

The New York Environmental Lawyer



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



New York City Skies Pre- and Post-Environmental Laws

Above, New York City skies as they appeared in 1973.
Below, New York City from Jersey City in 2014.



Inside

Energy Efficiency
Improvements,
Technology

Property Contamination
and Leasing

When Cleaning Makes
Things Worse

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Save the Dates!

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Message from the Chair

Deja Vu

All Over Again?*

I had originally planned to use this column as a midterm report on the state of the Section. I was going to share that we have added over two-dozen new members, held a very successful fall meeting and two well-attended programs at member offices, and attracted a record number of sponsorships for our January meeting, all while maintaining a healthy budget surplus. I was also going to discuss the Cabinet's ambitious plans for the next six months which include revisions to the Section bylaws, overhaul of our minority fellowship program, and a potential name change.



However, we then had a historic presidential election that literally shook the ground beneath the energy and mining industries and has rattled the environmental community, which fears that the Trump Administration will unravel much of President Obama's environmental initiatives.

The choice for EPA administrator, Scott Pruitt, recently said in a radio interview that the Obama EPA had been acting "outside of the Clean Air Act." He went on to say that "there's going to be substantial change" at EPA and there will be a "regulatory rollback." He said EPA will be "less consequential" and that the Administration will be "more trusting of the states." Trump Administration press spokesman Scott Spicer has said about Mr. Pruitt, "'He's going to be at the point of the spear of the top of the priorities of the administration, which is rolling back onerous federal regulations.'"

On the other hand, Mr. Trump said that clean air and "crystal clear water" were vitally important. The administration's America First Energy Plan states that:

our need for energy must go hand-in-hand with responsible stewardship of the environment. Protecting clean air and clean water, conserving our natural habitats, and preserving our natural reserves and resources will remain a high priority. President Trump will refocus the EPA on its essential mission of protecting our air and water.¹

Thus, I have decided to devote this column to an assessment of the implications of the Trump Administration for New York environmental law in general and for the Section.

The Trump Administration will likely embark on a three-tiered strategy regarding regulations promulgated or proposed by the outgoing Administration: Executive Actions, regulations promulgated on or after May 30, 2016, and regulations enacted prior to May 30, 2016.

I. Revoking Executive Orders and Directives

President Obama made heavy use of executive orders. During the campaign, Mr. Trump pledged to cancel "unconstitutional" executive actions, memorandums, and orders issued by President Obama on the first day he assumed office. Based on recommendations from several conservative groups, Trump is likely to cancel the following executive orders issued by President Obama:

- EO 13693 (Adopting Federal Sustainability Practices);²
- EO 13677 (Climate-Resilient International Development);³
- EO 13653 (Preparing the United States for the Impacts of Climate Change);⁴
- EO 13624 (Accelerating Investment in Industrial Energy Efficiency);⁵
- EO 13605 (Supporting Safe and Responsible Development of Unconventional Domestic Natural Gas Resources);⁶
- EO 13547 (Stewardship of the Ocean, Our Coasts, and the Great Lakes);⁷
- EO 13514 (Federal Leadership in Environmental, Energy, and Economic Performance);⁸
- EO 13508 (Chesapeake Bay Protection and Restoration);⁹
- Secretary of the Interior issued Order No. 3338 (coal leasing moratorium on federal land);¹⁰ and
- Presidential Memorandum Climate Change and National Security (September 21, 2016).

II. Executive Actions to Freeze "Midnight Rules"

Shortly after Mr. Trump took the oath of office, White House chief of staff Reince Priebus issued a memorandum to all executive departments and agencies freezing all pending regulations. The moratorium postpones for 60 days the effective date for any regulation that has been published in the Federal Register, but has not yet gone into effect. The memo instructs agency heads to withdraw any regulation that had been sent to the Office of the Federal Register ("OFR") but not yet published so that the rules may be reviewed by the department or agency head appointed or designated by Trump. In addition, agency

heads are prohibited from sending any proposed or final regulation to the OFR until department or agency nominees have been confirmed and assumed office.

The memo also said that for regulations whose effective date has been delayed to review questions of fact, law, or policy, the agencies should consider potentially proposing further notice-and-comment rulemaking. For delayed regulations that raise substantial questions of law or policy, the memo said agencies should notify the OMB Director and take further appropriate action in consultation with the OMB Director.

The following proposed environmental regulations would appear to be subject to a moratorium (in reverse chronological order of publication date in the Federal Register):

- Procedures for Chemical Risk Evaluation under the Amended Toxic Substances Control Act;¹¹
- Trichloroethylene (TCE); Regulation of Use in Vapor Degreasing under TSCA §6(a);¹²
- Federal Acquisition Regulation: Sustainable Acquisition;¹³
- Accidental Release Prevention Requirements: Risk Management Programs under the Clean Air Act;¹⁴
- Financial Responsibility Requirements under CERCLA § 108(b) for Classes of Facilities in the Hard Rock Mining Industry;¹⁵
- Financial Responsibility Requirements for Facilities in the Chemical, Petroleum and Electric Power Industries;¹⁶
- Federal Plan Requirements for Commercial and Industrial Solid Waste Incineration Units;¹⁷
- Protection of Visibility: Amendments to Requirements for State Plans;¹⁸
- Addition of a Subsurface Intrusion Component to the Hazard Ranking System;¹⁹
- Addition of Natural Gas Processing Facilities to the Toxics Release Inventory (TRI);²⁰
- Revisions to the Regulations for Candidate Conservation Agreements with Assurances;²¹
- Trichloroethylene; Regulation of Certain Uses Under TSCA § 6(a);²²
- Formaldehyde Emission Standards for Composite Wood Products;²³
- Hazardous Waste Generator Improvements Rule;²⁴
- Energy Conservation Program: Energy Conservation Standards for Miscellaneous Refrigeration Products;²⁵

- National Emission Standards for Hazardous Air Pollutant Emissions: Petroleum Refinery Sector Amendments;²⁶
- Revisions to the Prevention of Significant Deterioration (PSD) and Title V Greenhouse Gas (GHG) Permitting Regulations and Establishment of a Significant Emissions Rate (SER) for GHG Emissions Under the PSD Program;²⁷
- Energy Conservation Standards for Uninterruptible Power Supplies;²⁸
- Corporate Average Fuel Economy (CAFE) for light-duty vehicles;²⁹
- National Emission Standards for Hazardous Air Pollutants for the Portland Cement Manufacturing Industry;³⁰ and
- Clean Energy Incentive Program Design Details (CEIP)³¹

The three prior administrations and President Reagan delayed so-called “midnight regulations” (regulations issued between the election and inauguration).³² However, history shows that only a very small percentage of the regulations that have been temporarily frozen end up being rescinded or significantly modified. For example, President Clinton repealed less than 10 percent of the midnight regulations issued by the outgoing George H.W. Bush Administration. Of the 90 rules subject to the freeze imposed by the George W. Bush Administration, one rule was withdrawn in its entirety, three rules were withdrawn and replaced, and nine others were altered (e.g., different implementation date or reporting requirement) by the Obama Administration. This is because to eliminate or change midnight regulations, a new administration would need to commence a new notice-and-comment rulemaking and provide a rational explanation for why the rule is no longer appropriate.³³ Courts have invalidated changes that did not comply with notice-and-comment rulemaking, especially where EPA did not make specific factual findings.³⁴

III. Rescinding Regulations Using the Congressional Review Act (CRA)

For recent Obama regulations that have already gone into effect, the Trump Administration will need to work with Congressional Republicans to identify and prioritize regulations that could be rescinded under the Congressional Review Act (CRA).³⁵ The CRA requires agencies to notify each house when regulations are issued. Congress has 60 “session” days from the date of the notification or after the rule is published in the Federal Register to issue a joint resolution of disapproval by a simple majority.

Once the disapproval resolution is signed by the president, the rule cannot go into effect or continue in effect.³⁶ Once rescinded, the executive branch is prohibited from reissuing it “in substantially the same form” or crafting a

new rule that is “substantially the same” unless Congress enacts legislation specifically authorizing it.

The Congressional Research Service (CRS) has estimated that the 60-day period for repealing regulations will apply to all federal rules adopted after May 30, 2016. Several conservative groups and the House Freedom Caucus have developed a “kill list” of environmental and energy-related regulations.³⁷ Based on the CRS lookback date and the regulatory “kill list,” the following rules that the Obama Administration finalized in 2016 could be subject to a disapproval resolution under the CRA:

- Stream Protection Rule;³⁸
- Energy Conservation Program: Energy Conservation Standards for Residential Dishwashers;³⁹
- National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System General Permit Remand Rule;⁴⁰

- Effluent Guidelines and Standards for the Oil and Gas Extraction Point Source Category;⁵¹
- Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources;⁵²
- Source Determination for Certain Emission Units in the Oil and Natural Gas Sector for PSD and NNSR;⁵³
- Energy Conservation Standards for Small, Large, and Very Large Air-Cooled Commercial Package Air Conditioning and Heating Equipment and Commercial Warm Air Furnaces.⁵⁴

Disapproval resolutions may only be enacted as individual regulations. While the CRA provides an expedited legislative path for disapproval resolutions and prohibits the use of filibusters in the Senate, each resolution is subject to up to ten hours of debate. Since Congress must pass a new budget, plans to repeal the Affordable Care

“In his 100-day plan, candidate Trump vowed to eliminate funding for ‘wasteful’ United Nations Climate Change programs and redirect the money towards his proposed domestic infrastructure program.”

- Greenhouse Gas Reporting Rule: Leak Detection Methodology Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems;⁴¹
- Hazardous Waste Export-Import Revisions;⁴²
- Management of Non-Federal Oil and Gas Rights;⁴³
- Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles-Phase 2;⁴⁴
- Review of the National Ambient Air Quality Standards for Lead;⁴⁵
- Occupational Exposure to Respirable Crystalline Silica;⁴⁶
- Finding That Greenhouse Gas Emissions from Aircraft Cause or Contribute to Air Pollution That May Reasonably Be Anticipated to Endanger Public Health and Welfare;⁴⁷
- Standards of Performance for Municipal Solid Waste Landfills;⁴⁸
- Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills;⁴⁹
- Enforcement of Regional Standards for Central Air Conditioners;⁵⁰

Act, and the Senate must complete confirmation hearings, it is unlikely that Congress could rescind more than a handful of regulations.

To address these constraints and enhance the use of the CRA, though, the House of Representatives recently passed the Midnight Rule Relief Act⁵⁵ that would amend the CRA to allow Congress to repeal groups of regulations *en masse* instead of one at a time. It is unclear if the Senate will approve this measure.

IV. Defunding Environmental Programs

In his 100-day plan, candidate Trump vowed to eliminate funding for “wasteful” United Nations Climate Change programs and redirect the money towards his proposed domestic infrastructure program. The programs at risk include the \$3 billion contribution to the Green Climate Fund as well as international climate change programming implemented by the Department of State, Department of Treasury, and the U.S. Agency for International Development. The new chair of the House State and Foreign Operations Appropriations Subcommittee led efforts last year to eliminate GCF funding. If Mr. Trump does not issue executive orders to cancel these commitments, Congress could eliminate funding for these initiatives and other environmental programs as part of the budget.

The federal government is currently funded under a continuing resolution (CR) that expires at the end of

April. Presumably, President Trump will propose his first budget before the expiration of the CR. Congress could use agency appropriations bills to further cut EPA's budget and prohibit the use of funds for specific regulations that cannot be rescinded through the CRA.

V. Regulatory Reform

Regulatory reform is perhaps the centerpiece of the Trump Administration's plan to stimulate economic growth. Indeed, the Administration's "America First Energy Plan" states that "President Trump is committed to eliminating harmful and unnecessary policies such as the Climate Action Plan and the Waters of the U.S. rule."⁵⁶

Congress is also considering bills that will make it harder for federal agencies to promulgate new regulations. Indeed, the House has already passed the "Regulations From the Executive in Need of Scrutiny Act," (REINS Act).⁵⁷ The bill would require congressional approval of federal regulations with an estimated annual economic impact of more than \$100 million. The Senate is considering its own version of a REINS Act.

The House recently passed the "Regulatory Accountability Act,"⁵⁸ which would, *inter alia*, require federal agencies to identify the objective of a proposed rule and choose the lowest-cost alternative. It would prevent rules projected to cost \$1 billion from taking effect until courts could resolve litigation brought against those agency actions.

Another bill under consideration by the House is the "Separation of Powers Restoration Act,"⁵⁹ which is designed to undercut the "*Chevron Doctrine*."⁶⁰ The bill would require courts to decide "de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules" instead of deferring to agency interpretation.

The "Sunshine for Regulatory Decrees and Settlements Act,"⁶¹ (a/k/a the "sue-and-settle" bill) would prevent environmental and other groups from compelling federal agency action through litigation. The measure requires that consent decrees and settlements be filed only after interested parties have had a chance to comment. The bill would establish a 60-day comment period and would require courts to incorporate the public comments in their rulings. The bill would also make it easier for a new administration to petition a court to modify consent decrees approved during past administrations.

In addition to legislation, a Trump Office of Information and Regulatory Affairs (OIRA) could make it more burdensome for EPA to issue new rules by requiring more review and analysis. OIRA will likely also reverse the Obama policy that federal agencies must calculate the "social cost of carbon" when proposing rules. As part of his 100-day plan, Mr. Trump promised to push a measure that would require federal agencies to eliminate two federal rules for every new regulation that is promulgated.

VI. Amending Environmental Laws

The House of Representatives will likely consider legislation to amend the Clean Air Act to clarify that Congress never delegated to the EPA the authority to address climate change.

Myron Ebell, the Director of the Center for Energy and Environment of the Competitive Enterprise Institute (CEI) headed the Trump-Pence Transition team for energy and environment. While the media identified Mr. Ebell as a skeptic on the extent climate change is a result of human activity,⁶² he is better known as a private property rights advocate.⁶³ So it would not be surprising if Congress also considers bills to restrict the scope of the Endangered Species Act, Clean Water Act, and National Environmental Protection Act (NEPA).

VII. Abandoning Pending Litigation

The Trump Administration will be inheriting a variety of ongoing lawsuits challenging the Clean Power Plan (CPP),⁶⁴ the Cross-State Air Pollution Rule,⁶⁵ the Brick MACT⁶⁶ SIP Call for SSM Excess Emissions, and the Waters of the United States (WOTUS) rule.⁶⁷ The administration could withdraw its appeal, or seek a stay or remand to revise or repeal the regulations. Environmental groups would likely file lawsuits if the Trump Administration reversed course on defending these regulations.

If the federal Court of Appeals for the District of Columbia Circuit upholds the CPP, the Trump administration could appeal the decision to the Supreme Court. If the court remands the CPP to EPA, the administration would have the opportunity to substantially revise or even repeal the rule, which of course would likely lead to a new round of litigation.

VIII. Enforcement and Devolution of Federal Superfund Programs

Mr. Pruitt is a longtime federalism advocate, and as the Oklahoma Attorney General he led the state coalition that has challenged Obama-era regulations involving the CPP, methane, ozone standards and regional haze program partially on grounds that these rules represented an overextension of federal power. Thus, the conventional wisdom is that a Pruitt-led EPA will grant more autonomy to the states to implement and enforce federally delegated environmental laws.⁶⁸

The new administration is reported to be considering devolving environmental programs to the states. Unlike "cooperative federalism" where states assume responsibility for administering the programs with the understanding that they shall meet minimum federal requirements, devolution appears to contemplate full withdrawal of federal rulemaking authority.

Devolution of delegated programs would likely require an act of Congress. However, one program that presumably would not require any congressional action

and that has been prominently mentioned as a likely candidate for devolution is the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund).⁶⁹ While CERCLA authorizes the president to respond to releases of hazardous substances, this is not a mandatory obligation. Moreover, although the President is required under Section 105 to create and annually update the National Priorities List (NPL), the President can defer listing sites that may be addressed under a state response program.⁷⁰

Most states have adopted their own versions of CERCLA, but the liability framework and funding of these “mini-superfunds” vary by state. Many state superfund laws do not confer the same authority to their state agencies as the President has under CERCLA. For example, the New York State superfund law⁷¹ does not provide the New York State Department of Environmental Conservation (NYSDEC) with the authority to issue unilateral administrative orders. Moreover, NYSDEC has to comply with cumbersome administrative procedures before listing a site on the Registry of Inactive Hazardous Disposal Sites (the state superfund list)—a process that was seemingly further complicated by the recent decision in *In re FMC Corp. v. N.Y. State Dep’t of Envtl. Conservation*.⁷² Even if the NYSDEC had such authority, it is unclear that the department could take over EPA’s workload as NYSDEC’s staffing has been reduced to levels not seen since the early 1980s, despite a substantially increased workload.

There are currently 85 active and two proposed NPL sites in New York. The EPA Region 2 office is implementing remedial actions or exercising oversight on PRP-lead O&M activities/post-ROD groundwater monitoring at 72 NPL sites. Region 2 also is implementing 30 fund-lead removal actions (non-NPL sites) in N.Y. In addition, EPA is responsible for conducting 5-Year Reviews at 87 sites.

In Fiscal Year 2016 (FY-2016), Region 2 spent \$17,555,647 on ongoing removals and new removal starts while expending \$61,443,530 on ongoing RAs and new remedial starts. Roughly half of the removal action funds were expended on New York sites. The value of injunctive relief secured by Region 2 through a variety of enforcement instruments was \$637.9 million (64% of the national total). In addition, Region 2 office secured \$17.2 million in cost recovery (31% of the national total).

NYSDEC is implementing cleanups or supervising cleanups at 369 active class 2 sites (after deleting NPL sites). The department is also responsible for supervising ongoing maintenance activities at 399 class 4 sites. Under the Brownfield Cleanup Program (BCP), NYSDEC is supervising cleanups at 394 sites and has oversight responsibility for approximately another 300 sites that have site management plans. The department has oversight on approximately 60 RCRA corrective action sites and 137 “P” sites.

It is hard to see how NYSDEC would have the resources to assume the CERCLA workload of EPA Region 2. Even if staffing levels were increased through a federal block grant (as part of a devolution process) or increased appropriation from the state legislature, it is unlikely that there would be sufficient funds in the state superfund, much less staffing resources, to perform removal actions and long-term remedial actions as well as carry out PRP searches. Indeed, both NYSDEC and the state Department of Health resources were severely strained by the Hoosick Falls crisis last year. Furthermore, NYSDEC has had to use CERCLA for cost recovery because of limitations of the state superfund law.

It is unclear if the incoming administration has considered the potential impact of CERCLA devolution on the federal brownfield program since the funding authority for the brownfield grants and revolving loans originates from CERCLA section 104.⁷³ In FY 2016, EPA awarded \$55.2 million in brownfield assessment, revolving loan fund, and cleanup grants.

