 BCP amendments restrict available tax credits for locations in New York City. So while not restricting BCP eligibility for New York City properties, the amendments restrict and reduce what tax credits are available for New York City BCP sites. Under the old rules, all projects could receive redevelopment tax credits (a/k/a Tangible Property Credit Component (TPCC)) for development costs.[21] Credits were not explicitly targeted to blighted or low-income neighborhoods or other projects in special need of credits, and it was NYSDEC's position that some projects in strong real estate markets may have received windfalls via the BCP where state assistance for redevelopment was not necessary.[22] Therefore, under the amendments, TPCC is not available for BCP projects in New York City, unless they are:

- Properties that are located in Environmental Zones (En-Zones), which are areas with high poverty and/or unemployment levels;
- "Upside down" properties, where the cost of cleanup is 75 percent or more of the property value as if uncontaminated, or "underutilized" properties, which NYSDEC will define by regulation; or
- Sites that will be redeveloped for affordable housing projects, as defined by NYSDEC, in consultation with the Division of Housing and Community Renewal.

All sites outside of New York City will be eligible for the TPCC without being subject to the new tests.[23]

TPCCs have historically accounted for the lion's share of tax credits applied for and received via the BCP. A 2014 paper reported that, of the approximately $1.15 billion in tax credits received via the BCP from its inception through 2012, about $1 billion was TPCC.[24] The remainder was for site preparation (soil remediation, demolition, excavation, and other costs), groundwater remediation, real property and insurance tax credits. The same paper reported that the 20 projects that received the highest amounts of BCP tax credits were all accepted into the BCP before 2008. It also indicated that about 30% of all BCP projects since BCP inception are located in NYSDEC Region 2, which is New York City and is one (1) of NYSDEC's nine (9) regions.

TPCCs for non-manufacturing projects are capped at $35 million or three times the site preparation costs, whichever is less, and for manufacturing projects they are capped at $45 million or six times the site preparation costs, whichever is less. TPCC is not available if the contamination from groundwater or soil vapor is solely emanating from property other than the qualified site or if NYSDEC has determined that the qualified site has previously been remediated pursuant under NYSDEC oversight such that it may be developed for its then intended use. TPCCs are limited to property with a useful life of at least 15 years, and non-portable equipment, machinery, and associated fixtures and appurtenances on the site. Payments for related party service fees (developer fees) can only be claimed when they are actually paid and cannot be claimed under the site preparation or groundwater credits.[25]

The 2015 amendments limit the Site Preparation Credit to those costs needed for remediation. Under the old rules, Site Preparation Credits covered more than the cost of remediation, i.e., any costs associated with preparing a site. The reforms will move costs **not** associated with investigation, remediation or qualification for a certificate of completion for the site from the Site Preparation Credit to the TPCC. Also, the Site Preparation Credit was expanded to explicitly include the costs associated with remediating asbestos, PCBs and lead in structures that will remain on the site.[26] The 2015 amendments also clarified and expanded the definition of groundwater remediation costs.[27]

An advantage of the BCP, besides tax credits, is a liability release from NYSDEC. Liability release is a major driver for BCP applicants to enter the BCP, because there is no other method to obtain a liability release from NYSDEC. For parties not interested in the tax credits but wanting the liability release only for financing or other reasons, the 2015 amendments re-establish a voluntary cleanup option called BCP-EZ. It offers no tax credits but a liability release from the State. Such a release is often needed for financing or otherwise critical for a transaction and redevelopment to be considered in the first place or to move forward. In exchange for waiving tax credits, lightly contaminated sites can pursue the streamlined BCP-EZ option, with State oversight of the cleanup work. Significant threat sites will not be able to participate. Comment periods for the application and remedial investigation work plan may be eliminated.

Another aspect of the 2015 BCP amendments that may not increase the scope of eligible sites but may help increase applications is the elimination of NYSDEC oversight costs for volunteers. NYSDEC is authorized to offer flat fees for oversight costs. In addition, these costs may be claimed in tax credits and contribute to increasing the cap for the redevelopment credit.

Conclusions

The NYS BCP has been a success, having been utilized for almost 400 sites since its inception in 2003, and by some reports providing more than $1 billion in tax credits, and spurring $8 billion in direct investment and more than $15 billion in total economic activity. In the course of doing so, public health and the environment have been protected and improved. It is likely that the revised statutory definition of "brownfield site" and NYSDEC regulations promulgated pursuant thereto, should have a positive effect by increasing the scope and universe of properties, projects, and sites that can be considered for, and qualified for, the BCP. The new definition is arguably more science-based, and objectively determinable and verifiable as it would seem to be all or mostly data-driven. And the fact that cleanup standards, both in New York and other jurisdictions, including federal, are set at detection limits and background means that the scope and universe of potentially eligible sites may be increased significantly. Increasing the scope of BCP-eligible sites is consistent with the goal of further advancing the win-win environment-economics scenario, which is the basis for the NYS BCP and all other federal and state brownfield programs.

Endnotes

1. *2015 Enacted Budget Brownfield Cleanup Program Reforms*, N.Y. State Dep't of Envtl. Conservation, http://www.dec.ny.gov/chemical/101350.html (last visited Oct. 22, 2015) (hereinafter *2015 Enacted Reforms*).
2. N.J. Stat. Ann. § 58:10b-23 (West 2003); *id.*, at § 58:10b-23.2.
3. *Id.* at § 58:10b-23.2(c) "As used in this section, 'brownfield site' means any former or current commercial or industrial site that is currently vacant or underutilized and on which there has been, or is suspected to have been, a discharge of a contaminant and 'New Jersey Brownfields Site Mart' means an interactive database accessible on the Internet that provides information to developers, property owners, and State and local planners and officials, about brownfield sites in order to facilitate the sale and redevelopment of those properties." *Id.*
4. Evans v. Johnstown, 96 Misc. 2d 755, 760 (N.Y. Sup. Ct. 1978) (quoting City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241, 255 (N.Y. 1971) ("…a *de facto* taking requires a physical entry by the condemnor [sic], a physical ouster of the owner, *a legal interference with the physical use, possession or enjoyment of the property or a legal interference with the owner's power of disposition of the property*") (second emphasis added); *City of Buffalo*, 28 N.Y.2d at 253 ("… whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment that materially affect its value, it deprives him of his property within the meaning of the Constitution. And it is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property, so long as it affects its free use and enjoyment or the power of disposition at will of the owner."); Scribner v. Summers, 138 F.3d 471, 473 (2d Cir. N.Y. 1998) (citing Commerce Holding Corp. v. Board of Assessors of the Town of Babylon, 88 N.Y.2d 724 (1996); Criscuola v. Power Authority of the State of New York, 81 N.Y.2d 649 (1993)) ("the New York Court of Appeals acknowledged the existence of stigma from environmental contamination").
5. N.Y. Comp. Codes R. & Regs. tit. 6, § 375 (2006).
6. *Id.* at § 700–06.
7. Assemb. S02006-B, 2015 Leg. (N.Y. 2015) (hereinafter S02006-B).
8. *E.g.*, Matter of Lighthouse Pointe Prop. Assoc. LLC v. New York State Dept. of Envtl. Conservation, 14 N.Y.3d 161, 170–71 (N.Y. 2010) (Court of Appeals reinstated judgment of the Supreme Court directing DEC to accept property into the Brownfield Cleanup Program, where DEC had denied acceptance stating, inter alia, "[t]here is no indication that contaminants as defined in ECL 27-1405.7 and 6 NYCRR Part 375-1.2 (g) (i.e. hazardous waste or petroleum) are present at levels that would complicate the redevelopment or reuse of this property, nor is there any indication that there is a source of such contaminants"); Matter of East Riv. Realty Co., LLC v. New York State Dept. of Envtl. Conservation, 68 A.D.3d 564 (N.Y. App. Div. 1st Dep't 2009) (Appellate Division affirmed Supreme Court decision setting aside DEC exclusion of properties from Brownfield Cleanup Program); Matter of Destiny USA Dev., LLC. v. New York State Dept. of Envtl. Conservation, 63 A.D.3d 1568 (N.Y. App. Div. 4th Dep't 2009) (Appellate Division annulled DEC denial of owner's application for inclusion of property in Brownfield Cleanup Program).
9. *Brownfield Cleanup Program*, N.Y. State Dep't of Envtl. Conservation, www.dec.ny.gov/chemical/8450.html#eligible (last visited Oct. 22, 2015) (hereinafter *Brownfield Cleanup Program*).
10. *Id.*
11. "The department shall maintain and make available for public inspection…a registry of inactive hazardous waste disposal sites in such region or, with respect to the office of the county clerk or register, in such county.… In making its assessments, the department shall place every site in one of the following classifications: (1) Causing or presenting an imminent danger of causing irreversible or irreparable damage to the public health or environment—immediate action required; (2) Significant threat to the public health or environment—action required; (3) Does not present a significant threat to the public health or environment—action may be deferred; (4) Site properly closed—requires continued management; (5) Site properly closed, no evidence of present or potential adverse impact—no further action required." N.Y. Envtl. Conserv. Law §27-1305 (McKinney 2003).
12. *Brownfield Site Certificates of Completion*, N.Y. State Dep't of Envtl. Conservation, www.dec.ny.gov/chemical/30360.html (last visited Oct. 23, 2015).
13. *Brownfield Cleanup Program*, *supra* note 9.
14. N.Y. Envtl. Conserv. Law § 27-1415 (McKinney 2004) (authorizing and directing NYSDEC to establish soil cleanup objectives); N.Y. Envtl. Conserv. Law § 17-0301 (McKinney 2015) (authorizing and directing NYSDEC to establish groundwater quality standards).
15. N.Y. Comp. Codes R. & Regs. tit. 6, § 375 (2006); *Id.* at § 703.5.
16. *Id.* at § 375(6).
17. Another estimation may yield 66% instead of 35%. The 15 metals for which DEC established SCOs are arsenic, barium, beryllium, cadmium, hexavalent chromium, trivalent chromium, copper, cyanide, lead, manganese, mercury, nickel, selenium, silver, and zinc. Of the 15 unrestricted use SCPs for these 15 metals, 10 (or 66%), are set at detection limit or background. Assuming metals are evenly distributed throughout the State, 66% of the State may then be expected to exhibit metals above unrestricted use SCOs

for metals. While the fact that many SCOs are set at instrument detection limits or natural background may suggest they are impracticably low, it also leads to a result that large areas may exceed SCOs.

18. B. Hersh, *New York State Brownfield Cleanup Program and Tax Credit Analyses* (New York University Schack Institute of Real Estate, 2014) (Chart II-B6).

19. *Id.*

20. *Environmental Site Remediation Database Search*, N.Y. State Dep't of Envtl. Conservation, http://www.dec.ny.gov/cfmx/extapps/derexternal/index.cfm?pageid=3 (last visited Oct. 22, 2015).

21. BCP tax credits are based on costs of site preparation, groundwater remediation, environmental insurance, and construction (a/k/a development a/k/a tangible) costs. "The tangible property credit component shall be equal to the applicable percentage of the cost or other basis for federal income tax purposes of tangible personal property and other tangible property, including buildings and structural components of buildings, which constitute qualified tangible property and may include any related party service fee paid.… Eligible costs for the tangible property credit component are limited to costs for tangible property that has a depreciable life for federal income tax purposes of fifteen years or more, costs associated with demolition and excavation on the site and the foundation of any buildings constructed as part of the site cover that are not properly included in the site preparation component and costs associated with non-portable equipment, machinery and associated fixtures and appurtenances used exclusively on the site, whether or not such property has a depreciable life for federal income tax purposes of fifteen years or more." S02006-B, *supra* note 7.

22. N.Y. State Dep't of Envtl. Conservation, *Summary of Enacted Budget Brownfield Cleanup Program Reforms* (last visited Oct. 22, 2015), *available at* www.dec.ny.gov/docs/remediation_hudson_pdf/bcp2015.pdf.

23. *2015 Enacted Reforms*, *supra* note 1.