IX. And Now for the Good News

When the George W. Bush administration was slow to adopt climate change policies, over 100 cities developed their own programs to reduce carbon emission. During the Obama era, most states adopted Renewal Portfolio Standards (RPS) and other programs to promote investments in renewable energy such as rooftop PV (photovoltaics) and utility-scale solar, which have transformed those markets. A Brookings Institution study found that between 2000 and 2014, 33 states and the District of Columbia cut carbon emissions. Another report by M. J. Bradley and Associates concluded that 21 of 27 states will be able to achieve compliance with the CPP 2022-2024 goals through their existing and planned investments, and 18 could achieve compliance through 2030. Thus, even if the Trump Administration dismantles the Obama Climate Change initiatives, there will still be regulatory pressure to reduce carbon emissions.

The Energy Department has reported that cost of land-based wind turbines has dropped 41 percent between 2008 and 2015.⁷⁴ Wind power accounted for 41% of all new generation capacity installed in the U.S. in 2015, and is one of the fastest growing segments of the manufacturing sector. Indeed, wind-farm technician is projected to be the fastest-growing occupation in America over the next decade. There is similar good news about solar power. The total wind, utility-scale, and distributed PV accounted for over 66% of all new capacity installed in the nation in 2015.

It is not surprising then that a recent *Wall Street Journal* article indicated that market forces are driving companies to lower their carbon emissions.⁷⁵ Also influencing corporate carbon policies are the increasing number of shareholder resolutions asking firms to cut carbon emissions, requiring greater disclosure of strategies to manage

climate risks, and seeking to link executive pay with sustainability performance. Many companies are choosing to engage with shareholders to address the concerns instead of putting resolutions to a vote.⁷⁶

X. Conclusion

If many long-time Section members are experiencing a sense of *déjà vu*, it may be because they have seen this movie before—in the 1980s. When the Reagan Administration swept into office in 1981, it froze 60 midnight regulations and sought deep cuts to the EPA budget.⁷⁷ In its first two years, the Reagan EPA workforce dropped nearly 40%. Enforcement referrals declined by almost 70%.⁷⁸ EPA missed its first deadline for publishing its initial NPL partially because the Office of Management and Budget denied a request to fund the amount appropriated by Congress to develop the NPL. By the end of fiscal year 1982, Superfund-financed cleanups were approximately one-third of the spending levels authorized by Congress.⁷⁹ There was bold rhetoric about amending the Clean Water Act and Clean Air Act.

However, the administration overplayed its hand and moved beyond the consensus that had evolved around environmental protection. The political backlash helped the Democrats regain the Senate in 1982. The House of Representatives held numerous hearings on Reagan environmental policies that culminated in the resignation of EPA Administrator Gorsuch. Congress also enacted proscriptive laws in the form of the Hazardous and Solid Waste Amendments (HSWA) of 1984 and the Superfund Amendments and Reauthorization Act (SARA) of 1986 that gave the Reagan EPA very little wiggle room.

As a result, the worst fears of environmentalists were not realized as the more draconian proposals were either not enacted or were tied up in court until the end of the administration. By the end of the Reagan era, conservative groups were calling the Reagan environmental record as the “Squandered Opportunity.” Based on the level of fear in the environmental community, I suspect many would be relieved if the same could be said of the Trump era.⁸⁰

Hopefully, the Trump Administration will learn from the missteps of the Reagan Administration so that its environmental policies will not be as harsh as the campaign rhetoric. In any event, the Section is planning a program on the implications of the Trump Administration in March and will continue to monitor developments especially on how administrative or legislative actions may impact the practice of environmental law in New York. I also expect that our various committees will closely follow developments in Washington D.C, Region 2 and Albany, and keep Section members apprised through timely webinars, programming, the Section Community Page, and our journal.

Larry Schnapf

* With apologies to the late and beloved Lawrence Peter “Yogi” Berra and Joe Garagiola (who made up most of what Yogi never said).

Endnotes

1. <https://www.whitehouse.gov/america-first-energy>.
2. 80 FR 15871 (March 25, 2015).
3. 79 FR 58231 (September 26, 2014).
4. 78 FR 66819 (November 6, 2013).
5. 77 FR 54779 (September 5, 2012).
6. 77 FR 23107 (April 17, 2012).
7. 75 FR 43023 (July 22, 2010).
8. 74 FR 52117 (October 8, 2009).
9. 74 FR 23099 (May 15, 2009).
10. 81 FR 17720 (March 30, 2016).
11. 81 FR 7562 (January 19, 2017).
12. 81 FR 7432 (January 19, 2017).
13. 81 FR 5490 (January 18, 2017).
14. 81 FR 4594 (January 13, 2017).
15. 81 FR 3388 (January 11, 2017).
16. 81 FR 3512 (January 11, 2017).
17. 81 FR 3554 (January 11, 2017).
18. 81 FR 3078 (January 10, 2017).
19. 81 FR 2760 (January 9, 2017).
20. 81 FR 1651 (January 6, 2017).
21. 81 FR 95053 (December 27, 2016).
22. 81 FR 91592 (December 16, 2016).
23. 81 FR 89674 (December 12, 2016).
24. 81 FR 85732 (November 28, 2016).
25. 81 FR 75194 (October 28, 2016).
26. 81 FR 71661 (October 18, 2016).
27. 81 FR 68110 (Oct. 3, 2016).
28. 81 FR 52196 (Aug. 5, 2016).
29. 81 FR 49217 (July 27, 2016).
30. 81 FR 48372 (July 25, 2016).
31. 81 FR 42940 (June 30, 2016).
32. See *Memorandum from Rahm Emanuel to the Heads and Acting Heads of Executive Departments and Agencies*, 74 Fed. Reg. 4435-02 (Jan. 26, 2009); *Memorandum for the Heads and Acting Heads of Executive Departments and Agencies*, 66 Fed. Reg. 7702 (Jan. 24, 2001); *Memorandum for the Heads and Acting Heads of Agencies Described in Section 1(d) of Executive Order 12291*, 58 Fed. Reg. 6074, 6074 (Jan. 25, 1993); Executive Order 12291, “Federal Regulation,” 46 Federal Register 13193, February 17, 1981. Note that President George H.W. Bush issued a regulatory moratorium during the last year of his administration. See *Memorandum on Reducing the Burden of Government Regulation*, 1 PUB. PAPERS 166 (Jan. 28, 1992).
33. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).
34. See, e.g., *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir., 2008) (vacating Clean Air Mercury Rule); *Nat. Res. Def. Council v. Abraham*, 355 F.3d 179 (2d Cir. 2004); *Env’tl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802 (D.C. Cir. 1983); *Nat. Res. Def. Council v. EPA*, 683 F.2d 752, 761-63 (3d Cir. 1982).
35. 5 U.S.C. § 801-808.

36. In 2016, President Obama vetoed S.J. Res. 23 which sought to rescind the “Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units,” 80 FR 64510 (October 23, 2015).
37. The Department of Energy played a key role in the climate strategy of the Obama administration and issued more efficiency standards than the previous two administrations combined.
38. 81 F.R. 93,066 (December, 20, 2016).
39. 81 FR 90072 (December 13, 2016).
40. 81 FR 89320 (December, 9, 2016).
41. 81 FR 86490 (November 30 2016).
42. 81 FR 85696 (November 28, 2016).
43. 81 FR 79948 (November 14, 2016).
44. 81 FR 73478 (October 25, 2016).
45. 81 FR 71906 (October 18, 2016).
46. 81 FR 60272 (September 1, 2016).
47. 81 FR 54422 (August 15, 2016).
48. 81 FR 59332 (August 29, 2016).
49. 81 FR 59276 (August 29, 2016).
50. 81 FR 45387 (July 14, 2016).
51. 81 FR 41845 (June 28, 2016).
52. 81 FR 35824 (June 3, 2016).
53. 81 FR 35622 (June 2, 2016).
54. 81 FR 32628 (May 24, 2016).
55. H.R. 21.
56. <https://www.whitehouse.gov/america-first-energy>.
57. H.R. 26.
58. H.R. 5.
59. H.R. 76.
60. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).
61. S. 119.
62. Mr. Ebell was a co-author of the Energy and Environment chapter of CEI’s “Free to Prosper: A Pro-Growth Agenda for the 115th Congress.” Among the recommendations in that chapter are to overturn or defund EPA’s efforts to implement CPP, defund the United Nations Framework Convention on Climate Change (UNFCCC), and freeze and sunset the Renewable Fuel Standard (RFS). Available at: <https://cei.org/sites/default/files/CEI%20Agenda%20for%20Congress%202017%20-%20CH4%20-%20Energy%20and%20Environment.pdf>.
63. Mr. Ebell also co-authored the “Environmental Protection on Private and Public Lands” chapter of the same CEI publication. Available at: https://cei.org/sites/default/files/CEI%20Agenda%20for%20Congress%202017_Environmental%20Protection.pdf.
64. The CPP consists of two rulemakings issued under sections 111(b) and 111(d) of the Clean Air Act. See “Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 FR 64510 (Oct. 23, 2015)” and “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 FR 64662 (Oct. 23, 2015).” On February 9, 2016, the Supreme Court stayed implementation of the Clean Power Plan. In May, the U.S. Court of Appeals for the District of Columbia Circuit entered an Order in *West Virginia v. EPA* directing that oral argument in the consolidated cases would be heard *en banc*. Despite the stay, EPA moved forward with certain actions to provide support to states that are continuing to work on compliance plans despite the stay such as finalizing the Clean Energy Incentive Program (CEIP), which is intended to encourage energy efficiency projects as part of the agency’s early action incentive program.
65. Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 FR 74504 (Oct. 26, 2016).
66. 80 Fed. Reg. 65,470 (Oct. 26, 2015), 81 Fed. Reg. 31,234 (May 18, 2016) (“Brick MACT Reconsideration Rule”).
67. Clean Water Rule: Definition of “Waters of the United States,” 80 FR 37054 (June 29, 2015).
68. The key delegated environmental laws are the Clean Water Act (CWA), 33 U.S.C. 1251 et seq.; Clean Air Act (CAA), 42 U.S.C. 7401 et seq.; and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 et seq.
69. 42 U.S.C. 9601 et seq.
70. 42 U.S.C. 9605(h).
71. ECL 27-1301 et seq.
72. N.Y. App. Div., 3d Dep’t, No. 522187 (10/20/16).
73. 42 U.S.C. 9604(k).
74. The Future Arrives for Five Clean Energy Technologies – 2016 Update. Available at: https://energy.gov/sites/prod/files/2016/09/f33/Revolutiona%CC%82%E2%82%ACNow%202016%20Report_2.pdf.
75. “Companies on Climate: Trump or No, Still Cutting Emissions,” WSJ December 8, 2016, available at <http://www.wsj.com/articles/as-trump-knocks-obama-on-climate-firms-recommit-to-carbon-reduction-1481218505>.
76. Environmental Proxy Proposals Are Making More Demands, WSJ, November 28, 2016, available at <http://blogs.wsj.com/riskandcompliance/2016/11/28/environmental-proxy-proposals-are-making-more-demands>.
77. GAO “Potential Impacts of Reducing the Environmental Protection Agency’s Budget” (GAO/RCED 83-75 December 30, 1982).
78. See Joel A Mintz, “A Review of EPA’s Hazardous Waste Enforcement Effort,” 18 *Envtl. L.* 683, 718 (Summer 1988) (“The ‘file first, negotiate later’ attitude of the Carter administration was replaced by the notion that, as one EPA enforcement attorney stated it, ‘[Y]ou were to talk first and file later only if it was absolutely necessary and only if you could clear it with headquarters.’” Informal attempts at encouraging “voluntary compliance” became the enforcement procedure of choice. At least one EPA regional administrator was directly informed by William Sullivan, the agency’s enforcement counsel, that every enforcement case referred to headquarters by his region “‘will be considered a black mark against you.’” Considerable emphasis was also placed upon deferring federal enforcement activities in favor of state enforcement”).
79. See GAO “Environmental Protection Agency’s Progress in Implementing the Superfund Program” (GAO/RCED-82-91 June 2, 1982) available at: <http://ec2-52-72-239-167.compute-1.amazonaws.com/assets/140/137792.pdf>.
80. *Reagan and Environment: To Many, a Stalemate*, NYT, Jan. 2, 1989, available at: <http://www.nytimes.com/1989/01/02/us/reagan-and-environment-to-many-a-stalemate.html?pagewanted=all>.

Message from the Editor-in-Chief

We can expect many changes as the country transitions from the Obama administration to a Trump administration. How environmental protection and conservation are addressed is a change for which we as a section must prepare.

Minutes after Trump was sworn in, the White House website changed. I searched the term “climate change” on the website and nothing—nothing at all!—came up. So I searched the term “energy” and got a link to a page titled “An America First Energy Plan.” This and Trump’s list of cabinet members who will address environmental and energy issues, if confirmed, tell us what his environmental policy will look like

The White House’s “An America First Energy Plan” page lays out in broad strokes the new administration’s position and plan for energy and the environment. It does not include a climate policy, but instead states that “[f]or too long, we’ve been held back by burdensome regulations on our energy industry.” The administration “is committed to eliminating harmful and unnecessary policies such as the Climate Action Plan and the Waters of the U.S. rule.” This just as we have learned that for the first time since climate change data has been collected, temperatures have shot past the previous record three years in a row. The plan goes on to state that “[s]ound energy policy begins with the recognition that we have vast untapped domestic energy reserves right here in America. ... We must take advantage of the...untapped shale, oil, and natural gas reserves, especially those on federal lands....” In direct contradiction, the plan goes on to declare at the end that “[p]rotecting clean air and clean water, conserving our natural habitats, and preserving our natural reserves and resources will remain a high priority. ...[and this administration] will refocus the EPA on its essential mission of protecting our air and water.”

On inauguration day, the administration froze all new or pending regulations. However, to roll back the laws that were finalized during Obama’s eight-year term, acts of Congress will be needed. Nevertheless, Trump plans to reorganize domestic energy and environmental priorities, and to withdraw the United States from the Paris climate accord. He plans to open onshore and offshore leasing on federal lands and waters to encourage the production of fossil fuel resources in an effort to make America energy independent. The Trump administration says it “will end the war on coal,” review all anti-coal regulations, and reopen shuttered coal mines. Trump wants to reduce the



role of the United States Environmental Protection Agency (EPA) to an advisory one and scrap the Climate Action Plan and the Clean Power Plan, President Obama’s plan to move utilities toward lower carbon emissions. It is Trump’s view that these steps will lead to “more jobs, more revenues, more wealth, higher wages, and lower energy prices.”

Trump selected Myron Ebell to run the EPA working group on his transition team. Ebell is the director of energy and environmental policy at Competitive Enterprise Institute, and is known around the world as one of America’s most prominent climate-change skeptics.

He has selected Scott Pruitt, the Oklahoma attorney general and a friend of the fossil fuel industry, to run the EPA. Mr. Pruitt has been a leader in the legal battle against Obama’s climate change policies. As of the date of this writing, Pruitt has not agreed to recuse himself from those pending suits he filed against the EPA.

Trump’s pick for energy secretary, former Texas Governor Rick Perry, proposed scrapping the Energy Department in 2011. His selection is a promise that there will be an emphasis on energy sources like coal and oil, rather than on clean energy sources like wind and solar.

Ryan Zinke, Montana’s freshman representative and a former Navy SEAL commander, was selected as Interior Secretary. Zinke is a strong advocate for American energy independence. He supports a policy that includes renewable, alternative, and fossil fuel energy. He wants to cut through the bureaucracy to ensure that the national parks, forests, and other public lands are “used effectively.”

Finally, with another nod to big oil, Trump has chosen ExxonMobil CEO Rex Tillerson to serve as secretary of state.

These appointments are a significant indication of the direction we can expect Trump’s environmental and energy policies to take.

Although it could take a while for Trump to withdraw the U.S. from the Paris accord, in the meantime we can expect him to not enforce its guidelines and to repeal climate change regulations put in place under President Obama’s administration. Trump will not face a lot of resistance from a Republican Congress, but pulling out would have implications for Trump’s dealings with foreign leaders. On the other hand, fossil fuel industry advocates will see much opportunity in this policy change, such as opening of more public land and offshore areas to drilling, and building more energy infrastructure.

The coal industry is buoyed by Mr. Trump’s promises to rescind the coal mining lease moratorium and repeal anti-coal regulations. It is the coal sector’s view that it has suffered lower demand and job loss as a result of the im-

pact of regulations directed at its industry. Nevertheless, it is unlikely that coal is going to make a comeback. It remains to be seen whether the steps Trump takes, if any, to increase the use of coal will make economic sense. Coal is a fuel that is being phased out because of its pollution *and* because of the falling prices of renewables. Investors are choosing solar and wind because of economics.

During his campaign, Trump showed a lack of interest in wind and solar and voiced his intention to end federal spending on renewables in order to support a fossil fuel energy policy. His America First Energy Plan supports this intent. However, if the United States falls behind economically because the renewables energy market is being ignored, we can hope that the Trump administration will rethink this position. The best innovators in the world are going to be the ones who get out in front and take the advantage in the developing energy market.

One of Trump's promises is certain to be carried out—his plan to eliminate EPA's Clean Power Plan. The Clean Power Plan limits greenhouse gas emissions from existing fossil fuel-fired power plants. The rule considers the states' ability to shift power generation to cleaner sources. The Clean Power Plan is under review by the U.S. Court of Appeals, in a suit brought by 27 states and a few corporate interests, over whether EPA properly exercised its authority under the Clean Air Act. The case is expected to go to the Supreme Court next year. Legal commentators have suggested that Trump has several options for addressing the Clean Power Plan. He could not defend it in court, rescind the rule, or ask Congress for support in blocking it.

It seems that the Trump administration is nostalgic for those good ol' days before "burdensome regulations." Let's take a quick stroll down memory lane and remind ourselves of what the New York City skyline looked like in the 1970s, at the dawn of the environmental movement, the birth of the EPA, and the passing of the first environmental laws. https://c1.staticflickr.com/1/587/23584760246_eea286f107_b.jpg (see cover photo).

Now let's take a look at what the skyline looks like today. https://upload.wikimedia.org/wikipedia/commons/4/41/Lower_Manhattan_from_Jersey_City_November_2014_panorama_2.jpg (see cover photo).

The actions Trump has promised to take are in keeping with his plans to reduce federal regulation, and to move away from a strong central government. Trump's anti-regulation position is based on a view that the economy will grow if business is free of the control of an over-powerful federal government. It is important to keep in mind that this position anticipates that the states will retain their authority to regulate and we may see states take up the slack. As federal environmental programs are gutted, states are likely to take steps to control their environmental affairs. This will mean a lack of uniformity across the country, and neighboring and downwind, downgradient states could end up with complaints about pollution impacts from states with less stringent environmental regulation. Significantly for businesses in New York, the state has a robust environmental conservation and protection program. We can expect that New York will continue its environmental regulatory program throughout the term of the new administration.