24. B. Hersh, *supra* note 18.

25. S02006-B, *supra* note 7.

26. According to NYSDEC, this will more closely align the credit with cleanup costs and reduce the maximum redevelopment credit since the cap is based on the site's eligible site preparation costs. "Site preparation costs…shall mean all amounts properly chargeable to a capital account, which…necessary to implement a site's investigation, remediation or qualification for a certificate of completion, and shall include costs of: excavation; demolition; activities undertaken under the oversight of the Department of Labor or in accordance with standards established by the Department of Health to remediate and dispose of regulated materials including asbestos, lead or polychlorinated biphenyls; environmental consulting; engineering; legal costs; transportation, disposal, treatment of containment of contaminated soil; remediation measures taken to address contaminated soil vapor; cover systems consistent with applicable regulations; physical support of excavation; dewatering and other work to facilitate or enable remediation activities; sheeting, shoring, and other engineering controls required to prevent offsite migration of contamination from the qualified site or migrating onto the qualified site; and the costs of fencing, temporary electric wiring, scaffolding, and security facilities until such time as the certificate of completion has been issued. Site preparation shall include all costs paid or incurred within sixty months after the last day of the tax year in which the certificate of completion is issued that are necessary for compliance with the certificate of completion or subsequent modifications thereof, or the remedial program defined in such certificate of completion or subsequent modifications thereof, or the remedial program defined in such certificate of completion including but not limited to institutional controls, engineering controls, and approved site management plan, and an environmental easement with respect to the qualified site. Site preparation cost shall not include the costs of foundation systems that exceed the cover system requirements in the regulations applicable to the qualified site." S02006-B, *supra* note 7.

27. "'[O]n-site groundwater remediation costs' shall mean all amounts properly chargeable to a capital account, which are…necessary to implement a site's groundwater investigation, remediation, or qualification for a certificate of completion not already covered under site preparation costs, and shall include costs of: environmental consulting; engineering; legal costs; transportation, disposal, treatment or containment of contaminated groundwater; sheeting, shoring, and other engineering controls required to prevent off-site migration of groundwater contaminated from the qualified site or migrating onto the qualified site; and the costs of fencing, temporary electric wiring and security facilities until such time as the certificate of completion is issued. On-site groundwater remediation costs shall include all costs paid or incurred within sixty months after the last day of the tax year in which the certificate of completion is issued that are necessary for compliance with the certificate of completion or subsequent modifications thereof, or the groundwater remedial program defined in such certificate of completion including but not limited to institutional controls, engineering controls, an approved site management plan specific to on-site groundwater remediation, and an environmental easement with respect to the qualified site." S02006-B, *supra* note 7.

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Administrative Decisions Update

By Robert A. Stout Jr.

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law of the State of New York, and Parts 703 and 750 of Title 6 of the NYCRR by Joseph Vadney and Anne Marie Vadney

Decision and Order of the Acting Commissioner

September 2, 2015

Summary of the Decision

DEC alleged that respondent Anne Marie Vadney, as owner, and her brother, Joseph Vadney, as operator (Respondents): (1) engaged in construction activities including filling and grading at a 24.7 acre site located at 1627 NYS Route 9W in the Town of Coeymans in Albany County on May 21, 2008, without obtaining coverage under the DEC's General Permit for Stormwater Discharges from Construction Activity; and (2) discharged storm water from the site on May 4, 2009, causing turbidity in a Class C stream on the site. The Department sought remedial actions and an order imposing a $20,000 civil penalty, with $10,000 suspended provided Respondents undertook certain remedial activities. The ALJ recommended that Respondents be held liable but that the entire $20,000 penalty be suspended. The Acting Commissioner agreed with respect to liability, but ordered that only $18,000 of the $20,000 penalty be suspended.

Background

During the latter part of 2007, a representative of Sano-Rubin Construction Services approached Mr. Vadney about the possibility of placing fill at the site. Mr. Vadney indicated that he was interested and could use the fill to access the back portion of the property, on the other side of the on-site stream. Several weeks later, a representative of Bohl Construction ("Bohl") met with Mr. Vadney and it was verbally agreed that 50,000 cubic yards of fill would be brought to the site, without compensation to the Vadneys. Mr. Vadney stopped the filling after 70,000 cubic yards had been deposited.

On May 21, 2008, the town's code enforcement officer and a DEC staff member inspected the site and observed the filling of a stream and wetland area. DEC then sent a letter to Ms. Vadney requesting immediate action be taken to ensure no future water quality violations occurred. Respondents were also informed that a Notice of Intent ("NOI") for coverage under DEC's General Permit for Stormwater Discharges from Construction Activity must be filed and steps needed to be taken to stabilize the exposed soils onsite.

Respondents retained Sterling Environmental Engineering, P.C. to address the situation, and also requested that DEC and the U.S. Army Corps of Engineers commence enforcement action against Bohl. In August 2009, after several submissions, DEC deemed Sterling's revised stormwater pollution prevention plan ("SWPPP") adequate. Mr. Vadney requested that Bohl implement the plan. Bohl refused, citing cost. Mr. Vadney obtained cost estimates from other firms in the amount of $157,276 and $173,221. As of the hearing, the SWPPP had not been implemented and no enforcement action had been initiated against Bohl. Respondents indicate that they have spent in excess of $60,000 to address the issues at the site.

At the hearing, Respondents challenged the inclusion of certain photos taken by DEC staff, as well as a series of color photographs from the website "Google Earth." The ALJ allowed the staff photographs into evidence (rejecting Respondent's claim that the photos be barred for failure to be provided in response to previous FOIL requests, which requests did not specifically reference photographs), but barred the Google Earth images. The ALJ cited Mr. Vadney's testimony that he had not seen the Google Earth images prior to the hearing, and noted that DEC offered no testimony about how the photographs were obtained or whether they are accurate.

Mr. Vadney also disputed DEC's conclusion that he was an operator and argued that Bohl was the responsible operator at the site. The ALJ noted that it seemed likely that Bohl was an operator and that the record did not explain why staff chose not to pursue an enforcement action against Bohl. The ALJ did however, find that Mr. Vadney was an operator, pointing out that he attended meetings with DEC staff and the U.S. Army Corps of Engineers, is listed in the NOI and SWPPP as an operator, testified to making arrangements for the fill to be brought to the site, was aware of the filling as it was ongoing, and ultimately directed it to cease.

With respect to the first cause of action, commencing construction without first filing an NOI, the ALJ found that the record shows that construction activities commenced in September 2007, and Respondents filed for permit coverage over a year later.

The second cause of action alleged that the construction activities caused stormwater discharges with a substantial visible contrast to the natural conditions of the stream as a result of the soils not being properly stabilized, constituting a violation of water quality standards. Respondents argued that the DEC staff person testified

that he had not been to the site prior to his May 21, 2008 visit and that, therefore, he had no knowledge of the natural conditions of this particular stream and did not offer evidence that the murkiness in the stream was caused by a discharge at the site. The ALJ rejected this argument, finding that DEC staff showed that several acres of exposed soil existed at the site and that inadequate sediment controls were in place. Further, photographs of the murky water and testimony regarding observations at the site led to the reasonable inference that the murkiness was caused by the site conditions.

With respect to civil penalty, citing the large cost of implementing the remediation measures and the "troubling" fact that Bohl was not a party to the enforcement action, the ALJ recommended that the Commissioner suspend the entire $20,000 civil penalty upon completion of the remedial actions. The ALJ recommended that the remedial actions include: (i) immediate repair and implementation of on-site erosion and sediment controls and stabilization measures; (ii) provision of written documentation of the measures taken; and (iii) implementation of the SWPPP.

Decision and Order of the Acting Commissioner

The Acting Commissioner concurred with the ALJ in finding Respondents jointly and severally liable for failure to obtain a SPDES permit or obtain coverage under the General Permit for Stormwater Discharges from Construction Activity, and jointly and severally liable for the discharge of stormwater from the site that caused or contributed to a violation of water quality standards. However, while noting that Bohl may share some of the responsibility for the violations, the Acting Commissioner indicated that respondents were not entirely blameless and thus suspended all but $2,000 of the civil penalty, subject to completion of the remedial actions.

It is not at all clear why DEC chose to enforce against the individual owner and operator of the property and not the contractor that actually placed the fill. Prosecution of such enforcement actions underscores the responsibility that individuals have with respect to their property, as it cannot be assumed that such liability will be shifted to the contractor performing the work.

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Recent Decisions and Legislation in Environmental Law

Recent Decisions

Alaska Eskimo Whaling Comm'n v. U.S. E.P.A., 2015 U.S. App. LEXIS 11062 (9th Cir. 2015)

Facts

This appeal arises from a group of Alaska Native villages that rely on subsistence hunting of bowhead whales; they contend the new permit system adopted by the Environmental Protection Agency (EPA) will negatively impact their hunting.[1] The crux of the challenge is that the discharges allowed by the Beaufort Permit ("the Permit") will divert the whales from their normal seasonal migratory routes, making hunting more difficult and dangerous.[2] More specifically, the villages challenge the EPA's refusal to include a set of prohibitions as part of the Permit, including: a total prohibition on the discharge of six of the thirteen authorized waste streams and a prohibition during the fall bowhead hunting season of the discharge of an additional five waste streams.[3]

Procedural History

The Alaska Eskimo Whaling Commission (AEWC) petitioned for review of the Beaufort Permit issued by the EPA under the National Pollutant Discharge Elimination System (NPDES) provisions of the Clean Water Act, which authorizes discharges by oil and gas exploration facilities into the Beaufort Sea.[4] The petition was brought on behalf of Alaska Native villages that rely on whale hunting the Beaufort Sea for survival.[5]

Issues

(1) Whether the EPA adequately considered the extent to which the discharges authorized under the new Permit will interfere with subsistence uses of the Beaufort Sea, specifically the local communities' fall hunt for bowhead whales.

(2) Whether the EPA's application of its regulatory criteria to the Beaufort Permit was arbitrary or capricious.

Rationale

The Court reviewed the EPA-issued Permit under the arbitrary and capricious standard of the Administrative Procedure Act.[6] In so doing, the Court noted it would "not vacate an agency's decision unless it has [1] relied on factors which Congress had not intended it to consider, [2] entirely failed to consider an important aspect of the problem, [3] offered an explanation for its decision that runs counter to the evidence before the agency, or [4] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[7]

Before oral arguments, the EPA filed a letter with the Court disclosing a misstatement in the record and its brief; in sum, the EPA acknowledged that the cited modeling was incorrect in part.[8] Citing *SEC v Chenery Corp*, the Court found itself unable to "properly answer the question whether the EPA's error affected its decision" and ultimately remanded the case in part in order to address the issue.[9]

Turning to the remaining issues advanced by AEWC, the Court proclaimed AEWC's argument "misses the mark" with respect to its contention that the EPA is required to address several statutory considerations under the Clean Water Act.[10] The Court explained the considerations apply to the EPA's rule making process, not to individual permitting decisions.[11] The Court rejected the additional contentions, finding that the EPA's promulgation of the Permit was not arbitrary or capricious.[12]

Conclusion

The Court remanded the case to the EPA to determine whether the discharge of non-contact cooling water into the Beaufort Sea will cause unreasonable degradation of the marine environment because of the effect of such discharge on bowhead whales.[13] The Court denied the petition in all other respects, finding that the EPA's issuance of the Beaufort Permit is otherwise supported by the record, does not reflect a failure to consider an important aspect of the problem, and is not otherwise arbitrary or capricious.[14]

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Endnotes

1. *Alaska Eskimo Whaling Comm'n v. U.S. E.P.A.,* 2015 U.S. App. LEXIS 11062, *1-2 (9th Cir. 2015).
2. *Id.* at *2.
3. *Id.*
4. *Id.* at *1–2.
5. *Id.*
6. *Id.* at *2; *Akiak Native Cmty. v. U.S. E.P.A.*, 625 F.3d 1162, 1165 (9th Cir. 2010).
7. *Alaska Eskimo Whaling Comm'n*, 2015 U.S. App. LEXIS at *2, *quoting Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007).
8. *Alaska Eskimo Whaling Comm'n,* 2015 U.S. App. LEXIS, at *3-4.
9. *Id.* at *3, *citing Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 198 (1947).
10. *Alaska Eskimo Whaling Comm'n,* 2015 U.S. App. LEXIS, at *4.