Many questions remain about what Trump's environmental policy will look like, but one thing is certain: we are going to see a rollback of all efforts to combat climate change, including the repealing of regulations, a push for increased fossil fuel development, and a limiting of the work of energy regulators. In the face of this expectation, we will see the states take on a more significant role in environmental protection and energy regulation.

NYSBA Environmental Law Section members must do what we can to support New York State's efforts to protect and conserve the environment. In the face of Trump's war on the environment, we must make our voices heard here at home as well as in Washington, D.C., across the country, and around the world.

Miriam E. Villani

NEW YORK STATE BAR ASSOCIATION

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Message from the Issue Editor

The recent election raises some significant questions about the future of environmental regulation at the federal level. This issue contains three articles related to energy efficiency, as we have chosen to focus our attention on specific areas of regulation rather than big picture potential changes on the political horizon. The articles address energy efficiency from three different perspectives. This issue includes an article that addresses the role of energy efficiency in Clean Air Act permitting, an article proposing that New York City require energy efficiency improvements in homes, and an article summarizing recent developments in environmental law on Long Island, one of which is an initiative to encourage energy efficiency improvements.

The article by Channing Jones contains a proposal for the use of supply-side energy efficiency as BACT (best available control technology) under the Clean Air Act. There is general agreement that energy efficiency is a meaningful action with regard to climate change. The article takes that to the next step and examines how regulators can use energy efficiency in the air permitting process.

The article by Danielle Spiegel-Feld is a proposal that New York City require energy efficiency in private homes. The article addresses the reasons for such a requirement, the legal mechanisms the City could use to implement it, and includes a discussion of the potential legal chal-

lenges. The discussion of the potential legal challenges examines the case law that has developed in response to similar types of government requirements. The article is part of a larger Policy Brief being prepared by the authors at the Guarini Center on Environmental, Energy, and Land Use Law.

The article by Lilia Factor reviews recent developments in environmental law on Long Island, with a focus on local regulatory changes. Among the key changes are a local law passed in Nassau County to encourage renewable energy systems and energy efficiency improvements, an amendment to the Brookhaven Town Code regarding solar energy production, and a number of developments regarding offshore wind energy projects.

The substantive legal portion of this issue also includes student reviews of recent cases. We appreciate the work of the students in identifying relevant recent decisions as well as the work of our committee member Keith Hirokawa in assisting the students.

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

Aaron Gershonowitz

Message from the Student Editorial Board

On January 20, 2017, President-elect Donald Trump became President Trump. Although I am deeply concerned about the transition to the Trump administration for a number of reasons, it is clear that environmental policy is vulnerable. Following his mess of campaign promises, Mr. Trump appears to have modified some of his views—he presently concedes that there may be some relationship between humans and climate change instead of calling climate change a hoax—but he continues to tout plans to dismantle the regulatory state and alter the way we create environmental policy.

Judging from his Tweets alone, it appears Mr. Trump does not understand the significance of a healthy environment to the well-being of the nation. Every aspect of a progressive economy relies on sustainable harvests of natural resources, productive ecosystems to deliver goods and services to people, and a reliable system of green and grey infrastructure to support the connectivity of people and places. Trump's vision in his anti-environmental agenda, which includes pulling out of the Paris climate accord and undermining the Environmental Protection Agency (EPA), destabilizes our hard-fought expectations of the quality of our environment, both physically and in politics. Notwithstanding Trump's underestimation of the

difficulties such political revolutions may face, his vision seems shortsighted at best.

Since its establishment in 1970, the Environmental Protection Agency (EPA) has proven itself to be the solution to an entrenched business practice of carefree pollution. EPA has played an essential role in the provision of potable water and breathable air, remediation of contaminated sites, protection of vulnerable ecosystems, and even the education of the nation on preventing environmental and health problems in the future. EPA has been successful in creating a regulatory machine to manage how we use the environment, and has done so in a way that maximizes efficiency. But Mr. Trump does not like the EPA.

President Obama committed the United States as one of 195 countries pledging to change "business as usual" sufficient to limit the increase of global temperatures. It was a very presidential thing to do. In the first six months of 2016 alone, the world saw the warmest months on record, setting a record for the warmest half-year ever recorded. Mr. Trump will inherit a United States that is cooperating with the world in facing this very present

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Message from the Student Editorial Board

Continued from page 13

challenge. But Mr. Trump does not like addressing climate change.

The Obama Administration pursued its climate mitigation agenda by crafting the Clean Power Plan. The goal of this Plan is to take real and effective action on climate change by substantially reducing carbon pollution from U.S. power plants. The plan is complete and its implementation marks the first sincere effort our government has taken to address the causes and intensity of oncoming climate changes. But Mr. Trump does not like the Clean Power Plan.

Under the pro-environmental stance furthered by President Obama's administration, a moratorium was placed on fracking and drilling for energy recovery in federal areas. Mr. Trump and his administration apparently plan to lift the moratorium. Fracking is a technique used to release natural gas contained in shale by pumping water that contains chemicals into the ground creating fractures, which releases hydrocarbons. This process has detrimental environmental effects including: ground-water pollution, air pollution, human exposure to toxic chemicals, and infrastructure degradation. Many feel that the negative, long-term impacts from fracking require a

regulatory infrastructure that is more protective of human health. But Mr. Trump does not like regulation.

The policies and laws that Mr. Trump plans to sack or roll back are likely to transition our nation into a new and damaging era of environmental policy. His views on the environment were cemented with his nomination of Scott Pruitt—a climate change skeptic and attorney general of Oklahoma (one of the most intensive oil and gas producing states)—as the head of the EPA. Ironically, many worried that the Trump appointment would transform the EPA from a hands-on agency of experts dedicated to protecting human health and the environment to a hands-off, passive spectator agency. Instead, we are confronted with the likelihood of a hands-on critic of environmental protection who denies one of the most formidable threats to human health that humans have known.

So what now? The evidence suggests that Mr. Trump intends to buck traditions, uproot expectations, and clear a path through the regulatory forest that we now refer to as environmental law. The result is likely to undermine our expectations and confidence, both for the environment and also, more generally, for the system of law. After all, Mr. Trump does not like the law.

Linnea E. Riegel, for the SEB
Albany Law School '18

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Nixon Peabody LLP, Rochester, NY

EPA Update

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



Mary McHale



Chris Saporita



Joseph A. Siegel



Marla E. Wieder

Transition at EPA

Maybe the Greek philosopher Heraclitus of Ephesus said it best when he stated that the only thing that is constant is change. At the time of the drafting of this article we are only a few weeks out after election day and all indications are that there are significant changes on the horizon for EPA. In early December, President-elect Trump announced his pick of Scott Pruitt, the Oklahoma attorney general, to run the EPA. The Transition Team will be landing in Headquarters and possibly by the time of the publication of this article, the new administration will be starting to usher in a slate of appointees with starkly different priorities than the prior administration.

Superfund Update

CERCLA Financial Responsibility—Hardrock Mining

Section 108(b) of CERCLA gives the EPA the authority to require that classes of facilities establish and maintain evidence of financial responsibility. This financial responsibility is used to demonstrate the owner or operator's ability to cover the costs associated with releases or threatened releases of hazardous substances from their facilities. In July 2009, the EPA identified certain hardrock mining and mineral processing facilities as its first priority for the development of financial responsibility requirements. The EPA's research indicated that this industry typically operates on a large scale, and, in some situations, subsequent exposure of humans, organisms, and ecosystems to hazardous substances occurs on a similarly large scale. Hardrock mining facilities generate an enormous volume of waste, which may increase the risk of hazardous substance release.¹ While environmentalists have long argued that the financial assurance required for mining operations was inadequate, industry and trade groups have questioned the need for new bonding requirements.²

On December 1, 2016, the EPA proposed financial responsibility requirements for the industry. A public comment period will begin after publication in the Federal

Register. For a summary of the proposed rule and additional resources, see <https://www.epa.gov/superfund/proposed-rule-financial-responsibility-requirements-under-cercla-section-108b-classes>.

Additional Industries

In December 2016, the EPA also published a notice describing its plan to consider financial requirements under CERCLA for the electric power generation, transmission and distribution industry; the chemical manufacturing industry; and the petroleum and coal products manufacturing industry. The notice explains that EPA intends to move forward with the regulatory process, which will determine, what, if any, financial responsibility requirements are necessary for these industries. For more on this, see <https://www.epa.gov/superfund/superfund-financial-responsibility>.

NPL Listings and Proposals

In September, the EPA added 10 and proposed to add eight hazardous waste sites to the National Priorities List (NPL). These sites have contamination from a variety of sources, including manufacturing, mining, battery recycling and dry cleaning.³ In our area, the EPA added a portion of **Wappinger Creek in Dutchess County, New York** to the list. Sediment within the two-mile-long tidal portion of the creek, which is downstream from an industrial park, is contaminated with mercury, polycyclic aromatic hydrocarbons and other pollutants. For nearly 200 years, an industrial park along the creek was used for hat manufacturing, textile dyeing, manufactured gas plant operations, metal plating, ammunition production, chemical manufacturing and other activities. These activities contaminated the creek and surrounding communities. There have been several investigations and cleanups within the industrial park; however, contamination adjacent to and downstream of the industrial park still presents a risk. The portion of the creek that has been placed on NPL includes locations in the Village of Wappingers Falls and the Towns of Poughkeepsie and Wappinger.⁴

Among the sites proposed for addition to the NPL, was the **Saint-Gobain Performance Plastics Site in the Village of Hoosick Falls, New York**. Groundwater at the facility is contaminated with Perfluorooctanoic Acid (PFOA) and Trichloroethylene. Groundwater supplying the village's public water supply wells is contaminated with PFOA, as well as Vinyl Chloride and 1,2-Dichloroethane (1,2-DCA). The Vinyl Chloride and 1,2-DCA are both below EPA drinking water standards. The Village of Hoosick Falls has added carbon filtration to its public water supply, thereby providing clean water to local residents.⁵

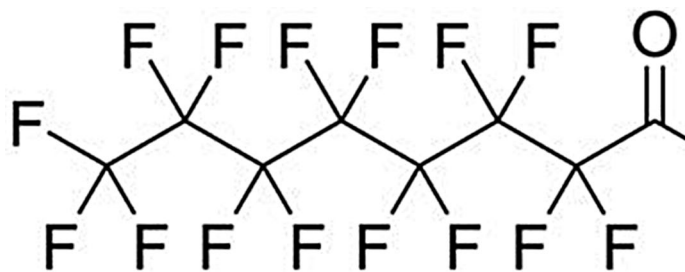
The facility was built in 1961, and had been used to manufacture circuit board laminates, polytetrafluoroethylene (PTFE)-coated fiberglass and other PTFE products. In 1999, Saint-Gobain Performance Plastics purchased the facility and began operations there, using PFOA in its manufacturing process. PFOA belongs to a group of chemicals used to make household and commercial products that resist heat and chemical reactions and repel oil, stains, grease and water. PFOA does not break down easily and therefore is very persistent in the environment. In 2006, the EPA reached a nationwide agreement with eight manufacturers to phase out the production and use of PFOA. These manufacturers stopped using PFOA in 2015.⁶

In January 2016, the New York State Department of Environmental Conservation (NYSDEC) added the site to the state's Superfund list and nominated it for inclusion on the NPL. In April 2016, the EPA installed groundwater monitoring wells near the facility and in May 2016, conducted groundwater sampling at and around the facility. In mid-May, the EPA conducted drinking water sampling at wells used by the Village of Hoosick Falls.⁷ For Federal Register notices and supporting documents for the final and proposed sites, see: <http://www.epa.gov/superfund/current-npl-updates-new-proposed-npl-sites-and-new-npl-sites>.

Jackson Steel off the NPL

In August, the EPA proposed deleting the **Jackson Steel Superfund site in Mineola, N.Y.** from the NPL. A cleanup of contaminated soil and groundwater contaminated with VOCs, pesticides and metals has been completed and the site no longer poses a threat to public health and the environment.⁸ As no viable responsible parties have been identified for this site, the cleanup was funded by the EPA Superfund program with taxpayer dollars at a cost of \$8.3 million.

The 1.5-acre Jackson Steel Superfund site includes a one-story 43,000-square-foot building formerly used as a metals manufacturing facility and an approximately 10,000-square foot paved parking area. The facility operated from 1970 through 1991. As part of its operation, the company used solvents as degreasers and improperly disposed of the solvents on-site. The EPA listed the site



on the NPL in February 2000. The EPA installed a system to remove volatile organic compounds from the soil and treated the contaminated groundwater. Groundwater standards have been met as a result of the treatment. The EPA also excavated and disposed of contaminated soil and materials in dry wells and sumps, and the building floor was decontaminated.⁹ As a result of the detection of vapor intrusion at an adjacent daycare center and billiards club, the EPA installed vapor mitigation systems in 2002. The systems will continue to operate and the EPA will continue to conduct periodic reviews to ensure that the cleanup continues to be protective.¹⁰

Super Fun [sic] Cleanups and Reviews

Hudson River Five-Year Review

After six seasons of in-river work, dredging to remove PCBs from a 40-mile stretch of the upper Hudson River between Troy and Fort Edward, New York was completed in the fall of 2015. The EPA has begun its second five-year review of the Hudson River PCBs Superfund site. The purpose of this review is to ensure that the cleanup is working as intended and will be protective of public health and the environment. The review will include an evaluation of all available data for the project, including fish, water and sediment data, as well as the new data to be collected this spring and summer.¹¹ The first five-year review for the site was completed in 2012.

As part of the EPA's commitment to conduct the five-year review in a transparent manner, the EPA held several public workshops with the Hudson River PCBs Site Community Advisory Group (CAG) to discuss the review. Following an evaluation of data and discussions with the federal Hudson River Natural Resources Trustees, New York State and the CAG, the EPA expects to issue the second five-year review report early 2017 and will make it available for public comment. The second five-year review should be completed by April 2017.¹²

Kentucky Avenue Wellfield Site

In July, the EPA proposed a plan to address contaminated soil and sediment at **Koppers Pond, a part of the Kentucky Avenue Wellfield Superfund site** in the Village of Horseheads in Chemung County N.Y. The pond is contaminated with PCBs and heavy metals. The Kentucky Avenue Wellfield site was added to the federal Superfund list in 1983 following detection of trichloroethylene (TCE) in a public water supply. Since the 1980s,

several cleanup actions were taken at the site, including the closing of the wellfield and connecting residents on private wells to the public water supply. In addition, TCE-contaminated soil was removed, a groundwater treatment system was installed and PCB-contaminated sediment in the ditch that connects to Koppers Pond was removed. The proposed plan would require an underwater cap on the pond's bottom and continued restrictions on how the area can be used in the future to ensure the integrity of the cap. Long-term monitoring of the sediment and fish will be conducted and the fish advisories will be updated as needed.¹³

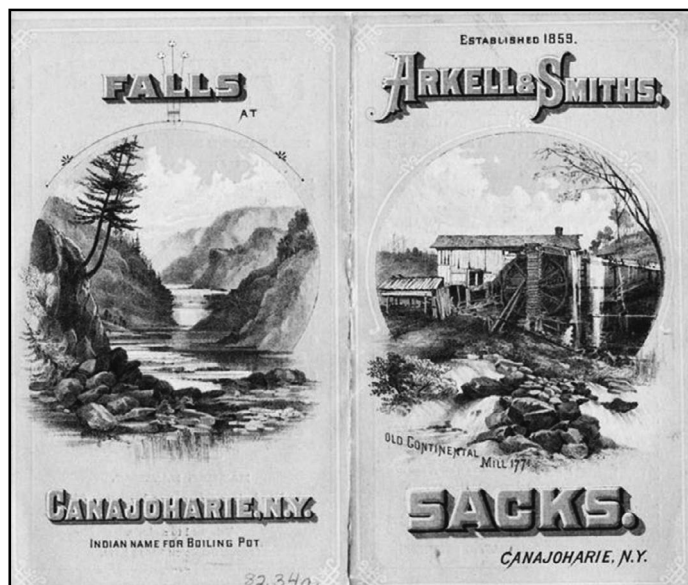
Eighteen Mile Creek, Part 2

In late August, the EPA proposed a plan to address contamination in the Creek Corridor portion of the **Eighteen Mile Creek Superfund Site, in Lockport, N.Y.** The Creek Corridor is approximately one mile in length and extends from the Erie Canal to Harwood Street in the City of Lockport. The creek and several adjacent properties are contaminated with PCBs and other contaminants, including lead. The plan, which is the second phase of cleanup at this site, calls for the complete removal of contaminated sediment in the Creek Corridor. The plan also proposes a combination of excavation and off of the site disposal, capping, and institutional controls to address contaminated soil at Upson Park, the former Flintkote Plant, White Transportation, and former United Paperboard Company properties. During the removal of contaminated sediment, the dilapidated Clinton and William Street dams would be removed. This portion of the site cleanup may cost an estimated \$23 million.¹⁴

Eighteen Mile Creek has a long history of industrial use dating back to the 1800s when it was used as a source of hydropower. The site was placed on the NPL in March 2012. Investigations at the site show that sediment and soil in and around the creek and nearby properties are contaminated with variety of pollutants, including PCBs and lead. In June 2013, EPA outlined a three-phase approach to site cleanup. The initial phase, which involved demolition at the residential and Flintkote building properties, was completed in 2016. The second phase of the cleanup, which is discussed above, involves the Creek Corridor. The third phase of cleanup, which is still in the investigation stage, will address groundwater and contaminated sediment in the creek from Lockport to its discharge in Lake Ontario.¹⁵

Arkell and Smiths Asbestos Site

The EPA's removal program has been working to stop the potential spread of asbestos at the former Arkell and Smiths Sack Co. facility in Canajoharie, N.Y. The original factory was built in the 1860s and was once home to the manufacturer of the first flat-bottom paper sack. The property was sold in 2007 and fell into disrepair. The site is 2.6 acres and contained seven interconnected collapsing buildings. In February of 2016, the EPA took building and



debris samples and determined that the asbestos from badly deteriorating structures on the site has the potential to impact the surrounding area. Several homes are located within 30 feet of the site. In September 2016, the EPA began demolition activities on structures that were observed to be partially collapsed and in jeopardy of additional collapses that would potentially release asbestos fibers. In October and November, portions of several buildings were demolished. Approximately 1,800 tons of asbestos-containing debris was sent to approved landfills and about 55 tons of scrap metal was sent for recycling. The EPA plans to continue demolition and off-site disposal activities at the site in spring 2017.¹⁶ For more information about asbestos, please visit: <http://www.epa.gov/asbestos>.

Soil Cleanup at Li Tungsten

In October, the EPA finalized its plan to conduct additional excavation of contaminated soil in some areas of the former **Li Tungsten Property in Glen Cove, N.Y.**, an inactive tungsten processing facility. Soil at the site is contaminated with arsenic, lead, and heavy metals. The cleanup plan includes removing and disposing of approximately 8,500 cubic yards of contaminated soil from portions of the site and backfilling the area with clean soil or provide covering. The final plan requires continued restrictions on how the site can be used in the future to ensure that activities at the site do not interfere with the cleanup.¹⁷ The cleanup plan builds on previous work undertaken at the site. The EPA previously excavated about 120,000 cubic yards of contaminated waste, some of it radioactive, from the adjacent cove. The EPA also removed the contents of approximately 270 chemical storage tanks, and demolished two unstable buildings from the property.¹⁸ Liable parties have funded the vast majority of the cleanups that have occurred to date at this site, and the current \$3.2 million remedial action will be funded through prior settlements with liable parties and performed by the EPA. The cleanup plan, including the

EPA's response to public comments, is available at: www.epa.gov/superfund/li-tungsten.

Agreement with Oxy on Passaic

In early October, the EPA announced an agreement with Occidental Chemical Corporation (Occidental), one of more than 100 parties identified as potentially responsible for contamination of the lower Passaic River, to perform engineering and design work needed to begin the cleanup of the lower 8.3 miles of the River. This work, valued at about \$165 million, includes sampling, evaluating technologies, and undertaking a remedial design effort. Occidental will also pay for the EPA's oversight costs. The EPA will pursue additional agreements with the other responsible parties.¹⁹

In March 2016, the EPA issued its final plan to remove 3.5 million cubic yards of toxic sediment from the lower 8.3 miles of the Passaic, followed by capping that entire stretch of river bottom. The sediment in the Passaic River is severely contaminated with dioxin, PCBs, heavy metals, pesticides and other contaminants. The lower Passaic is the most heavily contaminated section of the river. The cleanup is estimated to cost \$1.38 billion. Design work is expected to take four years to complete. The dredging, dewatering and disposal of dredged materials, and the capping and related construction work, will follow and is expected to take an additional six years to complete.²⁰ For more about this very complex site, visit the Passaic River web site: <http://www.ourpassaic.org>. A list of parties that were notified by EPA of their potential liability for costs associated with the lower Passaic is available at <https://semspub.epa.gov/src/document/02/457510>.

Improving Groundwater Cleanup in Vestal

In October, the EPA finalized its plan to thermally treat, move and capture VOCs that are contaminating soil that is a source of groundwater contamination at the Vestal Water Supply Well 1-1 Superfund site in Vestal, Broome County, N.Y. In addition, some of the soil is contaminated with PCBs, which will be excavated and removed from the site. The cost of this cleanup is approximately \$14 million.²¹ The final EPA plan builds on decades of work by the EPA and the NYSDEC to address contamination at the site.²² To view the final cleanup plan, visit: www.epa.gov/superfund/vestal-well-1-1.

RCRA Update

Happy 40th RCRA!

In October, RCRA marked its 40th anniversary! Over the past four decades, the RCRA program has successfully conquered diverse environmental challenges, including:

- Managing 2.5 billion tons of solid, industrial and hazardous waste, and providing opportunities to reduce or avoid greenhouse gas emissions through material and land management practices.

- Cleaning up and restoring 18 million acres of contaminated lands, nearly equal to the size of South Carolina.
- Raising the national recycling rate from 7 to 34%.

In addition, the RCRA program is always looking to find ways to reduce waste at its sources. Sustainable materials management is a systemic approach to using and reusing materials more productively over their entire life cycles that has been stressed in recent years. By looking at a product's entire lifecycle we can find new opportunities to reduce environmental impacts, conserve resources, and reduce costs.

For more on RCRA, including a very informative timeline, visit the special anniversary site at www.epa.gov/rcra/resource-conservation-and-recovery-act-40th-anniversary. For an update on the EPA's E-manifest (tracking) efforts, see www.epa.gov/newsreleases/epa-appoints-diverse-board-experts-help-develop-national-electronic-system-track. For an overview of e-waste issues, see: Cleaning up e-waste, see www.epa.gov/international-cooperation/cleaning-electronic-waste-e-waste.

Hazardous Waste Generator Improvements Rule

In major RCRA news, the EPA Administrator signed the final Hazardous Waste Generator Improvements Rule on October 28, 2016. The Rule was published in the Federal Register on November 28, 2016. This final rule includes **over 60 changes** to the hazardous waste generator regulations that clarify existing requirements, increase flexibility, and improve environmental protection. These changes also reorganize the regulations to make them easier to follow and make certain technical corrections.²³ Two key provisions where EPA is finalizing flexibility are:

1. Allowing a hazardous waste generator to avoid the increased burden of a higher generator status when generating episodic waste, provided the episodic waste is properly managed; and
2. Allowing a very small quantity generator (VSQG) (note: new term) to send its hazardous waste to a large quantity generator under control of the same person.

In addition, the rule enhances the safety of facilities, employees, and the general public by improving hazardous waste risk communication and ensuring that emergency management requirements meet today's needs. Further, the EPA is finalizing a number of clarifications without increasing burden including a reorganization of the hazardous waste generator regulations so that all of the generator regulations are in one place.²⁴ For a concise overview of the changes, see Fact Sheet About the Hazardous Waste Generator Improvements Final Rule at: www.epa.gov/hwgenerators/fact-sheet-about-hazardous-waste-generator-improvements-final-rule.

Energy Star Portfolio Manager—Waste Tracking

In August, the EPA unveiled a waste and materials tracking feature in its Energy Star Portfolio Manager, which is a free benchmarking and tracking tool for commercial building owners and managers. Reducing waste and reusing materials more productively through sustainable materials management over their entire life-cycles conserves resources, helps communities remain economically competitive and supports a healthy environment. Owners and managers using Portfolio Manager will now be able to benchmark 29 types of waste across four different management metrics alongside their existing sustainability management indicators. Types of waste include building materials, glass, paper, plastics, and trash.

Currently, U.S. commercial buildings and manufacturing activities are responsible for as much as 45 percent of the 150 million tons of waste in the United States that ends up in incinerators or landfills each year.²⁵ To learn more or register for a free webinar on the new waste tracking feature: www.energystar.gov/trackwaste.

TSCA Reform

The EPA is taking action to ensure that the Frank R. Lautenberg Chemical Safety for the 21st Century Act, signed June 2016, delivers on the promise of better protecting the environment and public health. The bipartisan bill to reform the Toxic Substances Control Act (TSCA) outlined a number of responsibilities for the EPA must be complete within a tight time frame.²⁶ The milestones accomplished by the agency include:

- A plan released in June 2016 that outlines activities for the first year of implementing the new law;
- The first determinations completed on seven pre-manufacture notices under TSCA in July 2016. The new law requires the agency to make affirmative determinations on new chemical substances *before* they can enter the marketplace. Additional determinations will be released as they are completed;
- A series of public meetings held in August to obtain feedback from stakeholders on the processes that will be used to establish fees and prioritize and evaluate chemicals;
- A list of five mercury compounds released on August 26th, that will be prohibited from export as of January 1, 2020. This action will prevent the ability to convert these compounds to elemental mercury after export from the U.S.²⁷

Additionally, the agency is establishing the Science Advisory Committee on Chemicals (SACC) to provide independent advice and expert consultation on scientific and technical aspects on risk evaluations, methodologies, and pollution prevention measures or approaches.²⁸

PBT Chemicals

In October 2016, EPA took steps to reduce exposure to certain persistent, bioaccumulative, and toxic (PBT) chemicals. The five chemicals to receive expedited action are:

- Decabromodiphenyl ethers (DecaBDE), used as a flame retardant in textiles, plastics and polyurethane foam;
- Hexachlorobutadiene (HCBD), used in the manufacture of rubber compounds and lubricants and as a solvent;
- Pentachloro-thio-phenol (PCTP), used as an agent to make rubber more pliable in industrial uses;
- Tris (4-isopropylphenyl) phosphate, used as a flame retardant in consumer products and other industrial uses; and
- 2,4,6-Tris(tert-butyl)phenol, used as a fuel, oil, gasoline or lubricant additive.

The statutory deadline for the EPA to propose action is June 22, 2019. The new law gave manufacturers an opportunity to request that the EPA conduct risk evaluations for the PBT chemicals on the EPA's 2014 Work Plan, as an alternative to expedited action. Requests for risk evaluations were made for two chemicals that can be used in fragrance mixtures. For the remaining PBT chemicals, the EPA must move ahead to take expedited action to reduce exposure to those chemicals to the extent practicable. After the EPA finishes identifying where these chemicals are used and how people are exposed to them, the Agency will move directly to propose limitations on their use.²⁹

The First 10 Chemicals for Review

In late November, the EPA announced the first 10 chemicals it will evaluate for potential risks to human health and the environment under TSCA. Under the new law, the EPA has the authority to require safety reviews of all chemicals in the marketplace. These chemicals were drawn from EPA's 2014 TSCA Work Plan, which includes a selection of 90 chemicals based on their potential for high hazard and exposure as well as other considerations. The EPA is required to complete risk evaluations for these chemicals within three years of publication of the notice in the Federal Register. If it is determined that a chemical presents an unreasonable risk to humans and the environment, the EPA must mitigate that risk within two years.³⁰ The first 10 chemicals includes TCE, a com-



mon degreaser found at thousands of contaminated sites, **asbestos**, which was once heavily used in building materials, and **tetrachloroethylene** (aka perchloroethylene, PCE or PERC), used primarily in dry cleaning and degreasing metals.³¹ For the full list of chemicals and more about EPA's role under the newly amended law, see www.epa.gov/assessing-and-managing-chemicals-under-tsca/evaluating-risk-existing-chemicals-under-tsca. See also, www.epa.gov/assessing-and-managing-chemicals-under-tsca/frank-r-lautenberg-chemical-safety-21st-century-act.

For more on the TSCA Reforms, see the TSCA Panel's presentation materials from ELS's January 2017 Annual Meeting, available on ELS's website.

Air Quality

Proposed Rule to Remove Title V Emergency Affirmative Defense Provisions from State and Federal Operating Permit Programs

Consistent with other recent EPA actions involving affirmative defenses, the EPA is proposing to remove the affirmative defense provisions for emergencies found in its state and federal operating permit regulations that implement title V of the Clean Air Act (CAA), 40 CFR §§ 70.6(g) and 71.6(g).³² These provisions "establish an affirmative defense that sources can assert in civil enforcement cases when noncompliance with certain emission limitations in operating permits occurs because of qualifying 'emergency' circumstances."³³ The EPA is proposing to remove these provisions, which have always been discretionary and not required elements of state operating permit programs, "because they are inconsistent with the enforcement structure of the CAA and recent court decisions from the U.S. Court of Appeals for the D.C. Circuit."³⁴ The EPA took comment on implementation consequences, for permitting authorities, on the proposed removal of the emergency affirmative defense provisions.³⁵

Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration (CISWI) Units

The EPA issued its Final Rule and Notice of Final Action on Reconsideration on aspects of "Standards of Performance for New Stationary Sources and Emissions Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units" for which it had granted reconsideration on January 21, 2015.³⁶ The EPA finalized proposed actions on the definition of "continuous emission monitoring system (CEMS) data during startup and shutdown periods"; the particulate matter limit for the waste-burning kiln subcategory; the fuel variability factor for coal-burning energy recovery units; and the definition of "kiln."³⁷ This action also finalized the EPA's denial of the "requests for reconsideration of all other issues raised in the petitions for reconsideration" of the 2013 CISWI rule.³⁸

Standards of Performance for Stationary Compression Ignition Internal Combustion Engines

EPA finalized amendments to the standards of performance for stationary compression ignition (CI) internal combustion engines "to allow manufacturers to design the engines so that operators can temporarily override performance inducements related to the emission control system for stationary CI internal combustion engines."³⁹ The amendments "apply to engines operating during emergency situations where the operation of the engine or equipment is needed to protect human life, and to require compliance with Tier 1 emission standards during such emergencies."⁴⁰ The rule also amends the standards of performance for certain stationary CI internal combustion engines located in remote areas of Alaska.⁴¹

Amendment to NESHAP for Petroleum Refinery Sector

In response to new information submitted after these regulatory requirements were promulgated, this final rule amends, in three respects, the National Emissions Standards for Hazardous Air Pollutants (NESHAP) for Petroleum Refineries.⁴² "First, this action adjusts the compliance date for regulatory requirements that apply at maintenance vents during periods of startup, shutdown, maintenance or inspection for sources constructed or reconstructed on or before June 30, 2014. Second, this action amends the compliance dates for the regulatory requirements that apply during startup, shutdown, or hot standby for fluid catalytic cracking units and startup and shutdown for sulfur recovery units constructed or reconstructed on or before June 30, 2014."⁴³ This action also finalizes technical corrections and clarifications to the NESHAP and the New Source Performance Standards (NSPS) for Petroleum Refineries.⁴⁴

Proposed Revisions to the Petition Provisions of the Title V Permitting Program

On August 15, 2016, the EPA proposed regulatory revisions to "streamline and clarify processes related to submission and review of title V petitions."⁴⁵ The proposed regulations "provide direction as to how petitions should be submitted to the agency,"⁴⁶ "describe the expected format and minimum required content for title V petitions,"⁴⁷ and clarify that "permitting authorities are required to respond to significant comments received during the public comment period for draft title V permits, and to provide that response with the proposed title V permit to the EPA for the agency's 45-day review period."⁴⁸ In addition to the regulatory changes, the preamble provides guidance "in the form of 'recommended practices' for various stakeholders to help ensure title V permits have complete administrative records and comport with the requirements of the CAA."⁴⁹ The notice also repeats information, previously discussed in specific title V orders, on the EPA's interpretation of certain CAA title V provisions and implementing regulations regarding the steps following an EPA objection in response to a title V petition.⁵⁰

SIP Requirements for PM_{2.5} NAAQS

On July 29, 2016, the EPA finalized requirements that state, local and tribal air agencies would have to meet as they implement the current and future national ambient air quality standards (NAAQS) for fine particulate matter (PM_{2.5}).⁵¹ This rule “interprets the statutory requirements that apply to PM_{2.5} NAAQS nonattainment areas under subparts 1 and 4” of the nonattainment provisions of the CAA.⁵² These “requirements govern attainment plans and nonattainment new source review (NSR) permitting programs.”⁵³ The rule provides details on meeting the statutory SIP requirements that apply to areas designated nonattainment for any PM_{2.5} NAAQS including, among other things, “[g]eneral requirements for attainment plan due dates and attainment dates; emissions inventories; attainment demonstrations; provisions for demonstrating reasonable further progress; quantitative milestones; contingency measures; and NSR permitting programs.”⁵⁴ This rule also clarifies the specific attainment planning requirements that apply to PM_{2.5} NAAQS nonattainment areas based on their classification (either Moderate or Serious), and the process for reclassifying Moderate areas to Serious.⁵⁵

The rule responds in part to a 2013 remand, by U.S. Court of Appeals for the District of Columbia Circuit, of two rules the EPA promulgated to clarify the statutory requirements for states to implement the 1997 PM_{2.5} NAAQS: the 2007 PM_{2.5} Implementation Rule and the 2008 PM_{2.5} NSR Rule.⁵⁶ These rules “required that PM_{2.5} nonattainment areas meet the general nonattainment planning requirements under ‘subpart 1’ of the nonattainment area provisions of the CAA.”⁵⁷ The D.C. Circuit found that PM_{2.5} nonattainment areas “are subject to both the general nonattainment planning provisions of subpart 1, and the nonattainment planning requirements specific to PM₁₀ nonattainment areas under subpart 4 of Title I, Part D of the CAA (because PM_{2.5} is a subset of PM₁₀).”⁵⁸ The court remanded the 2007 PM_{2.5} Implementation Rule and the 2008 PM_{2.5} NSR Rule, which both applied to the 1997 PM_{2.5} NAAQS, to the EPA to be re-promulgated in accordance with subpart 4 requirements.⁵⁹

Reconsideration of Final Air Toxics Standards for Industrial, Commercial, and Institutional Area Source Boilers

The EPA announced final decisions on issues for which reconsideration was granted for the EPA’s 2013 final amendments to its standards limiting emissions of hazardous air pollutants (HAPs) from industrial, commercial, and institutional area source boilers.⁶⁰ Consistent with the February 2013 final rule, the EPA is retaining the subcategory and separate requirements for limited-use boilers.⁶¹ And, consistent with the alternatives for which comment was solicited in the January 2015 proposal, the EPA is amending three reconsidered provisions as follows: an alternative particulate matter (PM) standard for new oil-fired boilers that combust ultra low sulfur liquid

fuel in place of the alternative PM standard for new oil fired boilers that combust low sulfur oil; a provision that requires further performance testing for PM every 5 years for certain boilers based on their initial compliance test in place of the provision eliminating further performance testing for such boilers; and a provision that requires further fuel sampling for mercury every 12 months for certain coal fired boilers based on their initial compliance demonstration in place of the provision eliminating further fuel sampling for mercury for such boilers.⁶² Based on comments received, the EPA is making minor changes to the proposed definitions of startup and shutdown.⁶³ This action also addresses a limited number of technical corrections and clarifications, including removal of the affirmative defense for malfunction in light of a court decision on the issue.⁶⁴ This action, which addresses continuous compliance requirements applicable in the future, “does not change the coverage of the final rule, nor does it substantially affect the estimated emission reductions, costs or benefits of the rule, or change the compliance deadlines of March 21, 2014, for existing sources and upon startup for new sources.”⁶⁵

An area source facility has the potential to emit less than 10 tons per year of any single air toxic or less than 25 tons per year of any combination of air toxics.⁶⁶ There are approximately 1.3 million boilers located at area source facilities that run on natural gas; they are not covered by the final standards or these adjustments.⁶⁷ The area source standards cover approximately 183,000 boilers, over 99% of which need only to conduct periodic tune-ups, and some of these also needed to perform a one time energy assessment.⁶⁸ Approximately 600 coal burning units, which are less than 1% of the boilers covered by the area source standards and represent the largest of these sources, are required to meet emission limits.⁶⁹

Final Rule General Permits and Permits by Rule for the Federal Minor NSR Program in Indian Country

Pursuant to the Federal Minor New Source Review (NSR) Program in Indian Country the EPA finalized general Permits, for use in Indian country, for new or modified minor sources in six source categories: concrete batch plants; boilers and emergency engines; stationary spark ignition engines; stationary compression ignition engines; graphic arts and printing operations; and sawmill facilities.⁷⁰