11. *Id.*
12. *Id.* at *4–6.
13. *Id.* at *7.
14. *Id.*

* * *

Capruso v. Village of Kings Point, 23 N.Y.3d 631, 992 N.Y.S.2d 469 (June 12, 2014)

Facts

This case involves the Village of King's Point ("Village") usage of 5.4 acres of land on the western end of parkland on the Great Neck Peninsula of Long Island.[1] The Village acquired the property in the 1920s and began to use 5.4 acres in a non-park manner in 1946. On this parcel of land, the Village unlawfully "erected structures" to store highway materials and supplies.[2] Furthermore, in 2008 the Village proposed to "deforest, regrade and enclose the Western Corner and build a Department of Public Works [DPW] facility."[3]

Several village residents and the State sought to "enjoin both the Village's proposed DPW project and its current use of the Western Corner for storage of highway materials and supplies, as unlawful uses of parkland in violation of the common law 'public trust doctrine.'"[4] The public trust doctrine makes it unlawful to erect structures that are outside the scope of the park purposes without prior legislative authorization.

Procedural History

The Nassau County Supreme Court granted preliminary injunctive relief to the State and denied the defendants' motions to dismiss the claims as time-barred and based on the doctrine of laches.[5] The Supreme Court also (1) permanently enjoined the defendants from denying or obstructing existing access to parks, unless and until explicit and specific approval was obtained from the State Legislature, (2) directed the defendants to remove all materials, equipment, and physical alternations, including buildings and other structures, from that portion of the park, and (3) directed the defendants to pay reasonable attorney fees and other expenses.[6] The defendants appealed. The Appellate Division affirmed, only modifying to the extent that payment of attorney fees was not warranted.[7] The defendants appealed this judgment and the Court of Appeals affirmed the decisions of the lower courts in favor of resident-appellees.[8]

Issue

The issue addressed by the court is whether an ongoing usage of dedicated parkland for non-park purposes, in violation of the public trust doctrine, may be successfully challenged under the continuing wrong doctrine.[9]

Rationale

The defendants conceded that the proposed DPW project was in violation of the public trust doctrine. However, the defendants pointed to the fact that the non-park use violation had been ongoing since 1946 and the proposed DPW facility was "nothing more than a change in the nature and the scope of an ongoing non-park use."[10] Thus, they argued that the violation occurred outside of the statute of limitations, and that the plaintiffs cannot succeed because their claims were not filed at the time the non-park use first began.

In response to the present non-park use allegation, the defendants raised a statute of limitations defense, stating that the "plaintiffs should have brought their action within six years of the change in use of the Western Corner."[11] Defendants further argued that the public trust doctrine should be treated differently from a nuisance or trespass violation because the "latter may not be discovered until long after the physical invasion of private property rights, whereas acts in violation of the public trust doctrine should be immediately discernible."[12] Lastly, the defendants argued that claims of this type are barred by laches. Generally, laches is a doctrine that offers protection to would-be defendants from assertions of a right or claim that is made after the appropriate time has passed for such assertion.[13]

The plaintiffs raised the issue that the statute of limitations defense is barred by the continuing wrong doctrine. The continuing wrong doctrine applies "in certain cases such as nuisance or continuing trespass where the harm sustained by the complaining party is not exclusively traced to the day when the original objectionable act was committed."[14]

The Court of Appeals ultimately sided with the plaintiffs, holding that the DPW program was not a mere change in scope, and that the DPW program was so substantial in nature that it restarted the statute of limitations timeframe. The Court stated that the present non-park use could not be traced exclusively to the day when the illegal encroachment began, and that the Village's violation "amounts to a continuous or reoccurring wrong."[15] Further, the Court recognized that it would be unreasonable to expect ordinary citizens, like the Village's residents, to know which municipal actions had received State Legislature approval and "whether municipal infrastructure located on parkland is intended to serve the park or public areas outside of the park."[16] Therefore, the Court held that the "plaintiffs are able to challenge the defendants ongoing violation of the public trust doctrine at any time while the violation lasts, without being barred by the statute of limitations."[17]

Finally, the Court stated that as a matter of law, the doctrine of laches is not an available defense against the State "when acting in a governmental capacity to enforce

a public right or protect a public interest." Furthermore, the doctrine of laches is not an available defense to an application of the continuing wrong doctrine.[18]

Conclusion

The Court affirmed, with costs, the order of the Appellate Division agreeing that the "plaintiffs are able to challenge defendants' ongoing violation of the public trust doctrine at any time while the violation lasts, without being barred by the statute of limitations."[19]

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1. *Capruso v. Vill. of Kings Point*, 23 N.Y.3d 631, 636, 992 N.Y.S.2d 469, 471 (2014).
2. *Id.* at 637.
3. *Id.*
4. *Id.*
5. *Capruso v. Vill. of Kings Point*, 78 A.D.3d 877, 912 N.Y.S.2d 244 (2d Dep't 2010).
6. Capruso, 23 N.Y.3d at 638 (2014).
7. *Id.*
8. *Id.*
9. *Id.* at 641.
10. *Id.* at 638.
11. *Id.* at 639.
12. *Id.* at 640–41.
13. *Id.*
14. *Id.*
15. *Id.* at 640.
16. *Id.* at 641.
17. *Id.*
18. *Id.* at 642.
19. *Id.* at 641.

* * *

Decker Mfg. Corp. v. Travelers Indem. Co., No. 1:13-CV-820, 2015 WL 438229 (W.D. Mich. Feb. 3, 2015)

Facts

This case involved the Albion Sheridan Township Landfill (the "Landfill"), which was privately operated from 1966 to 1981 under contract with the City of Albion, Michigan.[1] The Landfill was licensed by the State of Michigan Department of Health, and accepted municipal refuse and industrial wastes from households and industries in the City of Albion.[2] Ultimately, the Landfill was closed in 1981 and placed on the National Priority List as a Superfund Site.[3] The plaintiff, Decker Manufacturing Corporation ("Decker"), was labeled as a potentially responsible party (PRP) by the Environmental Protection Agency (EPA), making it liable along with others for the remediation costs connected with cleaning up the Landfill.[4]

Decker disposed of its waste at the Landfill from 1966 to 1981, which included Floor-Dri mixed with oil, paper, magazines, broken wood pallets, and sludge containing oil residue, lime soap, and metal shavings.[5] During this time, Decker was not aware of any problems with or discharges from the Landfill, and believed that disposing waste at the Landfill was "lawful and proper."[6] However, the Landfill was poorly located on sandy soil where the groundwater was shallow, and was not designed to prevent the migration of contaminants.[7] Therefore, much of the groundwater was contaminated by disposed waste, leading to the closure of the Landfill.[8]

Decker entered into a consent decree with the EPA in 1999, which expressly denied liability, but required Decker to reimburse the EPA for past and future response costs and to finance and perform "Operation and Maintenance" activities for thirty years.[9] Decker demanded from its insurer, Travelers Indemnity Company ("Travelers"), reimbursement for the alleged defense and indemnity costs related to its obligations with the EPA, along with any and all new claims that might be brought against Decker relating to the Landfill.[10] The defendant, Travelers, responded by asserting a counterclaim stating that it had no obligation to defend or indemnify Decker with respect to the Landfill.[11]

Within the insurance policies at issue, Travelers agreed to pay "all sums which the insured shall become legally obligated to pay as damages because of (a) bodily injury; or (b) property damage; to which this insurance applies, caused by an occurrence."[12] However, each of the insurance policies contained a pollution exclusion, which precluded insurance coverage for property damage arising out of waste or pollutant discharge that was "either expected or intended from the standpoint of any insured or any person or organization for whose acts or omissions any insured is liable."[13]

Procedural History

Decker filed this action for breach of contract and declaratory relief against Travelers in Calhoun County, Michigan, Circuit Court.[14] Travelers removed the case to the Michigan Western District Court on the basis of diversity of citizenship.[15]

Issues

(1) Whether property damage at the Landfill came from "any discharge of waste that was expected or intended from Decker's standpoint," which would preclude insurance coverage under the "pollution exclusion" contained in the insurance policy?[16]

(2) Whether Decker met its burden of showing it had satisfied all the conditions under the Travelers policies?[17]

Rationale

In dealing with the first issue, the court had to determine what constituted a "relevant discharge" for purposes of the pollution exclusion.[18] The court stated that the Landfill was identical to the landfills at issue in the Michigan Court of Appeals cases, *Kent County* and *South Macomb*, both of which applied the container approach.[19] Under this approach, Decker's placement of waste into the Landfill was equivalent to the placement of waste into a container.[20] This makes the "relevant discharge" for the pollution exclusion analysis the one from the Landfill into the environment, rather than the placement of waste into the Landfill.[21] The court held that there was no evidence to suggest that Decker was on notice of any problems at the Landfill, or that Decker "intended or expected" that its wastes would be discharged from the Landfill into the environment.[22] Therefore, the court found that the pollution exclusion did not apply.[23]

With regards to the second issue, the court first determined that there was "property damage" at the Landfill during the four-year time period when the policies were in effect.[24] Next, they looked at whether there was an "occurrence," or "accident."[25] In order to make this determination they looked at whether "the insured subjectively expected or intended the resulting property damage."[26] The court found that there was an occurrence because the property damage was the result of an accident that was neither expected nor intended.[27] Lastly, the court looked at whether Decker satisfied all conditions precedent under the insurance policies at issue. Ultimately, the court found that Travelers owed Decker a duty to defend and indemnify all of the Landfill claims even though the policy was not in effect when the contamination was discovered.[28]

Conclusion

The court held that the "pro rata, time-on-the risk allocation is consistent with the policy language in this case" making Travelers responsible for "property damage that occurs during the policy period, not for damages arising before or after the policy period."[29] However, the court did not determine how to apply the pro rata time-on-the-risk formula because of factual issues that required further legal argument.[30]

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1. *Decker Mfg. Corp. v. Travelers Indem. Co.*, No. 1:13-CV-820, 2015 WL 438229, at *1 (W.D. Mich. Feb. 3, 2015).
2. *Id*. at *6.
3. *Id*. at *1.
4. *Id*. at *2.
5. *Id*. at *7.
6. *Id*. at *9.
7. *Id*. at *8.
8. *Id*. at *7.
9. *Id*. at *1.
10. *Id*. at *2.
11. *Id*.
12. *Id*. at *9.
13. *Id*. at *3.
14. *Id*. at *2.
15. *Id*.
16. *Id*. at *3.
17. *Id*. at *9.
18. *Id*. at *4.
19. *Id*. at *8.
20. *Id*.
21. *Id*.
22. *Id*. at *9.
23. *Id*.
24. *Id*.
25. *Id*. at *10.
26. *Id*.
27. *Id*.
28. *Id*. at *12.
29. *Id*. at *14.
30. *Id*. at *15.

* * *

Fairview Plaza, Inc. v. Estate of Peter J. Rigos, 11 N.Y.S.3d 338 (N.Y. App. Div. 3d Dep't 2015)

Facts

Peter J. Rigos ("Rigos"), decedent, was the sole owner of a laundromat and dry cleaning business known as Wash-Rite Coin Laundry and Dry Cleaning ("Wash-Rite") from 1971 until his death in 1993.[1] The decedent's wife, Judith, and son, John, defendants, assisted in the operation of the business.[2] The property for Wash-Rite was leased from Fairview Plaza ("Fairview"), plaintiff.[3] In 1989, John began working full-time and subsequently took over the business.[4] In 1996, John entered into a new lease with plaintiff.[5] In 2002, Fairview initiated an environmental assessment of the property, which revealed contaminated soil behind Wash-Rite.[6] The soil was contaminated with perchloroethylene ("PERC") that had been used in the business' dry cleaning services until 1985.[7] Fairview commenced an action based on Navigation Law article 12[8] to recover the costs expensed in remedying the property.[9] Both Fairview and defendants moved for summary judgment.[10]

Procedural History

On January 7, 2014, the Supreme Court in Columbia County granted the Estate's motion for summary judgment and dismissed the complaint.[11] The Supreme Court held that PERC did not constitute "petroleum" under the Navigation Law,[12] and therefore found no basis of liability of defendants.[13] Fairview then appealed.[14]

Issue

Whether PERC falls under the definition of "petroleum" under Navigation Law, thereby providing a private cause of action to recover damages sustained as a result of the chemical's discharge.