Revisions to Public Notice Requirements for Clean Air Act Permitting Programs

On October 5, 2016, the EPA finalized revisions to the public notice provisions of the Clean Air Act, New Source Review, title V, and Outer Continental Shelf (OCS) permit programs and corresponding onshore area determinations for implementation of the OCS air quality regulations.⁷¹ The rule removes the mandatory requirement for a permitting authority to provide public notice of a draft permit, and certain other program actions, through publi-

cation in a newspaper and instead provides for electronic noticing (e-notice) of these actions; e-notice must include electronic access (e-access) to the draft permit.⁷² The rule requires e-notice for EPA

Actions, and actions by permitting authorities implementing the federal permitting rules, and allows for e-notice as an option for actions by permitting authorities implementing EPA-approved programs.⁷³ The rule does not preclude supplemental notice by other means.⁷⁴

CSAPR Update

On September 7, 2016, the EPA finalized an update to the Cross-State Air Pollution Rule (CSAPR).⁷⁵ The CSAPR Update addresses the interstate transport of ozone pollution, caused by emissions of nitrogen oxide (NO_x), in the eastern United States during the summertime ozone season, and seeks to help downwind states meet and maintain the 2008 ozone NAAQS.⁷⁶ In the CSAPR Update, the EPA finalized Federal Implementation Plans (FIPs) to address air quality impacts of the interstate transport of ozone air pollution in the eastern United States.⁷⁷ The CSAPR Update “identifies cuts in NO_x emissions in 22 states that contribute significantly to downwind ozone air quality problems and can be achieved using already installed, proven and cost-effective control technologies and other readily available approaches at affected sources.”⁷⁸ The CSAPR Update also “responds to the July 2015 decision of the Court of Appeals for the D.C. Circuit by addressing the court’s concerns regarding ozone season NO_x emissions budgets for 11 states.”⁷⁹

Proposed Electronic Reporting Requirements for Mercury and Air Toxics Standards

On September 29, 2016, the EPA proposed to amend the electronic reporting requirements for the National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units (also known as the Mercury and Air Toxics Standards (MATS)).⁸⁰ The proposal would “revise and streamline the electronic data reporting requirements of MATS” and “increase data transparency.”⁸¹

Rescission of Preconstruction Permits Issued Under the Clean Air Act

The EPA issued a final rule amending the federal Prevention of Significant Deterioration (PSD) regulations to remove a date restriction from the Permit Rescission provision.⁸² The rule does not otherwise alter the criteria under which a new source review (NSR) permit may be rescinded.⁸³ The rule clarifies that a rescission of a permit is not automatic and corrects an outdated cross-reference to another part of the PSD regulations.⁸⁴ The rule also adds a corresponding Permit Rescission provision to the federal regulations that apply to major sources in nonattainment areas of Indian country.⁸⁵

Proposed Implementation of the 2015 Ozone NAAQS: Nonattainment Area Classifications and SIP Requirements

On November 2, 2016, the EPA proposed nonattainment area classification thresholds and implementation requirements for the 2015 ozone NAAQS.⁸⁶ These requirements would apply to state, local and tribal air agencies implementing the 2015 ozone NAAQS.⁸⁷ This proposed action largely retains and updates the implementing regulations promulgated for the 2008 ozone NAAQS.⁸⁸

Proposed Consent Decree in Citizen Suit Regarding Ozone Transport Region

The EPA published notice of a proposed consent decree addressing a complaint filed by the Secretary of the North Carolina Department of Environmental Quality, alleging that the EPA failed to perform duties mandated by the CAA by failing to take action to approve or disapprove a December 9, 2013 petition submitted by several states in the Ozone Transport Region (OTR) requesting the EPA to expand the OTR to include North Carolina and several other states.⁸⁹ Under the terms of the proposed Consent Decree, the EPA “must sign a notice for public comment that proposes certain actions regarding the December 9, 2013 Petition as to the State of North Carolina, no later than January 18, 2017” and must sign a notice of final action regarding the petition as to North Carolina no later than October 27, 2017.⁹⁰

CLIMATE CHANGE

EPA Releases Climate Change Indicators Report; Records Existing Climate Change Impacts

On October 2, 2016, EPA released the 2016 edition of its *Climate Change Indicators* report, which demonstrates that “temperatures are rising, snow and rainfall patterns are shifting, and more extreme climate events—like heavy rainstorms and record high temperatures—are already happening.”⁹¹ With compelling and clear evidence of long-term changes to our climate, the report highlights impacts on the environment and human health both in the United States and around the world.⁹² The report features 37 climate indicators, including “U.S. and global temperatures, ocean acidity, sea level, river flooding, droughts and wildfires.”⁹³ Upon release of the report, Acting Assistant Administrator for EPA’s Office of Air and Radiation, Janet McCabe, stated that “with each new year of data, the signs of climate change are stronger and more compelling.”⁹⁴

The United States Signs Historic Kigali Amendment to Montreal Protocol to Phase Out High Global Warming Pollutants

On October 15, 2016, the United States and 196 other Nations agreed to phase down emissions of hydrofluorocarbons (HFCs) which have a greenhouse gas potential of

hundreds to thousands times more than carbon dioxide.⁹⁵ The agreement is referred to as the Kigali Amendment to the Montreal Protocol under the Vienna Convention for the Protection of the Ozone Layer.⁹⁶ HFC emissions are increasing by ten to fifteen percent per year. Given their high global warming potential, the phase-down has the potential to reduce climate change warming by as much as .5 degrees Celsius by the end of the century.⁹⁷

EPA Administrator Gina McCarthy stated: “As head of the U.S. delegation to the Meeting of the Parties to the Montreal Protocol, I met with leaders from around the world who share a commitment to protecting the planet and scaling down these harmful gases. Together, joined by Secretary of State John Kerry, we agreed to take action and get the job done. And that’s exactly what we did.”⁹⁸

Paris Agreement Enters Into Force on November 4, 2016

The Kigali Amendment will complement the December 2015 Paris agreement which entered into force on November 4, 2016, thirty days after crossing the threshold of the requisite number of nations and global emissions covered under the agreement, and a mere six months after the signing ceremony on Earth Day 2016. Secretary of State John Kerry stated that “the rapid entry into force timeline underscores the widespread recognition of the urgency at hand. It is a testament to the continued determination of states large and small, rich and poor, to act on the moral, social, and economic imperative to address the dangerous impacts of climate change.”⁹⁹ In President Obama’s remarks on the historic achievement, he stated that “the world has officially crossed the threshold for the Paris Agreement to take effect. Today, the world meets the moment. And if we follow through on the commitments that this agreement embodies, history may well judge it as a turning point for our planet.”¹⁰⁰

EPA Issues Two Rules to Reduce HFCs, Consistent with the Kigali Amendment

The EPA was already doing its part to reduce HFCs here at home before the Kigali Amendment. In early October, EPA finalized two rules that will reduce the use and emissions of HFCs. One rule updates existing air-conditioning and refrigeration service practices for ozone-depleting refrigerants and extends those requirements to HFCs, which are used as a substitute for the ozone-depleting substances.¹⁰¹ Most of the global and U.S. use of HFCs is in the refrigeration and air conditioning sector, and so the rule will have significant climate change benefits by preventing annual emissions of 3.6 MMTCO₂ equivalent from reduction of HFCs.¹⁰² EPA articulated two goals for the rule: (1) promote the proper handling and use of ozone depleting substances and HFCs to reduce emissions, and (2) improve the clarity and effectiveness of the existing rule.

The other final rule, published on October 11, 2016, is a “determination of acceptability” (Determination 32),¹⁰³

which expands the list of acceptable substitutes under EPA’s Significant New Alternatives Policy (SNAP) pursuant to Section 612 of the Clean Air Act.¹⁰⁴ Section 612 requires EPA to promulgate rules making it unlawful to replace ozone depleting substances with any substitute that presents adverse effects to human health or the environment where there is an alternative that reduces overall risk to human health and the environment and is currently or potentially available.¹⁰⁵ The EPA’s SNAP program evaluates substitutes for ozone depleting substances in a comparative risk framework.¹⁰⁶ In the notice, EPA approved a number of substitutes that are acceptable. The substitutes are blends that include HFCs; however, the global warming potentials of the blends are lower than or comparable to existing HFCs already in use as substitutes to ozone depleting substances.¹⁰⁷ The new substitutes are for refrigeration, air conditioning, fire suppression, and explosion protection.¹⁰⁸

EPA and the U.S. Department of Transportation (DOT) Finalize Greenhouse Gas/Fuel Economy Standards for Heavy-Duty and Medium Duty Vehicles

On August 18, 2016, EPA and DOT’s National Highway Traffic Safety Administration (NHTSA) jointly finalized standards for medium-duty and heavy-duty vehicles.¹⁰⁹ The final rule represents phase two for this category of vehicles, which President Obama called for in his 2013 Climate Action Plan. The final rule is consistent with the United States’ goal of achieving its non-binding intended nationally determined contribution target of 26-28 percent below 2005 levels in 2025, which was submitted in advance of the historic Paris Agreement.¹¹⁰ The Phase 2 final rule builds on the Phase 1 rule, which began covering new trucks and heavy vehicles in model year 2014, and includes new technology-advancing standards that will phase in through 2027.¹¹¹ Phase 2 will achieve fuel savings as high as 25 percent above Phase 1¹¹² and will lower CO₂ emissions by approximately 1.1 billion metric tons and provide \$230 billion in net health and climate benefits, outweighing costs by about an 8-to-1 ratio.¹¹³

For more information, see <https://www.epa.gov/regulations-emissions-vehicles-and-engines/regulations-greenhouse-gas-emissions-commercial-trucks>.

EPA Issues Proposed Determination for Midterm Evaluation of Light Duty Vehicle Standards

On November 30, 2016, EPA issued its proposed determination that the light duty vehicle emissions standards for model years 2022-2025 remain appropriate and that no rulemaking is necessary to change the standards.¹¹⁴ When EPA issued the Phase 2 light-duty rule for model years 2017-2025, the Agency included a requirement that it conduct a midterm evaluation of the greenhouse gas (GHG) standards for 2022-2025.¹¹⁵ The November 30 proposal serves to fulfill that requirement. It was preceded by the July 2016 release of a Draft Technical Assessment, issued jointly by EPA, NHTSA, and the

California Air Resources Board.¹¹⁶ The final determination is to be made no later than April 1, 2018.¹¹⁷ EPA's proposed determination concluded that automakers have a wide variety of technology pathways available to meet the standards and they can do so "at slightly lower per-vehicle costs than predicted in the TAR [Technical Assessment Report], and lower costs than predicted in the 2012 rulemaking that established the standards."¹¹⁸

The proposed determination document is available at: Proposed Determination on the Appropriateness of the Model Year 2022-2025 Light-duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation (PDF). The technical support document is available at Proposed Determination on the Appropriateness of the Model Year 2022-2025 Light-duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation: Technical Support Document (PDF).

EPA Issues Endangerment Finding for Aircraft Greenhouse Gas Emissions

On August 15, 2016, the EPA published its final determination that greenhouse gases endanger the public health and welfare within the meaning of Clean Air Act Section 231(a)(2)(A), 42 U.S.C. 7571(a)(2)(A), on aircraft emissions, and that the six well-mixed greenhouse gas emissions from certain classes of aircraft engines contribute to air pollution that endangers the public health and welfare.¹¹⁹ In issuing the finding, EPA was informed by, and placed considerable weight on, the "extensive scientific and technical evidence in the record supporting the 2009 Endangerment and Cause or Contribute Findings under CAA Section 202(a)."¹²⁰ EPA indicated that its finding also reflects the science assessments since 2009 which "strengthen and further support the judgment that GHGs in the atmosphere may reasonably be anticipated to endanger the public health and welfare of current and future generations."¹²¹

On a parallel track, the United States is involved in an international process with the International Civil Aviation Organization (ICAO), which is expected to formally adopt a final CO₂ emissions standard for aircraft in March 2017. Member states of ICAO will then be required to adopt standards "that are of at least equivalent stringency to those set by ICAO."¹²² U.S. aircraft emissions are a significant source of GHG emissions, representing roughly 12 percent of GHG emissions from the United States transportation sector and 29 percent of global aircraft GHG emissions.¹²³

EPA Issues Final Standards of Performance for Municipal Solid Waste Landfills

On August 29, 2016, EPA issued a final rule that updates the Standards of Performance for Municipal Solid Waste Landfills by creating a new subpart, 40 CFR Part 60, Subpart XXX.¹²⁴ The final rule implements Clean Air Act Section 111(b)(1)(B), 42 U.S.C. 7411(b)(1)(B), which requires EPA to review and, if appropriate, revise new

source performance standards at least every 8 years. Landfills that commence construction, reconstruction, or modification after July 17, 2014, are subject to the new Subpart XXX.¹²⁵

This action will achieve additional reductions in emissions of landfill gas and its components, including methane, by lowering the emissions threshold at which a landfill must install controls. This action also incorporates new data and information received in response to the proposed rulemaking and addresses other regulatory issues including surface emissions monitoring, wellhead monitoring, and the definition of landfill gas treatment system.¹²⁶ The final rule implements President Obama's "Strategy to Reduce Methane Emissions" and is consistent with the President's 2013 Climate Action Plan.¹²⁷ Methane is a potent GHG with a global warming potential 28-36 times greater than CO₂, and has been identified by the Intergovernmental Panel on Climate Change as the second leading long-lived global climate forcer. By lowering the threshold for installation of controls from 50 Mg/yr to 34 Mg/yr, substantial methane reductions will be achieved.¹²⁸

EPA Issues Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills

In addition to issuing a final rule for new, modified, or reconstructed landfills, EPA also issued, on August 29, 2016, final revised Emission Guidelines for existing landfills that accepted waste after November 8, 1987, and commenced construction, reconstruction or modification before July 17, 2014.¹²⁹ Similar to the final rule for new, modified, or reconstructed landfills, the final Emission Guidelines reduce the threshold for installation of controls at existing landfills from 50 Mg/yr to 34 Mg/yr, assuming they are not closed by September 27, 2017.¹³⁰ This action is also consistent with the President's Climate Action Plan and implements the President's Strategy to Reduce methane emissions. Although EPA had previously issued Emission Guidelines for landfills, EPA interprets Clean Air Act Section 111(d), 42 U.S.C. 7411(d), as providing discretionary authority to update the Guidelines and require states to update the standards of performance.¹³¹ When combined with the final rule for new, modified, and reconstructed landfills, methane emissions from landfills will be reduced by an estimated 334,000 tons per year beginning in 2025, which is equivalent to 8.2 million metric tons of CO₂.¹³² The benefits of the two rules far outweigh the costs by a ratio of 8-to-1, with climate benefits estimated at \$512 million in 2025.¹³³

New EPA/DOA Food Loss and Waste Program Will Reduce Methane Emissions

In November 2016, EPA and the Department of Agriculture announced the inaugural group of U.S. Food Loss and Waste 2030 Champions.¹³⁴ The Champions are U.S. businesses and organizations that have pledged to take concrete steps to reduce food loss and waste in

their operations by 50 percent by 2030. Food waste has significant implications for climate change because it results in methane emissions. Thirty-one percent of our retail and consumer food is wasted, much of it ending up in landfills which produce 20 percent of total U.S. methane emissions.¹³⁵ Fifteen Champions were announced in November including Ahold USA, Blue Apron, Bon Appétit Management Company, Campbell Soup Company, Conagra Brands, Delhaize America, General Mills, Kellogg Company, PepsiCo, Sodexo, Unilever, Walmart, Wegman's Food Markets, Weis Markets and YUM! Brands.¹³⁶ This program builds on EPA's Food Recovery Challenge, designed for businesses, organizations and Universities, which empowers partners to, among other things, reduce methane from food waste by implementing a hierarchy based on prevention, donation, and composting and/or anaerobic digestion.¹³⁷ Entities not ready to make the 50 percent reduction pledge required of the 2030 Champions program can choose to participate in the Food Recovery Challenge.

Details on becoming a U.S. Food Loss and Waste 2030 Champion can be found at www.usda.gov/oce/foodwaste and www.epa.gov/sustainable-management-food. Additional background and contact information for the 15 inaugural Champions is available in the USDA Newsroom: <http://www.usda.gov/wps/portal/usda/usdahome?contentid=2016/11/0245.xml&contentidonly=true>.

EPA Unveils New Web Portal to Build Resilience in Communities

EPA launched a new web portal on October 6, 2016 to support communities as they prepare for the impacts of climate change. The new on-line tool, called the Adaptation Resource Center (ARC-X), provides users with information specific to their geographic area and issues of concern.¹³⁸ ARC-X offers case studies that present strategies used by other communities with similar concerns, instructions on how to begin implementing the strategies, EPA tools to assist with the implementation, and sources of funding and technical assistance from EPA and other federal agencies.¹³⁹ The portal provides this information in the context of multiple types of climate change impacts including air quality, water management, waste management and emergency response, and public health.¹⁴⁰

ARC-X can be accessed at: www.epa.gov/ARC-X.

EPA Updates Climate Risk Assessment Tool for Water Utilities

In September 2016, EPA released an updated tool to build resilience at water, wastewater, and storm water utilities.¹⁴¹ The tool, known as the Climate Resilience Evaluation and Awareness Tool (CREAT), helps water utilities prepare for climate change impacts. The updated version provides climate change projection data, monetized risk results, and future climate scenarios such as increased precipitation and number of days over 100 de-

grees Fahrenheit.¹⁴² The tool was developed and updated "in consultation with drinking water and wastewater utilities, water sector associations, climate science and risk assessment experts, and multiple federal partners."¹⁴³ According to Joel Beauvais, Deputy Assistant Administrator for EPA's Office of Water, "water utilities operate on the front lines of climate change and face the challenges of increased drought, flooding and sea level rise. EPA is working to strengthen America's communities by providing climate preparedness tools like CREAT that local leaders can use to make smart decisions."¹⁴⁴

The CREAT tool is available at: <https://www.epa.gov/crwu/build-climate-resilience-your-utility>. To learn more about water sector climate readiness, visit <https://www.epa.gov/crwu>.

Water Quality

Science and Technical Support

EPA Announces Results of Its Six-Year Review of Existing Drinking Water Standards

On December 20, 2016, the EPA released the pre-publication copy of the *Federal Register* notice, "National Primary Drinking Water Regulations; Announcement of the Results of EPA's Review of Existing Drinking Water Standards and Request for Public Comment and/or Information on Related Issues," which resulted from the agency's third six-year review of National Primary Drinking Water Regulations. Based on a review of 76 regulations, the EPA concluded that eight national primary drinking water standards are candidates for regulatory revision. These eight candidates are included in the Stage 1 and Stage 2 Disinfectants and Disinfection Byproducts Rules, the Surface Water Treatment Rule (SWTR), the Interim Enhanced Surface Water Treatment Rule (IESWTR) and the Long Term 1 Enhanced Surface Water Treatment Rule (LT1). The eight candidates are Chlorite, *Cryptosporidium* (under the SWTR, IESWTR and LT1), Haloacetic acids, Heterotrophic Bacteria, *Giardia lamblia*, *Legionella*, Total Trihalomethanes, and Viruses (under the SWTR).

The EPA determined that for the contaminants regulated under these rules there is new information on health effects, treatment technologies, analytical methods, occurrence and exposure, implementation and/or other factors that provide a health or technical basis to support a regulatory revision that will improve public health protection. The determination is not a regulatory decision, but initiates a process that will involve more detailed analyses of health effects, analytical and treatment feasibility, occurrence, benefits, costs and other regulatory matters relevant to deciding whether a rulemaking to revise a regulation should be initiated, and the EPA will be seeking public comment on the possibility of regulatory revisions for the eight candidates.

For more information, visit: <https://www.epa.gov/dwsixyearreview/six-year-review-3-drinking-water-standards>.

EPA Releases Final Report on Impacts from Hydraulic Fracturing Activities on Drinking Water

On December 13, 2016, the EPA released its scientific report on the impacts from hydraulic fracturing activities on drinking water resources, which provides states and others the scientific foundation to better protect drinking water resources in areas where hydraulic fracturing is occurring or being considered. The report, done at the request of Congress, provides scientific evidence that hydraulic fracturing activities can impact drinking water resources in the United States under some circumstances. As part of the report, the EPA identified conditions under which impacts from hydraulic fracturing activities can be more frequent or severe. The report also identifies uncertainties and data gaps. These uncertainties and data gaps limited the EPA's ability to fully assess impacts to drinking water resources both locally and nationally. The final conclusions are based upon review of over 1,200 cited scientific sources; feedback from an independent peer review conducted by the EPA's Science Advisory Board; input from engaged stakeholders; and new research conducted as part of the study.

The report is organized around activities in the hydraulic fracturing water cycle and their potential to impact drinking water resources: (1) water acquisition, (2) chemical mixing, (3) well injection, (4) wastewater collection, and (5) wastewater management and disposal or reuse, and the EPA identified cases of impacts on drinking water at each stage in the cycle. Impacts generally occurred near hydraulically fractured oil and gas production wells and ranged in severity from temporary changes in water quality to contamination that made private drinking water wells unusable. The EPA identified conditions under which impacts from hydraulic fracturing activities can be more frequent or severe, including: (1) withdrawing water in times or areas of low water availability; (2) spills during wastewater management that result in large volumes or high concentrations of chemicals reaching groundwater resources; (3) injection into wells with leaks; (4) injection directly into groundwater resources; (4) discharge of inadequately treated hydraulic fracturing wastewater to surface water; and (5) disposal or storage of wastewater in unlined pits.

For a copy of the study, visit www.epa.gov/hfstudy.

EPA's National Lakes Assessment Finds Nutrient Pollution Is Widespread in Lakes

On December 8, 2016, the EPA released the results of a national assessment showing that nutrient pollution is widespread in the nation's lakes, with 4 in 10 lakes suffering from too much nitrogen and phosphorus. Excess nutrients can cause algae blooms, lower oxygen levels, degraded habitat for fish and other life, and lower water quality for recreation. The National Lakes Assessment also found an algal toxin—microcystin—in 39 percent of

lakes but below levels of concern. Low concentrations of the herbicide atrazine were found in 30 percent of lakes.

The assessment is part of a series of National Aquatic Resource Surveys designed to provide information about the condition of water resources in the U.S., and which are conducted in partnership with states and tribes to provide national-scale assessments of the nation's waters. An earlier National Lakes Assessment was conducted in 2007, but this latest study is expanded to include smaller lakes and increase the number of lakes assessed. Lake managers can use the new interactive dashboard to evaluate site-specific information and to explore population-level results. Conducted on a five-year basis, future lake surveys will help water resource managers assess broad-scale differences in the data and perform trends analysis.

For more information, visit: <https://www.epa.gov/national-aquatic-resource-surveys/nla>.

Standards: Guidance, Regulations, and Permits

EPA Releases a New Watershed Academy Online Module on "Aquatic Resource Awareness for Real Estate Appraisers"

Earlier this fall, the EPA released a new online training module titled designed for licensed real estate appraisers and approved by the Appraisal Foundation. The goal of this course is to increase awareness of aquatic resources, including why and how they are protected under environmental laws, what signs to look for that might indicate their presence in the environment, and how they can be documented as part of an appraisal. After successful completion of this course, real estate appraisers should have a general awareness of aquatic resources and be able to accurately complete the portion of the Uniform Residential Appraisal Report form that deals with site conditions. Real Estate appraisers will be provided an online, form-fillable Watershed Academy certificate after completion of a final exam in the course module which may be submitted to their respective state or national Appraisal Foundation for continuing education credits.

The online module is available at <https://www.epa.gov/watershedacademy/aquatic-resources-awareness-course-real-estate-appraisers>.

EPA Issues Final Rule on Treatment of Indian Tribes in a Similar Manner as States for Purposes of Section 303(d) of the Clean Water Act

On September 16, 2016, the EPA Administrator signed the final rule to establish a regulatory process for eligible tribes to apply to the EPA for authority to establish lists of impaired waters and total maximum daily loads (TMDLs) for waters on their reservation, pursuant to section 303(d) of the Clean Water Act. In Section 518(e) of the CWA, Congress authorized EPA to treat eligible federally recognized Indian tribes in a similar manner as states for purposes of administering Section 303 and certain other provisions of the CWA, and directed the agency to pro-

mulgate regulations effectuating this authorization. In the 1990s, EPA issued regulations establishing a process for federally recognized tribes to obtain treatment in a similar manner as states (TAS) for several provisions of the CWA; 53 tribes, for example, have since obtained TAS authority to issue water quality standards under CWA section 303(c). However, prior to this rule, the EPA had not yet promulgated regulations expressly establishing a process for such tribes to obtain TAS authority to administer the water quality restoration provisions of CWA section 303(d), including issuing lists of impaired waters and developing total maximum daily loads (TMDLs) under CWA section 303(d). By establishing regulatory procedures for eligible tribes to obtain TAS status for the CWA Section 303(d) Impaired Water Listing and TMDL Program, the rule enables eligible tribes to obtain authority to identify impaired waters on their reservations and to establish TMDLs, which serve as plans for attaining and maintaining applicable water quality standards.

The rule, and supporting information, can be found at: <https://www.epa.gov/tmdl/final-rule-treatment-indian-tribes-similar-manner-states-purposes-section-303d-clean-water-act>.

EPA Issues Final General Permit Remand Rule for Small Municipal Separate Storm Sewer Systems

On December 9, 2016, in response to a Ninth Circuit remand, the EPA issued a rule that finalized modifications to the Phase II stormwater regulations relating to the use of general permits for small municipal separate storm sewer systems (MS4s). The court had found that the rule's permit application and approval process had failed to meet the Clean Water Act standard of ensuring that permittees reduce the discharge of pollutants from the MS4 to the maximum extent practicable, protecting water quality, and satisfying the appropriate water quality requirements of the Act. The final rule establishes a "Permitting Authority Choice Approach" for how an NPDES permitting authority can issue and administer small MS4 general permits, which allows an NPDES permitting authority to use a Comprehensive General Permit or a Two-Step General Permit.

Under a Comprehensive General Permit, the NPDES authority would include the full set of requirements necessary for meeting the MS4 permit standard in the permit, and no additional requirements are established after the general permit is issued. Under the Two-Step General Permit, after issuing the base general permit, which includes the requirements that apply to all MS4s covered by the permit, the permitting authority establishes, through a second permitting step, additional permit terms and conditions for each MS4 seeking authorization to discharge under the general permit. Unlike applications submitted under a Comprehensive General Permit, applications submitted under a Two-Step General Permit will need to contain whatever additional information is necessary to the permitting authority to develop the additional

requirements for each permittee, and satisfy its obligation to review the application for adequacy, determine if additional control requirements are needed, and provide public notice and an opportunity for the public to submit comments and to request a hearing, before authorizing the permittee to discharge under the permit.

For more information, visit: <https://www.epa.gov/npdes/npdes-stormwater-final-ms4-general-permit-remand-rule>.

Enforcement and Compliance

EPA Issues Administrative Compliance Order Directing New York City to Develop City-Wide Plan for Addressing Sewer Backups into Buildings

On August 31, 2016, the EPA issued an Administrative Compliance Order to New York City requiring it to develop a plan to address continued sewer backups into residents' basements and other public and private property. The order gives the city 120 days to submit a plan to the EPA for approval to work toward the elimination of unauthorized wastewater releases from sewer backups city-wide over the next seven years. The order is designed to ensure that the city prevents sewer backups through a systematic and proactive program, as other large cities have.

EPA Obtains Penalty, Injunctive Relief, and Environmental Improvements from Aqueduct Racetrack for Illegally Discharging Polluted Stormwater

On September 30, 2016, as part of a National Enforcement Initiative focusing on concentrated animal feeding operations, the EPA filed a complaint against The New York Racing Association, Inc. (NYRA) and simultaneously lodged a consent decree to resolve the allegations in the complaint. The complaint alleges that NYRA, which operates the Aqueduct Racetrack where horse racing, training, and boarding of horses occur, and where up to 450 horses are housed on site during the horse racing season, violated the Clean Water Act by discharging wastewater containing animal wash water and detergent, and feed waste, from Aqueduct Racetrack into storm sewers that discharge to Jamaica Bay, a waterbody that is impaired by high levels of ammonia, nitrogen, oil/grease, and pathogens. In 2013 and 2014 alone, NYRA generated and discharged an estimated 1.26 million gallons per year of polluted wastewater.

Under the consent decree, NYRA will redirect all wastewater to sanitary sewers for treatment at a wastewater treatment plant. The settlement includes interim and long term measures, including the designation of a responsible employee; implementation of new operation and maintenance procedures; installation of a telemetry monitoring system in the manholes that will alert employees of any dry weather flows in the storm sewers; and weekly inspections. The settlement also requires

NYRA to post inspection results and compliance information on the internet, and pay \$150,000 as a civil penalty. NYRA also agreed to implement a Supplemental Environmental Project (SEP) that will reduce future storm water runoff impacts by planting 62 trees at the nearby NYRA Belmont Racetrack. The trees will capture and slow the flow of stormwater, increase soil permeability, prevent soil erosion, provide wildlife habitat, reduce the urban “heat island” effect, and improve air quality.

EPA Obtains Penalty, Injunctive Relief, and Environmental Improvements from New York State for Operating Prohibited Cesspools at State Parks

On December 19, 2016, the EPA, filed a complaint against the State of New York; New York State Office of Parks, Recreation and Historic Preservation (“OPRHP”); and the Palisades Interstate Park Commission (“Commission”), and simultaneously lodged a consent judgment to resolve the allegations in the complaint. The complaint alleges that the Defendants violated the Safe Drinking Water Act’s (“SDWA”) Underground Injection Control regulations in their continued ownership and operation of 54 Large Capacity Cesspools (“Prohibited LCCs”) at various New York State parks (mostly on Long Island) for years beyond the deadline of April 5, 2005, by which time they were required to close them. The sewage waste from LCCs is high in harmful nutrients, such as nitrogen, that can contaminate drinking water and degrade surface water quality. Many of New York’s public water systems rely on underground sources of drinking water, and nutrient pollution in and around surrounding Suffolk County is a longstanding problem that threatens Long Island’s Sole Source Aquifer.

Under the consent judgment, Defendants will pay a \$150,000 civil penalty, close the prohibited LCCs or convert them to lawful non-LCC uses by July 2019, and perform a Supplemental Environmental Project (SEP) that will reduce the nutrient pollution entering groundwater at seven of Defendants’ Long Island parks through the installation of urine separation systems that divert the collected urine to a wastewater treatment facility for treatment, installation of nitrogen reducing technology for sanitary waste, construction of a wetland for sanitary waste treatment, installation of green technology site improvements for stormwater treatment, and retrofitting existing stormwater drainage facilities with a bio-retention system. The estimated cost of the injunctive relief and SEP is \$17,000,000.

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://www.epa.gov/newsroom>, and other public information covering approximately July 1, 2016 through December 10, 2016.

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87. EPA Fact Sheet, Proposed Rule: Implementation of the 2015 National Ambient Air Quality Standards For Ozone: Nonattainment Area Classifications and State Implementation Plan Requirements.
88. 81 FR 81276; EPA Fact Sheet Proposed Rule: Implementation of the 2015 National Ambient Air Quality Standards For Ozone: Nonattainment Area Classifications and State Implementation Plan Requirements.
89. 81 FR 83235 (Nov. 21, 2016) citing *Donald van der Vaart, et al. v. McCarthy, et al.*, No. 4:16-cv-01946-SBA (E.D. N.C.).
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96. http://conf.montreal-protocol.org/meeting/mop/mop-28/final-report/English/Kigali_Amendment-English.pdf.
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98. *Id.*
99. Press Statement, John Kerry, Secretary of State, The Paris Agreement to Enter Into Force, Oct. 5, 2016, available at <https://www.state.gov/secretary/remarks/2016/10/262822.htm>.
100. White House Press Release, Remarks by the President on the Paris Agreement, October 5, 2016, available at <https://www.whitehouse.gov/the-press-office/2016/10/05/remarks-president-paris-agreement>.
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102. *Id.* at 82277.
103. 81 FR 70029 (Oct. 11, 2016).
104. 42 U.S.C. 7671(k).
105. 81 FR 70034 (Oct. 11, 2016).
106. *Id.* at 70035.
107. *Id.* at 70030-33.
108. *Id.* at 70029,
109. 81 FR 73478 (October 25, 2016).
110. *Id.* at 73479.
111. *Id.* at 73481.
112. *Id.*
113. EPA Press Release, EPA and DOT Finalize Greenhouse Gas and Fuel Efficiency Standards for Heavy-Duty Trucks, August 16, 2016, available at <https://www.epa.gov/newsreleases/epa-and-dot-finalize-greenhouse-gas-and-fuel-efficiency-standards-heavy-duty-trucks-1>.
114. EPA, Proposed Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation, Nov. 2016, available at <https://www.epa.gov/sites/production/files/2016-11/documents/420r16020.pdf>.
115. *Id.* at ES1.
116. *Id.*
117. *Id.*
118. <https://www.epa.gov/regulations-emissions-vehicles-and-engines/midterm-evaluation-light-duty-vehicle-greenhouse-gas-ghg>.
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124. 81 FR 59332-33 (Aug. 29, 2016).
125. *Id.*
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127. *Id.* at 59336.
128. *Id.* at 59342.
129. 81 FR 59276 (Aug. 29, 2016).
130. *Id.* at 59280.
131. *Id.* at 59277.
132. EPA Press Release, EPA Issues Final Actions to Cut Methane Emissions from Municipal Solid Waste Landfills, July 15, 2016, available at <https://www.epa.gov/newsreleases/epa-issues-final-actions-cut-methane-emissions-municipal-solid-waste-landfills>.
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134. EPA Press Release, USDA, EPA Announce U.S. Food Loss and Waste 2030 Champions, Nov. 17, 2016, available at <https://www.epa.gov/newsreleases/usda-epa-announce-us-food-loss-and-waste-2030-champions>.
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137. <https://www.epa.gov/sustainable-management-food/food-recovery-challenge-frc>.
138. EPA Press Release, New EPA Web Portal Helps Communities Prepare for Climate Change, October 6, 2016, available at <https://www.epa.gov/newsreleases/new-epa-web-portal-helps-communities-prepare-climate-change>.
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140. See, e.g., ARC-X, “Tailor Your Climate Adaptation Search,” at <https://www.epa.gov/arc-x/tailor-your-climate-adaptation-search>.
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ENVIRONMENTAL LAW SECTION COMMITTEE REPORTS

Adirondacks, Catskills, Forest Preserve & Natural Resource Management

Committee Co-chairs:
Claudia Braymer and Thomas Ulasewicz
Date of Report:
December 16, 2016

Committee Activities

Reviewed the NYSBA Report and Recommendations Concerning Article 14 of the NYS Constitution.

Judicial or Administrative Decisions

- *Sierra Club v. Village of Painted Post*, 26 N.Y.3d 301 (2015)—decided after last year's committee report.
- *CHA v. DEC* (Sup. Ct. 12/5/16) (Belleayre Resort Project in Catskills)—dismissed combined Petition/Complaint.
- Protect the Adirondacks! Inc. (NYS Constitution, Article 14 snowmobile case)—trial scheduled for March 2017; preliminary injunction(s) denied by Supreme Court, appeal of denial of preliminary injunction is pending, Appellate Division granted preliminary injunction pending the appeal.
- *Friends of Thayer Lake v. Brown*, 126 A.D.3d 22 (3d Dept. 2015) (Navigable rivers and streams and public right of navigation, including right to portage over posted private land)—Court of Appeals, 27 N.Y.3d 1039 (2016), remanded the case to Supreme Court for trial.

Legislation

- Proposed land bank legislation that would implement a constitutional amendment authorizing the placement of public utility lines and bike paths in the Forest Preserve and establishing land banks.
- Possible Constitutional Convention, and amendment to Article 14.

Regulations

- March 2016 amendments to the Adirondack Park State Land Master Plan.
- APA Classification of Boreas Ponds.

Agriculture and Rural Issues Committee

Committee Co-chairs:
Ruth A. Moore, Elizabeth Dribusch, Scott Wyner
Date of Report:
December 16, 2016

Committee Activities

- Recruitment and orientation of a new co-chair: New York State Department of Agriculture and Markets General Counsel Scott Wyner.
- A full Committee meeting by conference call on July 26.
- A webinar on February 11th, open to all Environment Section Members, on agriculture and climate change, featuring Michael Hoffman, Executive Director of the Cornell University Institute for Climate Change and Agriculture. Co-chairs Liz Dribusch and Ruth Moore moderated the Q&A after Dr. Hoffman's presentation entitled "Agriculture and Climate Change—the Challenges and Opportunities for the Region's Farmers and Agri-Businesses." Dr. Hoffman appreciated the opportunity to reach a new audience, and he deftly tailored his remarks to fit the interests of environmental and agricultural practitioners. Dr. Hoffman's power point presentation is posted on the Environmental Law Section's online communities site.
- Numerous organizational conference calls between the co-chairs to discuss upcoming programming, Committee new member recruitment, and planning for 2017, including a survey of Committee

members to assess areas of interest for the coming year.

- Co-chair Ruth Moore also attended the Executive Committee meetings at the Annual Meeting in New York City and the fall meeting in Cooperstown.