Rationale

In addressing Fairview's appeal, the court noted the absence of case law establishing PERC as "petroleum" under the Navigation Law,[15] and struggled with authority suggesting the contrary.[16] The court agreed with defendants that a per se rule for liability would be "unworkable" for petroleum-derived substances, such as PERC, since many of those substances pose "none of the same dangers as petroleum itself."[17] The court stated that it would be a novel expansion of the law if petroleum derived substances were sufficient to impose liability under the Navigation Law.[18]

Conclusion

The court held that the Supreme Court did not err in its decision that PERC does not fall under the definition for "petroleum" under the Navigation Law; therefore, summary judgment was proper and all other claims premised on the liability claim were also properly dismissed.

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Endnotes

1. *Fairview Plaza, Inc. v. Estate of Peter J. Rigos*, 11 N.Y.S.3d 338, 339 (N.Y. App. Div. 3d Dep't 2015).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. N.Y. Nav. Law (2015).
9. *Fairview Plaza*, 11 N.Y.S.3d at 339.
10. *Id.*
11. *Id.*
12. N.Y. Nav. Law § 172(15) (2015).
13. *Id.*; N.Y. Nav. Law § 171 (2015).
14. *Id.*
15. *Id.*
16. *Id.* (citing *Carman Realty, LLC v. Ju Cherl Yoon*, No. 0064422.0061, 2007 N.Y. Misc. LEXIS 9373 (N.Y. Sup. Ct. Mar. 12, 2007); *Major v. Astrazeneca, Inc.*, No. 5:01-CV-618 (Lead) (FJS/GJD), 5:00-CV-1736 (Member) (FJS/GJD), 2006 U.S. Dist. LEXIS 65225 (N.D.N.Y. 2006)).
17. *Fairview Plaza*, 11 N.Y.S.3d at 340.
18. *Id.*

* * *

Michigan v. E.P.A., 135 S. Ct. 2699 (2015)

Facts

This case arose from the Environmental Protection Agency's (EPA) interpretation of the Clean Air Act (CAA) with regard to the implementation of regulations.[1] The CAA controls pollution from power plants.[2] Further, it allows the EPA to regulate emissions of hazardous air pollutants given off by power plants if the regulations are deemed "appropriate and necessary."[3] As a result of a study completed by the EPA, the agency found regulations on power plants were "appropriate" since plants emitted mercury and other hazardous pollutants that pose a risk to society, and means were available to reduce these risks.[4] With regard to "necessary," the EPA concluded there were no other safety measures in place within the CAA to address the risks.[5] Costs were not considered.

Procedural History

Here, the Court reviewed a decision by the United States Court of Appeals for the D.C. Circuit.[6] The lower court upheld the EPA's decision to not consider costs when deciding whether to regulate power plants.[7] The petitioners in the present case include 23 states who are asserting that the EPA must take cost into consideration when determining that a regulation is "appropriate and necessary."[8]

Issue

The issue is whether the EPA, a federal agency, can ignore the costs when determining whether to regulate power plants.[9] Put another way, what does "appropriate and necessary" standard mean when deciding whether to regulate.[10] The EPA has conceded that it "gave cost no thought at all, because it considers cost irrelevant to its initial decision to regulate."[11]

Rationale

When a federal agency goes forward with a decision to regulate an industry, it must take part in "reasoned decision-making."[12] The result must be rational and reason-

able, and an action taken by a federal agency is deemed lawful only when "all relevant factors" are considered.[13] When there is an ambiguity in a law, the agency must act "within the bounds of a reasonable interpretation."[14] The CAA looks at power plants in a different view than other sources of pollution; while the federal law gives the EPA flexibility, it does not allow it to completely ignore the cost factor when deeming a regulation appropriate.[15] For instance, without any consideration of costs, a billion dollars in costs to a power plant that produces only minimal value to environmental benefits is not reasonable or "appropriate."[16] While the portion of the CAA that is relevant in part to power plants does not explicitly state cost must be considered, the law requires "multiple relevant factors" be considered.[17] Cost is a relevant factor.

Conclusion

The Court held that there are instances in which "appropriate and necessary" considerations do not include cost, but regulating power plants does require a consideration of cost.[18] The EPA acted unreasonably by determining that cost is irrelevant to the regulation of power plants.[19] The Court reversed the U.S. Court of Appeals for the D.C. Circuit and remanded the case.[20]

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Endnotes

1. *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2704 (2015).
2. *See* 77 Fed. Reg. 9330 (2012); 42 U.S.C. §7412.
3. *Michigan v. E.P.A.*, 135 S. Ct. at 2704.
4. *Id.* at 2705.
5. *Id.*
6. *Id.* at 2706.
7. *Id.*
8. *Id.* at 2704.
9. *Id.* at 2706.
10. *Id.* at 2709.
11. *Id.* at 2706.
12. *Id.*
13. *Id.*
14. *Id.* at 2706-2707, quoting *Utility Air Regulatory Group v. EPA*, 134 S.Ct. 2427, 2442 (2014).
15. *Michigan v. E.P.A.*, 135 S. Ct. at 2707.
16. *Id.*
17. *Id.* at 2709.
18. *Id.* at 2707.
19. *Id.* at 2712.
20. *Id.*

* * *

National Association for Surface Finishing v. Environmental Protection Agency and Gina McCarthy; California Communities Against Toxics, Et al., No. 12-1459 (D.C. Cir. 2015)

Facts

In 2012, the Environmental Protection Agency (EPA) updated its rule regarding the standards restricting emissions of hexavalent chromium. If not properly regulated, these emissions can cause cancer.[1] The new rule imposes more stringent emissions limitations and mandates the phaseout of a category of fume suppressants containing the toxic compound perfluorooctyl sulfonate (PFOS).[2] Environmental petitioners, including the Clean Air Council, California Communities Against Toxics, and the Sierra Club, contended that the new regulation was "too lax," alleging EPA ignored relevant information and impermissibly considered costs in calculating the revised emission standards.[3] The National Association for Surface Finishing (the "Association"), the industry petitioner, argued that the new rule was too stringent[4] and contended that EPA was required to make a determination of developments in practices, processes or control technologies when revising the regulation.[5]

Issue

What conditions are statutorily required when EPA revises emissions standards?

Rationale

The court rejected the argument made by the environmental petitioners that it was the responsibility of the EPA to calculate a new maximum achievable control technology (MACT) floor when revising emission standards based on its periodic technology review as required by the Clean Air Act.[6] The court concluded that the EPA was not required to recalculate the MACT floor at the outset of its technology review, at least where the EPA had decided not to revise emissions standards as a result of that review.[7] Furthermore, the court deferred to EPA's view that regulation triggered under 112(n)(1)(A) of the Clean Air Act must follow the procedures of section 112(d).[8] The EPA is required to recalculate only when "appropriate and necessary."[9]

The Association asserted that EPA unreasonably determined in its technology review that "developments" had occurred after the original rulemaking that required revision of the existing emissions standards.[10] The court held that the EPA permissibly identified and took into account cognizable developments in practices, processes and control technologies.[11] Developments also include improvements that could result in significant additional

emission reduction.[12] The court also said that it suffices for EPA to assess and discuss the collective impact of the developments it has identified, and to revise standards appropriately in light thereof.[13] The statute does not require EPA to identify a nexus between each distinct development and the revised standards.[14] Moreover, the shift in EPA's position from 2010 to 2012 was reasonable because the agency received intervening information relevant to its decision.[15]

Conclusion

The petitions for review by both the environmental petitioners and the Association were denied.[16] The Court upheld the Final Rule of the Environmental Protection Agency as established in 2012.[17]

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Endnotes

1. *Nat'l Assoc. for Surface Finishing v. EPA*, No. 12-1459, 3 (D.C. Cir. 2015).
2. *Id*.
3. *Id*. at 4.
4. *Id*.
5. *Id*.
6. *Id*. at 12.
7. *Id*.
8. *Id*. at 14.
9. *Id*.
10. *Id*. at 17.
11. *Id*. at 18.
12. *Id*.
13. *Id*. at 19.
14. *Id*.
15. *Id*.
16. *Id*. at 31-32.
17. *Id*.

* * *

Natural Resources Def. Council v. Envtl. Prot. Agency, 777 F.3d 456 (D.D.C. 2014)

Facts

The Clean Air Act (CAA) establishes National Ambient Air Quality Standards (NAAQS) for particular pollutants.[1] The Environmental Protection Agency (EPA) divides the country geographically, designating each region as: (1) attainment (if the region's atmospheric concentration of the pollutant falls below the allowed level); (2) nonattainment (if it does not); or (3) unclassifiable (if there is insufficient information).[2] When a region's pollutant concentration changes the EPA can alter the area's designation, so long as the EPA approves a maintenance plan to ensure that the area remains in compliance with the standard.[3]

In 1997, EPA promulgated stricter NAAQS for ground-level ozone than it originally had, by replacing the one-hour, 0.12 ppm standard with a 0.08 ppm standard over an eight-hour period.[4] In 2008, the EPA raised these standards even more, to 0.075 ppm over an eight-hour period, creating a more stringent ground-level ozone standard.[5] The deadline to designate areas under the 2008 NAAQS was July 2012.

The EPA issued an Implementation Rule (the "Rule") applying the new ozone standard to all nonattainment areas.[6] The Rule also extended the attainment deadlines and revoked the 1997 NAAQS for the purposes of transportation conformity requirements.[7]

Essentially, under the Rule, the EPA allowed affected regions more time to attain new ozone standards, and the EPA revoked requirements (from the 1997 NAAQS) that were applicable to areas that had yet to attain governing ozone standards or that had recently come into attainment but remained under obligations aimed to prevent reversion to nonattainment status.[8]

Procedural History

National Resources Defense Council (NRDC) petitioned for review of the Implementation Rule, challenging its schedule of attainment deadlines and revocation of the 1997 NAAQS for transportation conformity purposes.[9]

Issue

Whether the challenged portions of the Implementation Rule are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law?"[10]

Rationale

The court reviewed the EPA's interpretation of the CAA under the Chevron framework, whereby it "presumes that when an agency-administered statute is ambiguous with respect to what it prescribes, Congress has empowered the agency to resolve the ambiguity. The question for the reviewing court is whether in doing so the agency has acted reasonably and thus has 'stayed within the bounds of its statutory authority.'"[11]

NRDC challenged the Rule's new attainment deadlines as contrary to the statute and an arbitrary and capricious change from prior agency practice. The court did not reach the arbitrary and capricious challenge, however, because it determined that the Rule's deadlines were not within the reach of the statute.[12] The statute did not prescribe on its face the calculation of attainment deadlines when EPA promulgated revised NAAQS, as it did with the 2008 ozone standards.[13] Therefore, the court assessed

whether the agency's deadlines were based on a permissible construction of the statute (step two of Chevron).[14] Here, the court held that the EPA, self-admittedly, lacked statutory authority to establish the attainment deadline it did in the Rule and thus found that the EPA exceeded their authority.[15]

NRDC's second challenge concerned the partial revocation of the 1997 NAAQS under the Rule. The NRDC argued that the partial revocation of the 1997 NAAQS exceeds EPA's statutory authority and violates the Act's anti-backsliding provision.[16] The court found that EPA lacked the authority to revoke the conformity requirements, and thus did not feel the need to address the anti-backsliding provision. The Rule revoked the 1997 NAAQS for the 2008 ozone NAAQS for transportation conformity purposes, but at the same time, the 1997 designations and maintenance requirements remained in full effect for all other purposes.[17] However, under the statute, the EPA lacked authority to revoke only the 1997 transportation conformity requirements while preserving the 1997 NAAQS.[18] The EPA relied on its power to revoke a NAAQS in its entirety, yet the court explained that the statute itself disallowed the EPA to selectively eliminate only transportation conformity requirements.[19] Therefore, the court concluded that the EPA lacked authority to eliminate the conformity requirements alone.