Judicial or Administrative Decisions

Long Island Pine Barrens Society v. Suffolk County Legislature, 37937-10 (Supreme Court, Suffolk County, 2016, Whelan, J.)

A recent Supreme Court decision overturned Suffolk County's use of a zoning permit application process to allow farmers to build farm structures inconsistent with open space easements previously granted by Suffolk County under General Municipal Law Section 247 (which allows agricultural production, but not new construction in support of agricultural production). The decision emphasized that the easement was intended to preserve the open space in existence at the time the easement was granted and that the County holds the easement as a public trust and for a public purpose. The Court ruled that by returning the right of the landholder to build structures inconsistent with the easement (through a zoning permit), the County gave up something of value, violating the "public trust doctrine." This decision demonstrates the limitations of Section 247 as a method of preserving farmland.

Legislation

Department of Ag and Markets Agricultural Districts Law Improvements (Chapter 35 of the Laws of 2016)

The Agricultural Districts Law, enacted in 1971, was amended to: (a) better protect farms and farmers; (b) facilitate the creation of agricultural districts; and (c) streamline the establishment and review process for county governments and Department staff.

Industrial Hemp (Chapter 256 of the laws of 2016)

Based upon the language in the Omnibus Appropriations Bill of 2016 barring the use of federal funds in connection with preventing the sale, transport, distribution and processing of industrial hemp in connection with industrial hemp pilot projects permitted under the federal Farm Bill, this New York statute broadens of the scope of state's industrial hemp pilot program (enacted in 2014) to reflect the expanded scope of such projects permitted under federal law and policy. (The Department of Agriculture and Markets adopted emergency rules and has commenced rulemaking to incorporate these changes into its regulations.)

Regulations

- July 2016—Amending plum pox virus regulations, establishing quarantined areas in Orange and Ulster counties.
- August 2016—Amending emerald ash borer regulations, extending and combining 14 restricted zones into eight larger zones.
- November 2016—Amending Asian Longhorned Beetle regulations, extend the quarantine two square miles in central Long Island.

Global Climate Change Committee

Committee Co-chairs:

J. Kevin Healy, Carl Howard, Michael Gerrard,
Ginny Robbins

Date of Report:

December 15, 2016

Committee Activities

The committee organized a State Bar Association Leaders Climate Change Summit at Columbia Law School on June 17, 2016. Please see the meeting summary attached. To attract participants, we contacted the ABA and obtained the names of State Bar environmental committee leaders for all 50 states. We divided up the list and personally contacted each one over an approximately 60-day period. We plan to keep in contact with the Summit participants and work on possible future collaborations.

At the request of the Bar President-elect, we worked with Pace Law on the preparation of a 2016 update to the Task Force Report on Taking Action on Climate Change. The draft update will be available for our review this month, and we will work with Pace Law to finalize.

Current Bar Association Activities Relating to Climate Change

(as discussed at June 17, 2016 Summit)

This document organizes by category and jurisdiction the activities reported by attendees at the June 17, 2016 Bar Association Leaders Climate Change Summit. In addition to recording activities reported at the Summit, this document also notes questions, suggestions, and comments made by particular participants. The categories of activities it presents are: (1) Education; (2) Promoting Sustainable Practices, (3) Networks and Networking, (4) Advocacy, and (5) Challenges.

SECTION NEWS

Participants in the Summit (and contributors who could not attend) included:

Midori Akamine, Hawaii State Bar Ass'n	John Beling, Boston Bar Ass'n
Lorrie B. Benson, Nebraska State Bar Ass'n	Maura E. Blau, New Jersey State Bar Ass'n
Darren Carnell, Washington State Bar Ass'n	Todd A. Coomes, Delaware Bar Ass'n
Douglas Dagan, NRDC	Kimberly E. Diamond, ABA RADER Committee
Liz Edmondson, Kentucky Bar Ass'n	Pamela Esterman, Sive, Paget & Riesel
Richard H. Friedman, Pennsylvania Bar Ass'n	Michael B. Gerrard, Columbia Law School
Justin Gundlach, Columbia Law School	Steve Harvey, A Call to the Bar
J. Kevin Healy, New York State & City Bar Ass'ns	Diane Henkels, Oregon Bar Ass'n
Carl Howard, EPA	Stuart D. Kaplow, Maryland State Bar Ass'n
Michael Mahoney, New York City Bar Ass'n	Ann McQuesten, Oregon Bar Ass'n
Catherine V. Pagano, Women's Bar Ass'n of DC	R. Allan Payne, Montana Bar Ass'n
Virginia Robbins, New York State Bar Ass'n	Patricia F. Sharkey, Illinois State Bar Ass'n
Martin R. Siegel, Pennsylvania Bar Ass'n	Michelle Slater, Oregon Bar Ass'n
Randy Strobo, Kentucky Bar Ass'n	Roya Vasseghi, DC Women's Bar Ass'n

1. Education: Publications, Programming

1.1 Publications: Newsletters

Oregon Bar Association

The OBA's Sustainable Future Section's newsletter, "The Long View," receives contributions from 30-40 authors who are located across the country. Each issue is distributed electronically to members of the Sustainable Future Section and the Natural Resource Section. Though it is written primarily for lawyers, the editors try to draft it with law students and law firm staff in mind. It is freely available online: <http://osbsustain->

ablefuture.org/the-long-view-archives/home/section-newsletter/.

D.C. Women's Bar Association (WBA)

Online publication called "Raising the Bar," not yet open to non-members but may be in the future: <http://www.wbadc.org/newsletter>

Maryland Bar Association

Members of the association attempted publication of a newsletter on energy and environmental law, but found that it was too controversial.

American Bar Association (ABA) Section of Environment, Energy, and Resources (SEER) Renewable, Alternative, and Distributed Energy Resources (RADER) Committee

Newsletter has been published since 2012: <http://apps.americanbar.org/dch/comadd.cfm?com=NR252300&pg=2>.

1.1 Publications: Research

New York State Bar Association

New York State Bar Association Task Force on Global Warming, Taking Action on Climate Change (2009).

ABA

Final Report of the American Bar Association's Task Force on Sustainable Development (2015).

RADER Committee

Annual national writing competition for law students. Winning papers on energy topics are published and authors receive cash prizes.

1.2 Programming

Hawaii Bar Association Natural Resources Section

Recent CLE and other events include "Coping with Decreased Water Supplies," "Legislative Measures That Will Affect Hawaii's Statewide Land Use and Planning System," and "Climate Change Litigation and Policy in Hawaii."

Oregon SFS

SFS does regular CLEs on sustainability—but Diane Henkels noted that sustainability is often "too squishy" for CLE and that subjects must be characterized using other terms to warrant CLE credit. CLE events often include discussions of state legislation. The SFS also hosts film screenings, study groups, and other non-CLE events and community activities.

D.C. WBA

The WBA's Energy and Environmental Law Forum hosts 5–6 events per year, charging \$20 per event. The events are open to public. Examples have included: panels on renewable energy and careers in energy law, educational happy hours, and program on climate-related insurance. The insurance program was especially popular. In response to Diane Henkel's question, Roya Vasseghi said that these events are generally not CLEs, but added that young lawyers are particularly interested in learning how to start a sustainability-oriented career.

RADER Committee

The Committee holds 9–10 webinars per year. It has collaborated with the American Council on Renewable Energy and Bloomberg New Energy Finance on a renewable energy finance series.

NYC Bar Association

The NCYBA co-sponsored a conference in March to begin figuring out how to support and provide legal content for NYC's "Raising Awareness on Climate Change" effort. Attendees included NGOs, religious institutions, businesses, lawyers, and others. Some conference participants were especially interested in marketing as a tool for climate education and empowerment. The NYC Bar is interested in "hitching wagons to the city's efforts" to align work being done in multiple sectors behind this common goal. Michelle Slater asked for clarification on this point; Kevin Healy explained that the city is progressive on the issue of climate change, and lawyers should agree to stand behind the city and help where possible.

Kentucky Bar Association

The Environment, Energy, and Resources Section organizes 1 or 2 CLEs per year about issues relevant to lawyers in the state. This past year, the annual Earth Day CLE discussed the Clean Power Plan—it was the first time the Section had addressed climate change. Bipartisan opposition to the CPP was evident at the event.

Maryland Bar Association

Two types of program have been especially successful: PACE and green building. Property Assessed Clean Energy (PACE) financing programs exist in many states; programs about Maryland's program draw both attorneys and lenders, making them useful to participants not only for educational but also for networking/business reasons. Green building programs, held for CLE and otherwise, are heavily attended even though regis-

tration fees are steep. This might owe to the stringency of Maryland and DC building/efficiency codes.

2. Promoting Sustainable Practices: Operations, Awards, Certifications

2.1 Operations

New York State Bar Association

The NYSBA's Pollution Prevention (P2) Committee has in the past encouraged sustainable practices at meeting venues by requesting lengthy tours and interviews with facilities and events staff to discuss their operations. Topics covered on those tours include restaurant operation, grounds maintenance, laundry services, etc. In response to Michael Gerrard's question about the impact on hotel practices, Carl Howard replied that he's not sure, but that he would like to convince hotel managers of the PR benefits as well as the more direct cost savings and environmental benefits. Diane Henkels asked how long a tour takes; Carl answered that it goes quickly. Stuart Kaplow commented that the USGBC Green Buildings Venue Selection Guide may be useful in determining green conference spaces in the future. That Guide is available for download here: www.usgbc.org/resources/green-venue-selection-guide.

Oregon SFS

Efforts are under way to reduce energy consumption and paper use by the Oregon Bar Association's headquarters. This would build on the successful 40% reduction of paper use from 2009 to 2010. SFS members have found that highlighting cost savings to the Bar Association's CFO has been critical to moving proposals forward.

2.2 Awards

Oregon SFS

The SFS issues awards annually to law firms for innovative efforts to reduce carbon footprints. An average of 3 to 7 firms apply for each award. The winning firm receives a newsletter feature, an ad in the Bar monthly, and a write-up of their practices. The awards help promote good practices and emissions reductions. The SFS has learned that buy-in from firm management is important (i.e., it is a mistake to just accept an application from lower level associates or staff without confirming that partners have signed off) and that the award must be kept competitive and desirable, even if that means encouraging firms to apply or extending the deadline.

2.3 Certifications

Oregon SFS

The SFS helps conduct a third-party sustainability certification program, which recognizes Oregon law offices that adopt certain practices to reduce the energy, resources, and toxic chemicals required to operate the office.

3. Partnerships, Networks, and Networking

D.C. WBA

The WBA has recently made particular efforts to reach out to women in government relations. In response to Michael Gerrard's questions about the Section's relationship with the D.C. Bar Association, Roya Vasseghi and Cathy Pagano answered that the D.C. Women's Bar Environment Section has cosponsored some events with the D.C. Bar's Environment Section.

RADER Committee

The Committee recently collaborated with the American Council on Renewable Energy and Bloomberg New Energy Finance on a renewable energy finance series.

NYCBA

In March 2016, the NYCBA sponsored Opportunities to Raise Public Awareness about Climate Change and the Need for Action, a conference intended to synthesize ideas from academia, business, legal profession, NGOs, etc. on climate change education and marketing.

4. Advocacy

Oregon SFS

Coordinated efforts by Bar Association members and others in 2008 persuaded the Oregon State Bar Association to appoint 14 lawyers to a Task Force on Sustainability. The Task Force's report included two key recommendations, which the Board of Governors adopted in 2009. Those were: (1) adoption of a Sustainability Bylaw (now OSB Bylaw 26); and (2) authorization to form the OSB Sustainable Future Section, which now has about 275 members.

The Task Force also recommended that the legal profession should advocate for sustainable policies such as carbon pricing, as well as a constitutional amendment to support standing for climate change-related lawsuits.

Maryland Bar Association

Although the Maryland Environment and Energy Section does not take an official stance on climate change and related issues to avoid intra-section "philosophical wars," the section acts informally to support and shepherd legislative measures through that are both good for sustainability and for clients' businesses. The adoption

of tighter building and energy efficiency code provisions are characteristic examples. Importantly, success in this regard builds on advocacy efforts *not* being public.

RADER Committee

Committee members receive regular requests from members of Congress and others seeking neutral information from experts about issues relating to renewable energy, e.g., integrating wind energy into electric grid operations despite its variability. Currently, there is no readily accessible and searchable database of publications produced by the Committee or its members. Suggestions for addressing this absence ranged from creating an improved search function in the existing ABA-based website to creating a freestanding database.

5. Challenges: Disputes Over Climate Science, Regional Differences

5.1 Disputes Over Climate Science

In Maryland, Delaware, Montana, Kentucky, and even the ABA, climate change is a politically sensitive issue. Many members' clients oppose climate change-related regulation for business or ideological reasons (or both). This in turn prevents bar association members from taking a position, lest they be speaking contrary to the interests of some members' clients. Several participants noted that many bar association members would like their associations to take a position.

In Kentucky, this sensitivity extends beyond climate issues to anything that might affect the coal industry—for instance, the state adopted a PACE program but called it a program for Energy Project Assessment Districts or "EPAD" because that title did not include the term "clean energy."

Stuart Kaplow encouraged attendees to try to focus their respective associations' efforts on middle-ground topics that were less politicized.

Maura Blau from New Jersey and Martin Siegel from Pennsylvania reported that many lawyers are uninterested in climate change and do not see how it could be relevant to their legal practice. Questions from others led them to clarify that lawyers generally think of climate action as relating only to global mitigation, and not to local adaptation efforts.

5.2 Regional Differences

Oregon

Sustainable Future Section members are concentrated around Portland. Reaching out to more conservative parts of the state has proved difficult.

Corporate Counsel Committee

Committee Co-chairs:
George A. Rusk and Michael J. Hecker
Date of Report:
January 15, 2017

Committee Activities

Planning activities/discussions to revitalize dormant committee, including discussions with H. Tollin and L. Schnapf; replacement of outgoing co-chair Robert Hallman with M. Hecker; and development of half day CLE outline of program to be co-sponsored by NYSBA Environmental Energy Section Corporate Counsel Committee and NYSBA Corporate Counsel Section (Jeffrey Laner, Section Chair).

Judicial or Administrative Decisions

- (1) Recent federal enforcement cases under Foreign Corrupt Practices Act (FCPA), Dodd Frank, Sarbanes Oxley and SEC Rules regarding ethical conduct violations and regulatory/statutory requirements promoting sound, corporate governance and employment of best industry practices;
- (2) Tronox bankruptcy court award of \$5 billion for creation of privately funded environmental/ remediation trust to address contamination at former Kerr McGee sites; (3) PFOA settlements at Hoosick Falls and others sites involving injured parties and PRPs (e.g., DuPont, Honeywell, etc);
- (3) Activist shareholder cases emphasizing statutory and regulatory compliance and governance improvements at all levels of corporation.

Legislation

Please summarize significant state or federal legislation enacted in 2016 that involve the jurisdiction of the Committee

- (1) Federal Coal Combustion Residue (CCR) statute and regulations;
- (2) Federal Dodd Frank reporting and governance statute; NC Coal ash beneficial re-use law requiring coal ash risk assessments, remediation and beneficial re-use at 3 pilot project sites;
- (3) Federal Renewable Energy investment tax credit incentives; Grimm Waters statute removing federal subsidies of for flood insurance; and
- (4) Water Resource Development Act authorizing funding and granting broad authority to USACE

to promote public private partnerships to develop coastal/river ports, harbors and recreational areas.

Regulations

- (1) SEC regulations emphasizing shareholder access, Board/shareholder interaction and fair dealings; investor disclosure (Regulation FD); Federal and NYS beneficial reuse/recycling regulations; and NYS brownfield regulatory program amendments.

Guidance Documents

- (1) DOJ sentencing guidelines and Yates memorandum emphasizing the need for good governance practices and companies and officers in the corporate setting to reduce risk of enforcement prosecution and penalties and promote compliance;
- (2) EPA Clean Energy Plan; and (3) CEQ Climate Change Guidelines governing the preparation of EIS documents.

Hazardous Waste/Site Remediation

Committee Co-chairs:
David J. Freeman and Amy L. Reichhart
Date of Report:
January 5, 2017

Committee Activities

- We prepared comments, submitted to DEC on April 5, regarding DEC's revised definition of "underutilized" under the 2015 amendments to the Brownfield Cleanup Act.
- We convened a conference call on September 26 to discuss DEC's emerging policies regarding costs that the agency will allow to qualify for Site Preparation Credits.
- We organized and presented a highly successful CLE program, "Update on Hazardous Waste and Site Remediation Issues" in Albany on November 15.

Judicial or Administrative Decisions

- The Third Department decided *In re FMC Corporation v. NYSDEC*, 2016 N.Y. App. Div. LEXIS 6785 (App. Div., Third Dept. 10/20/16), finding that the NYSDEC may not spend money from the state superfund until it first provides a hearing to a potentially responsible party.

Legislation

- On July 21, 2016, Governor Cuomo signed legislation extending the statute of limitations in New York for personal injury claims related to pollution at superfund sites. The new statute is codified as CPLR 214-f.

Regulations

- DEC adopted its new definition of “underutilized” on July 29, effective August 12.

Legislation Committee

Committee Co-chairs:
John Parker and Jill Kasow
Date of Report:
December 16, 2016

Committee Activities

On May 18, 2016, the committee held its annual legislative forum. We have submitted an article for publication to the Section Journal, *The New York Environmental Lawyer*, that summarizes the event. The forum focused on water contamination and specifically showcased several viewpoints on Hoosick Falls PFOA drinking water contamination. The speakers at the forum spoke candidly and were sensitive to the timeliness and significance of the contamination issue for the local community. The article set forth a summary of these discussions yet does not directly attribute the findings to individual participants.

In addition, a young attorney and member of the Section, Jordan Lesser from the NYS Assembly, has joined the Committee and will be writing an end-of-session legislative update in the future.

Judicial or Administrative Decisions

N/A.

Legislation

As of this writing, the following is a list of notable bills that passed through the environmental conservation committees and were signed into law by the Governor:

- Ch 412, A919, A. Zebrowski: Relates to notice of public hearings relating to the adoption of rules and regulations by DEC, increases public hearing time frame from 30 days to 45 days, in line with SAPA.
- Ch 464, A10264, A. Englebright: Establishes the New York state ocean acidification task force.

- Ch 310, S368, S. LaValle: Authorizes the commissioner of environmental conservation to undertake projects to protect national historic landmarks from shore erosion.
- Ch 312, S5322C, S. Marcellino: Prohibits mercury-added rotational balancing products.