Conclusion

The court found that EPA's regulations implementing the 2008 ozone standards exceeded its authority under the Clean Air Act. The court thereby vacated the pertinent portions of EPA's regulations.[20]

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Endnotes

1. *Natural Resource Def. Council v. Envtl. Prot. Agency*, 777 F.3d 456, 457 (D.C. Cir. 2014).
2. *Id.* at 458.
3. *Id.* at 458–59.
4. *Id.* at 460–61.
5. *Id.* at 462–63.
6. *Id.* at 463.
7. *Id.*
8. *Id.* at 457.
9. *Id.* at 463.
10. *Id.*
11. *Id.*
12. *Id.* at 463–64.
13. *Id.* at 464.
14. *Id.* at 465.
15. *Id.* at 467.
16. *Id.* at 469–70. The anti-backsliding provision requires the agency to promulgate requirements that are not less stringent than the controls applicable to areas designated as nonattainment before the relaxation. *Id.* at 459.
17. *Id.* at 469–70.
18. *Id.* at 470.
19. *Id.* at 471–72.
20. *Id.* at 473.

* * *

Pennsylvania, Dep't of Envtl. Prot. v. Lockheed Martin Corp., No. 1:09 CV-0821, 2015 WL 412324 (M.D. Pa. Jan. 30, 2015)

Facts

This case involves the Quehanna Wild Area Nuclear Site (the "Site") in Clearfield County, Pennsylvania constructed in 1957.[1] The Site is a point of contention because of its use as a research facility and the subsequent costs incurred from decommissioning the facility.[2] During the decommission in the 1990s, the Commonwealth incurred more than $35 million in expenditures to demolish the structures, take samples, and cleanup Strontium-90—a hazardous nuclear material.[3] Respondent's predecessor, Martin-Marietta Corporation, was the last known user of Strontium-90 at the Site, from 1962 until 1967.[4]

In the early 2000s, the United States entered into negotiations with the Pennsylvania Department of Environmental Protection (PADEP).[5] The United States agreed in a Final Agreement to pay a portion of the Commonwealth's incurred expenses, in the amount of $10 million, in return for being released from any future claims for the costs associated with the cleanup.[6]

Procedural History

The Commonwealth commenced this lawsuit against Respondent, Lockheed Martin Corporation (LMC) in order to recover costs incurred from decommissioning the facility.[7] LMC filed a counterclaim and a third-party complaint against the United States seeking contribution if they were found liable to the Commonwealth.[8]

Issue

The main issue addressed by the court is whether the United States is protected from LMC's Section 113(f)(1) contribution claim by the Final Agreement with the Commonwealth?[9]

Rationale

Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) Section 107(a), categories of potentially responsible parties for the "presence of hazardous substances" are enumer-

ated and defined.[10] These categories include parties such as the "owner and operator of a vessel or a facility" and allow for those who contributed even minimally to nonetheless be held potentially liable.[11] CERCLA also incentivizes parties to negotiate settlements with the government in order to protect themselves from future contribution actions brought by other parties.[12]

In drafting the Final Agreement, the United States and the Commonwealth negotiated a settlement to protect the United States from future contribution actions while providing payment for part of the costs for the demolition and cleanup for the Site.[13] However, the court established that the Final Agreement was not a settlement as defined by CERCLA Section 113(f)(2) because the agreement was not judicially or administratively approved.[14]

The second issue is whether LMC, if liable, is able to seek recovery for costs from the United States.[15] CERCLA Section 113(f)(1) permits potentially responsible parties to seek contribution from other parties that may be joint and severally liable.[16] For this reason, the court determined that LMC, if liable, is entitled to contribution from the United States, despite the Final Agreement.[17]

Conclusion

The court denied the motion for summary judgment, finding that the Final Agreement does not comply with Section 113(f)(2), as it was neither judicially nor administratively approved.[18]

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Endnotes

1. *Pennsylvania, Dep't of Envtl. Prot. v. Lockheed Martin Corp.*, No. 1:09-CV-0821, 2015 WL 412324, 1 (D. M.D. Pa. 2015).
2. *Id*. at 2.
3. *Id*.
4. *Id*.
5. *Id.*
6. *Id.*
7. *Id*. at 3.
8. *Id.*
9. *Id.* at 1.
10. *Id*. at 4.
11. *Id*.
12. *Id*.
13. *Id*. at 2.
14. *Id*. at 6.
15. *Id*.
16. *Id*. at 4.
17. *Id*. at 7.
18. *Id.* at 8.

* * *

Sierra Club v. ICG Hazard, LLC, 781 F.3d 281 (6th Cir. 2015)

Facts

This case involves a surface coal mine called Thunder Ridge, operated by ICG Hazard (ICG) in Kentucky that was operating under a general permit to discharge specific pollutants into Kentucky's water supply.[1] Under the Clean Water Act (CWA), a permitting authority—in this case, the Kentucky Division of Water (KDOW)—can issue a permit exempting a polluter from the general rule that "the discharge of any pollutant by any person shall be unlawful."[2] The exemption at issue in this case, known as a "permit shield," was pursuant to the National Pollutant Discharge Elimination System (NPDES), which allows permit holders to discharge certain levels of specific pollutants.[3] Under NPDES, the permitting authority can issue a *general* permit or an *individual* permit, the former being a blanket permit applying to several operations in the same industry.[4]

In 2009, ICG sought to modify its general permit to account for planned expansion of the mine.[5] In doing so, ICG was required to submit water samples from one discharge point.[6] The water samples collected revealed selenium in the water at a level exceeding the limit of Kentucky's water standard.[7] Notably, selenium was a pollutant not specifically mentioned by ICG's general permit.[8] Shortly thereafter, Petitioner, Sierra Club, brought a citizen suit claiming that the selenium levels were in violation of the CWA because ICG was not allowed under its general permit to discharge selenium.[9]

The District Court granted summary judgment in favor of ICG, finding that the general permit shielded ICG from liability. Petitioner appealed on the theory that the permit shied does not protect ICG from the discharge of selenium because it "was neither expressly authorized by the general permit nor reasonably contemplated by KDOW when it issued the permit."[10]

Procedural History

This case was brought in the U.S. District Court for the Eastern District of Kentucky, which granted summary judgment on all claims in favor of ICG.[11] Sierra Club appealed to the U.S. Court of Appeals for the Sixth Circuit who reviewed the District Court's decision to grant summary judgment *de novo*.[12]

Issue

The main issue, a question of first impression addressed by the court, was whether the CWA's permit shield applies to general permit holders to the same extent as individual permit holders?[13] Specifically, was the discharge of selenium, a substance not permitted to be discharged under ICG's general permit, covered by the

permit shield, thus protecting ICG from liability for the pollution?[14]

Rationale

The court first established that the permit shield was available to general permit holders by applying *Chevron* deference.[15] Under this theory the Court looked first to "whether 'Congress has directly spoken to the precise question at issue.'"[16] If not, meaning the statute was ambiguous, then the court "defer[s] to the agency's interpretation, provided that interpretation was promulgated via notice-and-comment rulemaking or a formal adjudication and provided it is reasonable."[17] Applying this theory the court found that the relevant provisions of the CWA were ambiguous, and so deferred to the EPA's interpretation, finding that the permit shield applies with equal force in the general permit context as in the individual permit context.[18]

Next, the court relied on the Fourth Circuit's analysis in *Piney Run*,[19] a case pertaining to the "scope of the permit shield in the context of *individual permits*," in determining whether general permits should be treated in the same way.[20] Under the standard articulated in *Piney Run* an individual permit holder can be covered for the discharge of a substance not specifically named in the permit if (1) "the permit holder [complies] with the CWA's reporting and disclosure requirements" and (2) "the discharges [are] within the permitting authority's 'reasonable contemplation.'"[21] The court found that both prongs were satisfied since ICG disclosed the presence of selenium when it sought to modify and expand its permit, and KDOW "knew at the time it issued the general permit that the mines in the area could produce selenium."[22]

Notably, the dissent argued that the majority went too far in extending the permit shield, formerly applicable to just "custom-tailored, 'individual permits,'" to the "one-size-fits-all 'general' permit."[23]

Conclusion

The Court affirmed the District Court's decision, finding that ICG was protected by the permit shield and not liable for its discharge of selenium.[24]

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Endnotes

1. *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 282 (6th Cir. 2015).
2. *Id.* at 283.
3. *Id.* at 282–83.
4. *Id.*
5. *Id.* at 283.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 284.
16. *Id.* (*citing Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).
17. *Id.* at 287.
18. *Id.*
19. *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carrol Cnty.*, 268 F.3d 255 (4th Cir. 2001).
20. *Sierra Club*, 781 F.3d at 285–86.
21. *Id.*
22. *Id.* at 290.
23. *Id.* at 292.
24. *Id.*

* * *

Recent Legislation

Affordable Reliable Electricity Now Act of 2015, S. 1324

A bill to require the Administrator of the Environmental Protection Agency to fulfill certain requirements before regulating standards of performance for new, modified, and reconstructed fossil fuel-fired electric utility generating units, and for other purposes (the "bill").[1]

The bill was introduced by Senator Shelly Capito [R-WV] on May 13, 2015 and reported by Committee on August 5, 2015.[2] The bill was referred to the Committee on Environment and Public Works (the "Committee") and then ordered without amendment by the Committee.[3] There are thirty-five cosponsors of the bill, thirty-four Republicans and one Democrat.[4]

Sections three and four are the most significant provisions of the bill. Section three requires the Environmental Protection Agency (EPA) to meet certain conditions prior to issuing, implementing, or enforcing a rule under the Clean Air Act.[5] In issuing those rules for new power plants, the EPA must place power plants fueled with coal and natural gas into separate categories for power plants using coal below a specified average heat content.[6] Before the EPA can establish a greenhouse gas standard based on the best system of emission reduction, the standard must first be achieved for at least one year at representative power plants throughout the country.[7]

Section four of the bill sets the standard for existing power plants.[8] In order to regulate carbon dioxide emis-

sions from existing power plants, the EPA must issue state-specific model plans demonstrating how each state can meet the required greenhouse gas emission reductions.[9] States need not adopt a state plan that addresses carbon dioxide emissions from existing power plants if the plan would negatively affect economic growth, the reliability of its electricity system, or electricity ratepayers by causing rate increases.[10] The bill then extends the compliance dates of those rules for existing power plants pending final judicial review.[11]

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Endnotes

1. S. 1324, 114th Cong. (2015) *(Thomas)*.
2. *Id.* (provided on *Thomas* in the "Actions" section).
3. *Id.*
4. *Id.* (provided on *Thomas* in the "Cosponsors" section).
5. *Id.* at § 3.
6. *Id.*
7. *Id.*
8. *Id.* at § 4.
9. *Id.*
10. *Id.*
11. *Id.*

* * *

An Act in Relation to Authorizing and Directing the Public Service Commission to Study the Impact on Consumers and Perform a Cost Benefit Analysis of the Reforming the Energy Vision (REV) Initiative, S. 5131

This Act (the "Bill"), would authorize and direct the Public Service Commission to conduct a study analyzing the impact on consumers and a cost-benefit analysis of the Reforming the Energy Vision (REV) initiative.[1]

This analysis and study would include the potential costs and benefits of the REV initiative, the impact that REV will have on electric rates, the feasibility of other potential initiatives which could update and upgrade the current energy infrastructure, an analysis of the potential costs and benefits of such alternative initiatives, the impact on consumers resulting from the expense of replacing the existing energy infrastructure, and any other information which is deemed to be necessary from the public service commission.[2] The Bill requires the Public Service Commission to report the results of the Bill to the Governor, the Temporary President of the Senate, the Speaker of the Assembly, and the Minority Leaders of the Senate and the Assembly.[3] The Bill further precludes funding for the REV initiative by way of any increased taxes, fees, rates, or charges upon existing utility rates on the consumers of New York State until the completion of the study and analysis.[4]

The Bill was introduced in the Senate by Sen. John DeFrancisco. It passed the Senate and was delivered to the Assembly on June 11, 2015, where it is currently under review by the Committee on Energy.[5]

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Endnotes

1. S. 5131, 238th N.Y. Leg. Sess. § 1.
2. *Id.* at § 1.
3. *Id.* at § 2.
4. *Id.* at § 3.
5. S. 5131-2015: An act in relation to authorizing and directing the public service commission to study the impact on consumers and perform a cost benefit analysis of the Reforming the Energy Vision (REV) initiative, OPEN, http://open.nysenate.gov/legislation/bill/S5131-2015.

* * *

Energy Efficiency Improvement Act of 2015, S. 535

On April 30, 2015, the Energy Efficiency Improvement Act of 2015 became Public Law No.: 114-11.[1] The bill was first sponsored by Robert "Rob" Portman, a Junior Senator from Ohio, and was cosponsored by Senators Jeanne Shaheen and Kelly Ayotte of New Hampshire, Senators Cory Gardner and Michael F. Bennet of Colorado, Senator Susan M. Collins of Maine, Senator Joe Manchin III of West Virginia, and Senator Al Franken of Minnesota.[2] The Energy Efficiency Improvement Act, intended to promote energy efficiency, is broken down into three Titles: Tile I–Better buildings, Title II—Grid-enabled water heaters, and Title III—Energy information for commercial buildings.[3] This Law responds to some of the recent green building litigation by providing for more advancing efficiency standards in buildings and appliances.

Title I—Better buildings, focuses on energy efficiency in Federal and other buildings.[4] This Act requires the General Services Administration (hereinafter "GSA") to: (1) develop and publish model leasing provisions to encourage building owners and tenants to use greater cost-effective energy and water efficiency measures in commercial buildings, and (2) develop policies and practices to implement the measures for the realty services provided by the GSA to agencies no later than 180 days after the enactment date.[5] The model provisions, policies, and best practices are to be developed with the help of the Secretary of Energy.[6] Cost-effective efficiency measures include any building product, material, equipment of service, and the installing, implementing, or operating thereof, that provides energy/water savings in an amount that is not less than the cost of such installing, implement-

ing, or operating.[7] This section also amends the Energy Independence and Security Act of 2007 by requiring the Department of Energy (hereinafter "DOE") to zero in on separate, or leased, spaces with high-performance energy efficiency measures.[8] High-performance energy efficiency measures refer to any technology, product, or practice that will result in substantial operational cost savings by reducing energy consumption and utility costs.[9] Also, the DOE is to perform a study, no later than one year from enactment, to determine if improving energy efficiency is feasible in commercial buildings through design and construction of the separate spaces.[10] Finally, Title I amends the Energy Independence and Security Act of 2007 by requiring the Environmental Protection Agency (EPA) to create a voluntary Tenant Star program so that tenants in commercial buildings may be recognized for voluntarily achieving high levels of energy efficiency.[11] The EPA may also develop a similar program to recognize those commercial building owners and tenants who use high-performance energy efficiency measures in the design and construction of leased spaces.[12]

Title II—Grid-enabling water heaters. This section amends the Energy Policy and Conservation Act for grid-enabled water heaters to contribute to an electric thermal storage or demand response program.[13] This section provides additional energy conservation standards for these particular water heaters.[14]

Title III—Energy information for commercial buildings, requires federal agency leasing space in a building without an Energy Star label to: (1) in its lease provisions require that the space's energy efficiency be measured against a nationally recognized benchmark and (2) meet particular energy consumption disclosure requirements.[15] This section further provides that no later than 18 months from the date of enactment, the DOE must begin to maintain a database to store and make available public energy-related information on commercial and multifamily buildings.[16]

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Endnotes

1. Energy Efficiency Improvement Act of 2015, S. 535, 114th Cong. (2015).
2. *Id.*
3. *Id.*
4. *Id.* at § 102.
5. *Id.* at § 102(b)(1).
6. *Id.*
7. *Id.* at §§ 102(a)(2)–(3).
8. *Id.* at § 103(a).
9. *Id.*
10. *Id.*
11. *Id.* at § 104(a).
12. *Id.*
13. *Id.* at § 201(1).
14. *Id.*
15. *Id.* at § 301(a)(2)(B(i)–(ii).
16. *Id.* at § 301(c)(1).

* * *

Environmental Conservation Law, S45-2015

Senate Bill 45 (the "Bill") will add two new sections to the Environmental Conservation Law in relation to wastewater treatment facilities.[1] This Bill is sponsored by Senator Brad Hoylman and co-sponsored by Martin Malavé Dilan, Liz Krueger, and Bill Perkins.[2]

The Bill maintains that no wastewater treatment facility in New York shall accept water from hydraulic fracturing operations, unless the facility meets standards set out in another provision of the Environmental Conservation Law.[3] Furthermore, the Bill states that the Commissioner shall enact regulations on wastewater treatment facilities that treat wastewater from hydraulic fracturing operations.[4] The standards in these regulations should "reflect the greatest degree of effluent reduction achievable through application of the best available demonstrated control technology, process, operating methods, or other alternatives."[5] These standards will govern wastewater treatment of hydraulic fracturing operations discharge, until "the federal government determines that a greater degree of effluent limitation is achievable by this category of facilities."[6]

Section 17-0709 of the Bill will not take effect until January 1, 2020, while the rest of the Act will take effect immediately.[7]

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Endnotes

1. S.B. 45, 2015–2016 Reg. Sess., (N.Y. 2015), *available at* http://open.nysenate.gov/legislation/api/1.0/pdf/bill/S45-2015.
2. *Id.* (identifying the sponsors and co-sponsors of the legislation).
3. *Id.* at § 1.
4. *Id.* at § 2.
5. *Id.*
6. *Id.*
7. *Id.* at § 3.

* * *

Environmental Justice Act, S01385

New York State Senate Bill S01385, in conjunction with New York State Assembly Bill A02966, amends the Environmental Conservation Law (ECL) by adding Article 74 to protect minority and low-income communities from environmental hazards.[1] This bill is known as the

Environmental Justice Act (the "Act"), and is sponsored by a Senator from New York's 21st District, Senator Kevin S. Parker.[2]

The main purpose of the legislation is "to establish governmental procedures in order to safeguard residents' health and welfare, and achieve environmental justice."[3] Racial and ethnic minority populations and low-income communities face a disproportionate impact of environmental hazards.[4] The Act is in accordance with the federal government's implementation of Executive Order 12898 creating the National Environmental Justice Advisory Council (NEJAC).[5]

Within the Act, "[s]tate agencies, boards, commissions and other bodies involved in decisions that may affect environmental quality shall adopt and implement environmental justice policies."[6] Environmental programs and policies will be reviewed to ensure that they meet the needs of minority and low-income communities.[7] Existing health data will be used to identify any disproportionate impacts, which will then be combated through the use of "compliance, enforcement, remediation, siting, and permitting strategies."[8]

Through the Act, an Environmental Justice Advisory Council (the "Council") is to be created to advise the New York State Department of Environmental Conservation (NYSDEC) and the Environmental Justice Task Force (the "Task Force") on environmental justice issues.[9] The Council will be composed of individuals from "grass roots or faith-based community organizations… [the] academic public health [sector], statewide environmental civil rights and public health organizations, large and small business civil rights and public health organizations, large and small business[es] and industry, municipal and county officials, and organized labor."[10]

The Task Force is to be created by the NYSDEC Commissioner and Department of Health Commissioner[11] as a "multi-agency" group that will include "senior management from the Governor Counsel's Office, the Attorney General's Office, the Department of Health, Agriculture and Markets, Transportation, and Education."[12] The purpose of the Task Force is to serve an advisory role to state agency heads regarding "actions to be taken to address environmental issues."[13] Communities may file petitions with the Task Force asserting that residents and workers within the area are subjected to "disproportionate adverse effects resulting from the implementation of laws affecting public health or the environment."[14] The Task Force will then develop an "Action Plan" to address the selected communities and attempt to reduce the "existing environmental burdens and avoid[s] or reduce[s] the imposition of additional environmental burdens."[15] The Task Force will then monitor these Action Plans after implementation.[16]

This Act shall take effect July 1, 2016, and the Task Force and the Council shall be established and operating by October 1, 2016.[17]

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Endnotes

1. Assemb. A02996, 2015 Leg., 238th Sess. (N.Y. 2015); S. S01385, 2015 Leg., 238th Sess. (N.Y. 2015).
2. *Id*. (identifying the sponsors of the legislation).
3. *Id*.
4. *Id*.
5. *Id*.
6. *Id*. at § 74–1002 (1).
7. *Id*. at § 74–1002 (2).
8. *Id*. at § 74–1002 (3).
9. *Id*. at § 74–1002 (4).
10. *Id*.
11. *Id*. at § 74–1003 (1).
12. *Id*.
13. *Id*.
14. *Id*. at § 74–1003 (2).
15. *Id*. at § 74–1003 (4).
16. *Id*. at § 74–1003 (5).
17. N.Y. Assemb. A02996; N.Y. S. S01385.

* * *

Grassroots Rural and Small Community Water Systems Assistance Act, H.R. 2853

This bill, currently under consideration in the U.S. House of Representatives, would modify Section 1442(e) of the Safe Drinking Water Act (1996), giving assistance to smaller and more rural communities to get their public water to a proper quality.[1]

On June 23, 2015, Representative Gregg Harper introduced this bill to the House of Representatives.[2] New York's Paul Tonko co-sponsored.[3] Once it was introduced in the House, it was referred to the Committee on Energy and Commerce (of which Rep. Harper is a member)[4] and the Committee on Energy and Commerce: Subcommittee on Environment and the Economy (of which Rep. Harper is the Vice-Chairman)[5] These committees will consider the bill before debating it on the floor of the House.[6]

The bill's purpose is to make it easier for people in rural communities to have clean water.[7] The goal increases access to financial resources, utilizing grants to pay nonprofit organizations to give onsite trainings with regards to small water systems, as well as water security enhancements, and regional and onsite trainings.[8]

If this bill becomes a law, money could be redistributed through grants to local and not-for-profit water agencies of the EPA's choosing so that smaller rural areas have the necessary resources to keep water safe and clean.[9] From 2016-2020 these organizations would go on-site to establish standards and help to fix issues that these areas are currently facing.[10]

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Endnotes

1. H.R.2853, 114th Cong. (2015) *(Thomas).*
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*

* * *

Great Lakes and Fresh Water Algal Bloom Information Act, H.R. 349

House of Representatives Bill 349 is a bill to monitor and correct algal blooms in the Great Lakes by way of establishing an electronic database.[1]

The Great Lakes and Fresh Water Algal Bloom Information Act (the "Bill") is sponsored by Representative Robert E. Latta (HO-5).[2] The Bill is co-sponsored by Representatives Candice S. Miller (MI-10), Bob Gibbs (OH-7), Tim Ryan (OH-13), Steve Stivers (OH-15), Tim Walberg (MI-7), Marcia L. Fudge (OH-11), Mike Quigley (IL-5), Reid J, Ribble (W-8I), Matthey A. Cartwright (PA-17), Chris Collins (NY-27), David P. Joyce (OH-14), and David B. McKinley (WV-1).[3]

The main purpose of the proposed legislation is to "create an electronic database of research and information on the causes and corrective actions being taken with regard to algal blooms in the Great Lakes, their tributaries, and other surface fresh waters."[4] The database would be created and administered by the Administrator of the National Oceanic and Atmospheric Administration ("the Administrator").[5] The comprehensive findings compiled by the Administrator would be reported to Congress each year and would be available electronically to the public.[6] Note, however, that the Administrator would have a duty to preserve "confidentiality of information in accordance with all applicable United States laws and regulations."[7]

This Bill does not impose any *new* research requirements. Rather it is designed to compile research from "relevant chemical, physical, and biological data that have been collected by an accredited university, association or organization, research group, Federal agency, State, or local government in the United States or Canada" into a cohesive database.[8] There are a number of benefits in compiling this information into one source, including the ability to study the causes of and solutions to reducing algal blooms in the fresh water masses in and around the Great Lakes.[9] This Bill coordinates and compiles the research into one place so that Congress and the public can track the progress of "corrective actions being taken" to combat algal blooms.[10]

This Bill was introduced on January 14, 2015, and first referred to the Committee on Science, Space and Technology.[11] At the same time, the Bill was also referred to the Committee on Natural Resources.[12] Those committees are currently considering the Bill.[13] As of now, there are no related bills.[14]

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Endnotes

1. H.R. 349, 114th Cong. (2015), *available at* https://www.congress.gov/114/bills/hr349/BILLS-114hr349ih.pdf.
2. *Id.* (identifying the sponsors and co-sponsors of the legislation).
3. *Id.*
4. *Id.* at § 2(a).
5. *Id.*
6. *Id.* at §§ 2(d)(1)–(2).
7. *Id.* at § 2(c).
8. *Id.* at § 2(b).
9. *Id.* at § 2(a).
10. *Id.* at §§ 2(d)(1) & (2).
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*

* * *

Micro-Bead Free Waters Act, S. 3932

On February 23, 2015 Senator Tom O' Mara introduced Bill 3932 (the "Bill"), also known as the Microbead-Free Waters Act, "to amend the environmental conservation law, in relation to prohibiting the distribution and sale of personal cosmetic products containing microbeads."[1] The Bill prohibits the sale of personal cosmetic products which contain microbeads, vests all matters pertaining to microbeads in personal cosmetic products with the state, authorizes the Department of Environmen-

tal Conservation to promulgate rules and regulations, establishes penalties for violations of the Bill, and sets the effective date of the Bill as January 1, 2016.[2] The Bill was referred to the Committee on Environmental Conservation and was cosponsored by Senators Addabbo, Avella, Boyle, Breslin, Carlucci, Comrie, Espaillat, Funke, Gianaris, Golden, Hamilton, Hassell-Thompson, Hoylman, Kennedy, Krueger, Lanza, Larkin, Latimer, Lavalle, Martins, Montgomery, Murphy, Panepinto, Parker, Peralta, Perkins, Ritchie, Rivera, Robach, Sampson, Sanders, Savino, Serrano, Squadron, Stavisky, and Valesky.[3]

Microbeads, a synthetic alternative ingredient to natural materials, are found in more than one hundred personal cosmetic products and may pose a serious threat to New York's natural environment.[4] Microbeads have been found in high concentration throughout New York's Great Lakes, as well as in the Finger Lakes and Mohawk River, and have been documented to harm fish and other aquatic organisms and collect harmful pollutants already present in the environment.[5] Research has indicated the majority of these microbeads enter bodies of water due to individual disposal of personal cosmetic products in household drains. Absent costly upgrades to sewage treatment facilities, microbeads will continue to pollute New York waters.[6]

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* * *

1. The N.Y. Senate, S3932-2015: An Act to Amend the Environmental Conservation Law, in Relation to Prohibiting the Distribution and Sale of Personal Cosmetic Products Containing Microbeads, OPEN, http://open.nysenate.gov/legislation/bill/S3932-2015.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

* * *

New York State Environmental Sustainability Education Act of 2015, A.5845

On March 5, 2015, Assembly member Kavanaugh, along with Assembly members Colton, Jaffee, Markey and Bichotte introduced Bill A.5845 in the New York State Assembly, establishing the New York State Environmental Sustainability Education Act (the "Act").[1] The bill was referred to the Assembly Standing Committee on Education, where it subsequently died.[2] Similar bills have been introduced to the Assembly since 2008, all of which have died in the Committee.[3]

The Act proposes a new section to require the New York State Department of Education (NYSED) in conjunction with the New York State Department of Environmental Conservation (NYDEC) to "establish a model program to guide the development, implementation and evaluation of a comprehensive environmental sustainability education program to be made available to public schools."[4] It would require NYSED to "assist [the public schools] in developing curricula and training staff to adequately prepare students to participate as active and involved citizens in building a sustainable future."[5] Additionally, the Act would require the program design to include topics that could be integrated into existing subjects within the broader curriculum framework; raise awareness of the nature and function of ecological, social, economic, and political systems including how they are interrelated to environmental and sustainability issues; and reinforce the value of innovative technology that reduces use of nonrenewable resources, minimizes environmental impact, and conveys the importance of creating and maintaining a sustainable lifestyle.[6] If enacted, the Act would take effect immediately.[7]

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Endnotes

1. New York State Environmental Sustainability Act, A.5845, 238th N.Y. Leg Sess. § 1.
2. *Id.*
3. The New York State Assembly, *Memorandum in Support of A.5845*, http://assembly.state.ny.us/leg/?default_fld=&bn=A05845&term=2015&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y.
4. *Id*.
5. A.5845, s*upra* note 1.
6. *Id.*
7. *Id*.

* * *

New York State Innovation Energy and Environmental Technology Program, S03032

Bill S03032, sponsored by State Senator Rich Funke (R–55th Senate District), is an act to amend the New York State urban development corporation act, in relation to creating the New York State Innovative Energy and Environmental Technology Program.[1]

The essential purpose of Bill S03032 is to provide early stage funds through a grants program to stimulate the creation of new businesses and jobs in the energy and environmental sectors of New York's Economy.[2] If enacted, the grants program will encourage the development of energy and environmental technology-oriented businesses, as well as provide assistance to existing industries pressured by rising international competition. Both aspects of the grants program will build upon New York's

economic vitality by serving to retain or increase employment.[3]

In establishing the New York State Innovative Energy and Environmental Technology Program, the legislature will achieve its goal of ensuring the success of energy and environmental technology-oriented businesses by awarding capital grants of up to $100,000.[4] However, whether or not a business qualifies for the grant depends on whether it meets certain criteria. Foremost, these grants would only be available to small businesses. Small businesses are classified as being headquartered in the state, with their principal operations located in the state, employ 100 or fewer persons, and are involved in developing innovative energy and environmental technologies.[5] If a business meets this criteria, an application for a grant shall describe the product, device, technique, and system or process that is to be developed.[6] It will include a market assessment, an explanation of its technical value, measurable outcomes resulting from its manufacture and sale, estimated timeline for bringing it to market, and a budget for its development and marketing that describes how the grant will be used.[7]

The grant application will then be evaluated. It is required that the corporation consults with the New York State Energy Research and Development Authority and the Department of Environmental Conservation, which are responsible for developing standards to be used in evaluating each application.[8] The suggested criteria to be used shall include, but is not limited to, economic impact; "ability of the applicant to leverage other funds; financial commitment of the applicant; technical feasibility; likelihood that the economic benefits will be manifest within a six- to twelve-month period" and the "likelihood that the product, device, technique, system or process will result in improvements to public health, quality of life, the environment, human or business performance or economic productivity."[9]

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Endnotes

1. New York State Innovation Energy and Environmental Technology Program, S.03032, Reg. Sess. (N.Y. 2015).
2. *Id.* at § 1.
3. *Id*.
4. *Id*. at § 2(2).
5. *Id*. at § 2(1)(c).
6. *Id*. at § 2(4).
7. *Id*. at § 2(4)(A-E).
8. *Id*. at § 2(5).
9. *Id*. at § 2(5)(A-F).

* * *

Petroleum Coke Transparency and Public Health Protection Act, S. 1763

On July 14, 2015, Senator Richard Durbin of Illinois introduced Bill S.1763, the Petroleum Coke Transparency and Public Health Protection Act, to the Senate of the United States.[1] The Bill was cosponsored by Senator Gary Peters of Michigan and has yet to be passed in the Senate.[2] Over the past several years, United States crude oil refineries have grown their coking capacity to accommodate the conversion of heavy crude oils into refined petroleum products.[3] Correlating with the refineries' increase in coking capacity, domestic production of petroleum coke is expected to grow, leading to increases in the storage, transportation, and use of the material.[4] Currently, uncovered piles of petroleum coke have been stored in the open air on the banks of the Detroit River, as well as near homes and baseball fields in Southeast Chicago.[5] State regulators, communities, and industry stakeholders would all benefit from an understanding of petroleum coke and its potential impact on public health and the environment.[6]

The Petroleum Coke Transparency and Public Health Protection Act would call for the Secretary of Health and Human Services, in consultation with the Administrator of the Environmental Protection Agency (EPA), the Secretary of Transportation, and the Secretary of Energy, to engage in a study concerning petroleum coke and report the results to Congress within 180 days of enactment.[7] The report submitted to Congress shall include an analysis of the public health and environmental impacts of the production, transportation, storage, and use of petroleum coke, an assessment of potential approaches and best practices for storing, transporting, and managing petroleum coke, and a quantitative analysis of current and projected domestic petroleum coke production and utilization locations.[8] The Secretary of Health and Human Services would be required to conduct the study using the best available science and then be required to publish the report on the Department of Health and Human Services website.[9] If the Bill is enacted, within one year of that date, the Administrator of the EPA, in consultation with the Secretary of Transportation, would be required to promulgate rules concerning the storage and transportation of petroleum coke to ensure the protection of public and ecological health based upon the findings of the study and the report.[10]

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Endnotes

1. Petroleum Coke Transparency and Public Health Protection Act of 2015, S. 1763, 114th Cong. (2015) (*Thomas*).
2. *Id.*
3. *Id.* at § (2)(1).
4. *Id.* at § (2)(2).

5. *Id.* at §§ (2)(3), (2)(4).
6. *Id.* at § (2)(5).
7. *Id.* at § (3)(a).
8. *Id.* at §§ (3)(a)(1)–(3).
9. *Id.* at §§ (3)(b), (c).
10. *Id.* at § (4).

* * *

S.1814, 238th N.Y. Leg. Sess.

This Bill, sponsored by Sen. Klein (D),[1] aims to amend both the Environmental Conservation Law and Tax Law requirements as they relate to "green" roofs.[2] Specifically, the bill aims to amend: (1) the Environmental Conservation Law in regards to review and certification of green roof materials, and (2) the Tax Law that grants green roof installation credit.

Section 1 of the proposed law lays forth these proposition: "The commissioner shall develop standards for the construction, installation and certification of green roofs that can be eligible for the green roof installation personal income tax credit."[3] The Bill states that these standards should include inspection and certification criteria both prior to the green roof installation, and after such installation.[4]

Pre-installation criteria for certification might include plant growth rate and drought tolerance, appropriate root systems for the roofs, appropriate plant irrigation, potential generation of allergens, and the need for remedial indoor air filtration to buildings. Post-installation inspection and certification may include both the pre-installation criteria and runoff testing to examine pollutant levels.[5]

Section 1, subsection 3 defines various terms for purposes of this Bill. Amongst some of the most fundamental definitions: green roof is defined as roofing on an eligible building that covers at least fifty percent of the building's eligible roof space; eligible building means a residential or mixed use building with residential units.[6]

Section 2 of the Bill proposes adding a new subsection to Section 606 of the Tax Law for the purposes of green roof installation credits. Essentially, the amendment would allow a tax credit for fifty-five percent of qualified green roof expenditures (not exceeding $5,000) on green roofs installed on a residential property located within New York owned by the taxpayer and used as the taxpayer's principal residence.[7] Examples of qualified expenditures under the amendment include those for plant material, soil irrigation and drainage systems, labor costs, and installation, architectural and engineering services.[8] Section 2 also allows for proportionate shares of total expenses to be given to persons living in condominium/cooperative housing and residences where multiple taxpayers live.[9]

The Bill was introduced in Senate during the 2015-2016 Regular Sessions, and referred to the Committee on Environmental Conservation on January 15, 2015.[10]

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Endnotes

1. *See* S.1814, 238th N.Y. Leg. Sess. (2014).
2. *See generally id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* See text of the bill for many other definitions not within the scope of this summary.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*

* * *

The Ratepayer Protection Act of 2015, H.R 2042

The Ratepayer Protection Act of 2015 (the "Act") would grant an extended compliance date pending judicial review for any EPA final rule addressing carbon dioxide emissions from fossil fuel-fired power plants.[1] It would also allow States to protect households and businesses from electricity rate increases.[2] The Act applies to existing fossil fuel-fired electric utility generating units as defined under section 111(d) of the Clean Air Act (42 U.S.C. 7411(d)).[3] The compliance date extension would begin sixty-one days after notice of promulgation of the final rule appears in the Federal Register, ending on the day upon which judgment becomes final and is no longer subject to further appeal or review.[4]

The Act also provides that no State shall be required to adopt a state plan, and no State shall become subject to a federal plan, if its respective governor determines that implementation of the state or federal plan would have a significant adverse effect on the State's residential, commercial, or industrial ratepayers.[5] The determination of a plan's potentially adverse effects requires the consideration of rate increases associated with a state or federal plan, as well as other rate increases associated with environmental requirements.[6] Alternatively, a State may avoid complying with a federal plan if its governor determines that implementation of the plan would have a significant adverse effect on the reliability of the State's electricity system.[7]

The Act requires that either of these determinations be made in consult with the State's public utility commission; environmental protection, public health, and economic development agencies; and Electric Reliability Organization as defined in section 215 of the Federal Power Act (16 U.S.C. 8240).[8] The Act also requires that, in implementing any final rule, the Administrator of the EPA treat hydropower as renewable energy.[9]

The Ratepayer Protection Act of 2015, sponsored by Rep. Ed Whitfield (R-KY), passed the House of Representatives on June 24, 2015.[10] Republican lawmakers promote the bill as a way to protect economies, consumers, and states.[11] Democrats have criticized the bill, saying it would stall the implementation of the Clean Power Plan and spur frivolous lawsuits.[12] President Obama has pledged to veto the bill if it passes the Senate.[13]

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Endnotes

1. H.R. 2042 114th Congress (2015-2016) (*Thomas*).
2. *Id.* at § 3.
3. *Id.* at § 2.
4. *Id.*
5. *Id.* at § 3.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at § 4.
10. *See* H.R. 2042.
11. Timothy Cama, *GOP assails EPA 'power grab' ahead of vote to slow climate rules*, The Hill (June 24, 2015), *available at* http://thehill.com/policy/energy-environment/245992-gop-epa-climate-rule-a-power-grab-unprecedented.
12. *Id.*
13. *Id.*

* * *

The Regulatory Fairness Act, S. 234, 114th Cong. (2015)

Senate Bill 234 is a bill to amend the Federal Water Pollution Control Act to confirm the scope of the Administrator of the Environmental Protection Agency's (EPA) authority to deny or restrict the use of defined areas as disposal sites for discharge of dredged or fill material into navigable waters (hereinafter the "Bill").[1] The Bill is also referred to as the Regulatory Fairness Act.

The Bill is sponsored by Senator David Vitter (R-LA)[2] and co-sponsored by Senators Joe Manchin III (D-WV), Dean Heller (R-NV), Mitch McConnell (R-KY), Michael B. Enzi (R-WY), James E. Risch (R-ID), Mike Crapo (R-ID), John Barrasso (R-WY), David Perdue (R-GA), and James Lankford (R-OK).[3]

The main purpose of the proposed legislation is to limit the time in which the Administrator of the EPA may deny or restrict the use of any area defined as a disposal site for discharge of dredged or fill material into navigable waters.[4] The Administrator would only be permitted to deny or restrict use of a defined area after the Secretary of the Army publishes notice of an application for a permit for a specific disposal site and before the Secretary issues the permit.[5] The Bill would also require the Administrator to provide "all information and data reviewed in making any determination under paragraph (1)."[6]

Additionally, the proposed legislation would invalidate any previous restriction or denial actions under taken by the Administrator where: (1) the Secretary did not publish notice of the application; and (2) the Secretary had issued a permit prior to the Administrator's decision to restrict or deny the use of the defined disposal site.[7]

This Bill was introduced on January 22, 2015.[8] The Bill was referred to the Committee on Environment and Public Works.[9]

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Endnotes

1. The Regulatory Fairness Act, S. 234, 114th Cong. (2015).
2. *Id.* (identifying the sponsors and co-sponsors of the legislation).
3. *Id.*
4. *Id.*
5. *Id.* at § (c)(1).
6. *Id.* at § (c)(3)(C).
7. *Id.* at § (c)(5).
8. *Id.*
9. *Id.*

* * *

To Amend the Safe Drinking Water Act to Provide for the Assessment and Management of the Risk of Algal Toxins in Drinking Water, and for Other Purposes, H.R. 212

Introduced on January 8, 2015 by Representative Robert Latta of Ohio, the Drinking Water Protection Act is an act to amend the Safe Drinking Water Act.[1] This bill directs the Environmental Protection Agency to develop and submit to Congress a strategic plan for managing and assessing risks associated with algal toxins in drinking water provided by public water systems.[2] Representatives Candice Miller (MI), Mike Quigley (IL), Marcy Kaptur (OH), Tim Murphy (PA), David Joyce (OH) and David

McKinley (WV) co-sponsored the bill. On August 7, 2015, the President signed the bill.[3]

The Drinking Water Protection Act amends the Safe Drinking Water Act by adding a new section that calls for a strategic plan to assess and manage risks associated with algal toxins in drinking water provided by the public water systems.[4] This plan includes steps and timelines to evaluate the risk to human health from the contaminated drinking water and establish, publish and update a comprehensive list of algal toxins that may have an effect on human health if exposed while taking into account the level of likely exposure.[5] The strategic plan includes guidelines to determine whether to publish health advisories and provides guidance regarding analytical methods and frequency of monitoring necessary to determine if the toxins are present in the drinking water provided by the public water systems.[6] This strategic plan also recommends feasible treatment options, including procedures and equipment to mitigate any adverse public health effects of algal toxins.[7] Finally, the Drinking Water Protection Act will facilitate cooperative agreements, and provide technical assistance to the affected States and public water systems for the purpose of managing risks associated with the toxins.[8]

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Endnotes

1. H.R. 212, 114th Congress (2015-2016) (*Thomas*).
2. *Id.*
3. *Id.*
4. H.R. 212, 114th Cong. (2015) (*Thomas*) (provided on *Thomas* in the "Summary" section).
5. *Id.* § 1459 (1)(A), (B).
6. *Id.* § 1459(1)(D).
7. *Id.* § 1459(1)(E).
8. *Id.* § 1459(1)(F).

* * *

Water in the 21st Century Act of 2015, H.R. 291, 114th Cong. (2015)

In January, Representative Grace F. Napolitano of California introduced a bill to "establish[ ] within the Environmental Protection Agency (EPA) a WaterSense program to identify and promote water efficient products, buildings, landscapes, facilities, processes, and services."[1] The purpose of the Bill is "(A) to reduce water use and (B) to reduce the strain on water, wastewater, and stormwater infrastructure.[2] Further, the Water in the 21st Century Act of 2015 (the "Act") will help "to conserve energy used to pump, heat, transport, and treat water.[3] Another goal of the Act is "to preserve water resources for future generations, through voluntary labeling of, or other forms of communications about, products, buildings, landscapes, facilities, processes, and services that meet the highest water efficiency and performance criteria."[4]

Under the Act, the EPA will establish a WaterSense label and create a procedure to have an item be certified to display the WaterSense label.[5] Further, the EPA will enhance the public awareness of the WaterSense label and regularly review and update the WaterSense criteria.[6] Also, the EPA may identify and implement approaches to improve water efficiency or lower water use.[7] The Administrators will also authorize WaterSense label for use on products that are labeled by the Energy Star program.[8]

Further, this Bill establishes an incentive program that is available to entities that provide financial incentives to residential, commercial, and institutional consumers for the purchase of water-efficient products, buildings, landscapes processes, or services.[9] Beginning in the fiscal year 2015, this Bill allows the EPA to make grants to owners or operators of water systems to address any ongoing or forecasted climate-related impact on the water quality or quantity.[10] To obtain a grant, an owner or operator of a water system will submit to the EPA an application which must explain how the program is expected to enhance the resiliency of the water system and how the program is consistent with any approved State and tribal climate adaptation plan and not inconsistent with any approved natural resource plan.[11] Pursuant to this Bill, before the 3 years have elapsed after the date of the enactment of this Act, and every 3 years thereafter, the EPA shall submit to Congress a report on progress.[12] Further, this Bill will (1) promote increased development of critical water resource infrastructure through additional opportunities for financing water resource projects; (2) attract new investments to infrastructure projects; (3) complement existing Federal funding sources; and (4) leverage private investment in water resource infrastructure.[13]

The Secretary of the Interior may provide financial assistance to and for projects in any Reclamation State, as listed in the Bill, any other state in which the Bureau of Reclamation is authorized to provide assistance, and the State of Alaska and Hawaii.[14] Further, the Secretary of the Interior "shall establish and maintain an open water data system within the United States Geological Survey."[15] The data system will be used to advance the availability, timely distribution, and widespread use of water data and information for water management, education, research, assessment, and monitoring purposes.[16] The purposes of the system are (1) to advance the quantification of the availability, use of, and risk of water resources throughout the United States; (2) to increase accessibility to, and expand the use of, water data and information in a standard; and (3) to facilitate the open exchange of water information.[17]

The Act amends Section 102 of the Water Resources Research Act of 1984.[18] The amended section states "additional research is required to increase the effectiveness and efficiency of new and existing treatment works through alternative approaches."[19] Section 104 of the Water Resources Research Act of 1984 is also amended by adding requirements for the Secretary to submit to various Committees reports regarding compliance of each funding recipient.[20] Further, the Bill requires that the Secretary conduct evaluations of each institute at least once every 3 years to determine the quality and relevance of the water resource research, the effectiveness of the research in producing results, and the effectiveness of the institute for planning, conducting, and arranging for research.[21]

Moreover, this Bill reauthorizes The Water Desalination Act of 1996 through 2020.[22] Pursuant to the Water Desalination Act of 1996 the Secretary of the Army, with the Administrator of the National Oceanic and Atmospheric Administration, will review the operations of reservoirs.[23] The review includes evaluating the water control manual and rule curves and using improved water control forecasts and run-off forecasting methods.[24]

Also, the EPA shall develop nonregulatory national drought resilience guidelines relating to drought preparedness planning and investments for communities, water utilities, and other water users and providers.[25] Additionally, specifically for California, a salmon drought plan will be established.[26] This plan will help recover threatened or endangered populations under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).[27] The Secretary of the Treasury will fund this plan by transferring $3,000,000 to the Director of the United States Fish and Wildlife Service.[28]

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Endnotes

1. H.R. 291, 114th Cong. (2015) (*Thomas*).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at § 101(a)(2)(A)(i)(ii).
6. *Id.* at § 101(a)(2)(E).
7. *Id.* at § 101(a)(2)(J).
8. *Id.* at § 101(a)(2)(K).
9. *Id.* at § 101(b)(2)(A).
10. *Id.* at § 101(c)(2).
11. *Id.* at § 101(c)(4)(A), (B), (C), (D).
12. *Id.* at § 101(c)(11).
13. *Id.* at § 211(1–4).
14. *Id.* at § 212.
15. *Id.* at § 301(b).
16. *Id.*
17. *Id.* at § 301(c).
18. *Id.* at § 302(a); 42 U.S.C. 10301.
19. *Id.* at § 302(a)(3).
20. *Id.* at § 302(b); 42 U.S.C. 10303.
21. *Id.* at § 302(e)(1).
22. *Id.* at § 302(e)(2).
23. *Id.* at § 304(a).
24. *Id.*
25. *Id.* at § 401(a).
26. *Id.* at § 401(b)(1).
27. *Id.* at § 401(b)(a)(i).
28. *Id.* at § 401(c)(1).

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