The budget saw an increase in allocation to the Environmental Protection Fund at \$300 million, an increase of \$123 million over the previous year. In addition, the following article VII language was passed (Budget Bill S6408C):

- PART T—Amends language regarding the Waste Tire program fee to create a three-year sunset and creates additional fee expenditure authority for the Department of Health for the study of disease caused by vectors in waste tire piles including flies and other insects, rodents, birds and vermin.
- PART U—Amends language related to the EPF Climate Change Account within the Environmental Protection Fund to provide funding for projects intended for state mitigation and adaptation efforts for climate change. This language also creates a grant program for zero emissions vehicles infrastructure, to be available for municipalities at up to \$250,000 per grant.
- PART Z—Provides language to extend the effective date of the Diesel Emissions Reduction Act for one year.
- PART AA—Provides language to allow incentives for the purchase of Zero Emissions Vehicles (ZEV) and establishes a Zero Emissions Vehicles rebate program. The ZEV program is to be created and administered by the New York State Energy Research and Development Authority and shall provide rebates to individuals of up to \$2,000 for the purchase of electric, hydrogen fuel cell, and hybrid plug-in vehicles.

Environmental Insurance

Committee Co-chairs:
Gerard P. Cavaluzzi and Daniel W. Morrison
Date of Report:
December 30, 2016

Committee Activities

As a Committee leadership update, in keeping with our Section’s interest in orderly succession planning and diversity, we are also pleased to report that Michele Schroeder will be replacing Dan Morrison as Co-Chair.

Dan will remain as a Committee member. We thank Dan for his service and contributions over the years and we welcome Michele's continued participation on our Committee in this role for 2017.

The Committee Has Undertaken the Following Projects in the Current Year:

On October 28, 2016, our Committee hosted its highly regarded 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 the leading 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 for more than a decade.

Planned Activity for 2017 Includes:

The Committee will hold quarterly calls to share market trends and to exchange anecdotal peer information about environmental insurance policy provisions, claims and coverage experiences. To the extent deemed appropriate by the Committee for 2017, a summary paper on hot topics or current trends in environmental insurance may be produced and posted to the Environmental Law Section Online Community or as a brief report for publication in the New York Environmental Lawyer. The Committee is also considering producing a brief 2017 case law update or a white paper on a selected relevant 2017 topic.

Mining and Oil and Gas Exploration

Committee Co-chairs:

Alita Giuda & Adam Schultz

Date of Report:

December 2016

Committee Activities

The Committee scheduled a spring and fall conference call and had email communications regarding possible Committee activities. A couple of ideas have been proposed and will be considered for the 2017 agenda. Also, a possible CLE with Jim Ragano in 2017 is being considered, among other ideas.

Judicial or Administrative Decisions

There were no significant decisions regarding oil and gas operations or mining operations in 2016. There have not been many decisions given the current oil and gas development climate in New York. One case, decided in late 2015 after last year's report, affirmed a trial court dismissal of a landowner's claims that DEC's response to a comment submitted relating to the proposed HVHF regulations was improper, and that potential drilling at their property created a risk of environmental harm, as well as improperly impacted their property rights. *Community Watersheds Clean Water Coalition, Inc. v. New York State Dep't of Env't'l Conservation*, 134 A.D.3d 1201 (3d Dep't 2015). The Third Department found the claims non-justiciable, as they were contingent on events that had not occurred (in the case of adoption of the HVHF regulations) or that may never occur (in the case of prospective drilling.)

With respect to mining, there were no significant cases decided this year, however, a handful of cases relating to mining were issued. One such case is a §1983 action filed in the Southern District of New York regarding alleged constitutional harms arising out of the Town's disparate treatment of several projects, including a mining operation. *See Roe v. Town of Mamakating*, 2016 U.S. Dist. LEXIS 75665 (S.D.N.Y. 2016). This case was dismissed on ripeness grounds. There were also a few cases regarding non-conforming use issues and vested rights. *See Phair v. Sand Land Corp.*, 137 A.D.3d 1237 (2d Dep't 2016); *Matter of Sand Land Corp. v. Zoning Bd. of Appeals of Town of Southampton*, 137 A.D.3d 1289 (2d Dep't 2016); *Matter of Elam Sand Gravel Corp. v. Town of W. Bloomfield*, 140 A.D.3d 1670 (4th Dep't 2016)(finding that a special use permit application was entitled special facts exception).

The Second Department also saw a challenge to a hardship waiver issued to a sand and gravel miner in the Central Pine Barrens. *See Matter of Long Island Pine Barrens Society, Inc. v. Central Pine Barrens Joint Planning & Policy Comm'n*, 138 A.D.3d 996 (2d Dep't 2016)(finding petitioners had standing, but denying petition on the merits). Finally, a use variance challenge relating to *See also Matter of Elam Sand & Gravel Corp. v. Town of W. Bloomfield Zoning Bd. of Appeals*, 137 A.D.3d 1732 (4th Dept' 2016)(finding use variance denial in relation to proposed sand and gravel mine was not arbitrary and capricious).

Legislation

New York enacted no laws related to oil and gas or mining operations. Federal laws related to oil and gas and mining do not affect operations or environmental issues.

Regulations

The SRBC has proposed regulations that include changes affecting the oil and gas as well as mining industry. Proposed amendments include requiring registration

for grandfathered consumptive users to ascertain the quantity of water used, revisions to clarify the project review application procedures, revisions and additions to the Review and Approval provisions, the hearings and enforcement provisions, and some miscellaneous changes. Specific noteworthy contents include SRBC's statement that the registration process is not intended to result in regulation of the grandfathered uses, but simply to gather data. The review and approval provisions would be revised to incorporate special review provisions for certain projects, including mine dewatering, to reflect the significant reviews performed by other regulatory entities.

Although less relevant to New York regulatory and environmental matters, EPA issued some additional oil and gas well development air regulations. <https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-industry/new-source-performance-standards-and>. Additionally, the U.S. Bureau of Land Management issued oil and gas regulations for operations on Federal land. https://www.blm.gov/style/medialib/blm/wo/Communications_Directorate/public_affairs/news_release_attachments.Par.15043.File.dat/VF%20Proposed%20Rule%20Waste%20Prevention.pdf. These regulations were litigated immediately, and the regulations were annulled. <http://www.wyd.uscourts.gov/pdfforms/orders/15-cv-043-S%20Order.pdf> It appears that an appeal is pending. <https://www.westernenergyalliance.org/knowledge-center/legal>

Guidance Documents

There were no guidance documents issued regarding mining issues in 2016. To accompany its air regulations (and the increased regulation of potential methane leaks from oil and gas well sites), EPA issued guidance regarding air impacts and oil and gas flowback, which are available at <https://www.epa.gov/sites/production/files/2016-10/documents/2016-ctg-oil-and-gas.pdf>.

Coastal and Wetland Resources

Committee Co-chairs:
Teresa Bakner and Amy Kendall
Date of Report:
January 3, 2017

Committee Activities

The federal regulation of Waters of the United States ("WOTUS") continues to evolve while State laws and regulations concerning tidal and freshwater wetlands remain relatively stagnant with no changes in law or regulation and little case law of note. The WOTUS rule remains

stayed while the Sixth Circuit considers the procedural and substantive challenges to the rule. With recent national elections changing the composition of the Congress and statements made by President Elect Trump it appears that the rule may be withdrawn entirely. In any event there is no indication from the Sixth Circuit Court that a decision will be forthcoming in the near future. This has essentially left the regulated community and the regulators in limbo—continuing to implement the existing program which was developed ad hoc by the federal agencies in guidance drafted to address numerous Supreme Court decisions ruling on WOTUS.

This year the U.S. Supreme Court issued one decision of note, finding in *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, that a Corps approved Jurisdictional Determination (JD) is a final agency action judicially reviewable under the Administrative Procedure Act. This decision was pre-figured in several earlier rulings of the Court; however, the ruling squarely provides that a JD can be appealed, without first engaging the time-consuming and costly process of applying for a permit pursuant to Section 404 of the Clean Water Act. In addition to the *Hawkes* case, there were several interesting decisions by lower level courts in cases involving wetlands.

The Corps also issued a new Regulatory Guidance letter on the types of JDs that can be requested by the regulated public and the legal effect of the preliminary JD as opposed to the "official" JD. The Guidance is useful in that it clearly sets forth the risks attendant upon obtaining a preliminary JD, rather than an "official" JD which is binding on the Corps and can be administratively or judicially appealed. The RGL and accompanying explanatory documents can be found on the Corps website.

Judicial or Administrative Decisions

The following is a summary of significant state or federal cases decided in 2016 that involve the jurisdiction of the Committee.

FEDERAL

Supreme Court:

In *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016), the United States Supreme Court held that approved jurisdictional determinations ("AJDs") were final agency actions reviewable by federal courts under the Administrative Procedures Act. 5 U.S.C. § 500 et seq.

Courts of Appeals:

1. *Nat'l Ass'n of Home Builders v. E.P.A.*, 786 F.3d 34 (D.C. Cir. 2015)

Plaintiff association that only had a preliminary JD, not an approved JD, and thus could not show that it had imminent plans to discharge into a likely

SECTION NEWS

jurisdictional watercourse, did not have standing to challenge the regulations.

2. *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31 (D.C. Cir. 2015)

A challenge to dredge and fill permits granted for a pipeline construction that had approximately 1,950 crossings subject to the CWA, and required authorization from four regional offices. Plaintiff claimed that the Corps failed to address the cumulative effects of the water crossings for the entire pipeline. Held that each region need only address the cumulative effects of all the crossings in its region, on a watershed basis, or by suing a different type of geographic area, and need not address the entire project for cumulative impacts.

3. *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043 (10th Cir. 2015)

Holding that, when certain permits involve “some level of speculation about future operations,” the Corps may partially defer the minimal-impact determination by establishing additional safeguards through the use of project-level personnel to evaluate environmental impacts and ensure minimal-impact.

Holding that, “although district engineers must analyze cumulative impacts, the engineers need not include a written analysis of cumulative impacts within the verification letters.”

4. *Lost Tree Village Corp. v. United States*, 787 F.3d 1111 (Fed. Cir. 2015)

Holding that the Corps’ denial of plaintiff’s 404 permit application amounted to a Lucas taking *per se* because the Plaintiff’s property was valued at 99.4% less without a permit than it would have been with one.

5. *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, 781 F.3d 1271 (11th Cir. 2015)

Holding that Association had standing to challenge Corps’ permit issuance when it alleged that its members “use waters downstream from mining sites for recreational and other purposes; that those waters are visibly polluted; that the pollution of those waters decreases their enjoyment of them; and that pollution has impaired habitats for wildlife they like to observe and study.

Holding that downstream pollution from a mining operation is redressible in a § 404 suit, and is not limited to § 402 challenges, which require permits for surface drainage from a mining site to pass

through a sediment pond before being discharged into downstream waters.

Holding that laches did not apply to bar Plaintiff’s claims when it delayed “nine or ten months” in bringing its action.

6. *South Carolina Coastal Conservation League v. U.S. Army Corps of Engineers*, 789 F.3d 475 (4th Cir. 2015)

Holding that plaintiff’s claims were moot. Plaintiff brought challenge to prevent the intrusion of saline water into freshwater impoundments that were classified as freshwater marshes. By the time of the action, the salinity levels of the outside brackish waters were less saline than the freshwater marshes that Plaintiff sought to protect from saline intrusion.

7. *Mingo Logan Coal Co. v. E.P.A.*, 829 F.3d 710 (D.C. Cir. 2016)

Holding that EPA correctly considered the effects on water quality downstream from a mining fill operation, reasoning that such downstream impacts are not wholly within the realm of § 402, which allows States to regulate downstream discharges. Reasoning that, in considering downstream water quality, the EPA was not regulating the discharge into downstream waters, which is an authority empowered to the State, it is just assessing whether discharge into those waters will produce “unacceptable adverse effects” on wildlife.

8. *Ohio Valley Environmental Coalition, Inc. v. U.S. Army Corps of Engineers*, 828 F.3d 316 (4th Cir. 2016)

Holding that the Corps did not violate NEPA and CWA by limiting its review in issuing a “valley fill” permit to mining operation to only the act of dredging and filling the stream beds that were under the entire valley fill. Reasoning that the Corps does not have the authority to consider the broader impacts of the entire surface coal mining operation on human health, and its review is limited to the actual filling of the stream. Any actions that occur on top of that are outside the purview of the CWA.

9. *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, 833 F.3d 1274 (11th Cir. 2016)

Holding that the revision to Nationwide Permit 21 (“NWP 21”), that set new strict discharge regulations for surface coal mining operations, but also allows for the grandfathering of prior permits without satisfying the specific new requirements, is a valid action. The fact that the grandfathered permits are not required to satisfy the new method for measuring minimal impact does not exempt those permit holders from otherwise proving that their

permitted activities will have a minimal impact and not exceed previously approved discharge levels, notwithstanding that they are not required to abide by the strict parameters of the new regulation to show such minimal impact.

STATE

On November 21, 2016, the Court of Appeals upheld the determination of the New York Department of State that Entergy Nuclear Operations Inc.'s pending application to renew its federal operating licenses for the Indian Point nuclear reactors on the Hudson River in Westchester County is subject to review for consistency with the policies of New York's Coastal Management Program (CMP). *Entergy Nuclear Operations, Inc. v. N.Y. State Dep't of State*, No. 179, 2016 WL 6825615 (N.Y. Nov. 21, 2016).

Regulations

The following is a summary of significant state or federal regulations proposed or adopted in 2016 that involve the jurisdiction of the Committee.

FEDERAL

On April 18, 2016, USACE, together with the USEPA, the U.S. Fish and Wildlife Service, and the U.S. Department of Agriculture—Natural Resources Conservation Service ("NRCS"), published the final biennial update to the National Wetland Plant List (NWPL) in the federal register. The 2016 NWPL list became effective on May 1, 2016.

On June 1, 2016, USACE issued proposed new Nationwide Permits. 81 Fed. Reg. 35,186. USACE plans to reissue the 52 existing nationwide permits and the general conditions with some modifications. USACE has also proposed two new nationwide permits and one new general condition. One of the two new proposed nationwide permits will authorize living shoreline bank and shore stabilization activities in navigable waters of the United States, and discharges of dredged or fill material into waters of the United States for the construction and maintenance of living shorelines. "Living shorelines" are defined to encompass a "range of shoreline stabilization techniques along estuarine coasts, bays, sheltered coastlines, and tributaries." This proposed permit for living shorelines comports with the Army Corps' recognition of a landowner's "general right to protect property from erosion." The 2012 nationwide permits expire on March 18, 2017. As of the date of this report, USACE had not published final nationwide permits.

STATE

NYDEC has proposed a new Part 490 "Projected Sea-Level Rise" as required by the Community Risk and Resiliency Act, Chapter 355 of the Laws of 2014 (CRRRA).¹ The proposed sea-level rise projections are based on sea-level

rise projections included in "Climate Change in New York State: Updating the 2011 ClimAID Climate Risk Information", Horton et al. (2014), prepared for the New York State Energy Research and Development Authority. Written comments were accepted through December 30, 2016.

Guidance Documents

The following is a summary of significant state or federal guidance documents proposed or adopted in 2016 that involve the jurisdiction of the Committee.

FEDERAL

USACE issued a Regulatory Guidance Letter dated October 31, 2016.² The RGL explains the differences between AJs and preliminary jurisdictional determinations ("PJD"). The RGL does not change the way JDs are made, but rather clarifies procedure and provides explanation. It also explains that priority will be given to jurisdictional requests that are accompanied by permit requests.

STATE

On December 27, 2016, NYSDEC issued a proposed "Tidal Wetlands Guidance Document."³ The purpose of this guidance documents is described as "(A) to encourage appropriate use of living shorelines in place of hardened approaches for erosion control, because living shorelines offer greater habitat and ecological value than hardened shorelines and revetments [], and (B) to promote a consistent approach for permit application evaluations for living shoreline techniques." *Id.*, p. 5. The draft guidance defines "living shoreline" as (p. 6-7):

Shoreline techniques that incorporate natural living features alone or in combination with structural components such as rock, fiber rolls, bagged shell, and concrete shellfish substrate. This combination is also called hybrid. To be considered a living shoreline the techniques shall:

- Control or reduce shoreline erosion while maintaining benefits comparable to the natural shoreline such as, but not limited to, allowing for natural sediment movement;
- Use the minimum amount of structural components necessary to obtain project goals;
- Improve, restore, or maintain the connection between the upland and water habitats; and
- Incorporate habitat enhancement and natural elements, including native re-vegetation or establishment of new veg-

etation that is consistent with a natural shoreline typical of the site location.

International

On December 8, 2016, the commissioners of the International Joint Commission (“IJC”) signed an order of approval which will allow for the implementation of “Plan 2014” for regulating water levels and flows in Lake Ontario and the St. Lawrence River by setting flows through the Moses-Saunders Dam, which is located between Cornwall, Ontario and Massena, New York. The order of approval was signed following the concurrence of the governments of both the United States and Canada. Plan 2014 follows 16 years of scientific study, public engagement and other proposed plans. The IJC Commissioners concluded that Plan 2014 allows for more natural variability in water flows, which will “restore plant diversity and habitat for fish and

wildlife.”⁴ Plan 2014 allows for an increase of 2.5” in the maximum water level for Lake Ontario, and therefore has caused significant concern for municipalities and property owners along the lake. For more information, visit the Plan 2014 website at http://www.ijc.org/en_/Plan2014.

Endnotes

1. See <http://www.dec.ny.gov/regulations/103870.html> for more information.
2. See http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl_6-01_app1-2.pdf?ver=2016-11-01-091706-840.
3. See http://www.dec.ny.gov/docs/fish_marine_pdf/dmrlivingshoreguide.pdf.
4. See “Lake Ontario-St. Lawrence River Plan 2014: Summary of Benefits and Impacts,” http://www.ijc.org/files/tinymce/uploaded/LOSLR/Plan2014FactSheet_EN.pdf (last visited December 30, 2016).

Memorandum to the Executive Committee Regarding the Report of the Committee on Diversity

Committee on Diversity Co-Chairs:
Joan Leary Matthews and John Greenthal

Introduction

Environmental Law Section members have long recognized that the vitality of the Section rests heavily on a diverse membership, and our Section is viewed within the Bar Association as a leader in its plans and efforts to achieve a significant increase in diverse members.

In the view of the Committee on Diversity, we have done pretty well. Leading up to 2016, we think some of the Section’s most successful efforts have been in increasing the number of younger and women speakers at CLE programs, as chairs of committees, and in Section leadership positions.

2016

Working with the Membership Committee, the Committee on Diversity’s focus during 2016 was on events aimed at introducing the Section to, and in networking with, law school students. That initiative led to a marked increase in student members. (We now need to ensure that the students become attorney members of the Section.) Events at Buffalo Law School, Cornell Law School, and Hofstra Law School, combined with an event at a firm to which students from New York City law schools were invited, were successful in making the Section “younger.”

2017

For the upcoming year, the primary targets of the Committee on Diversity will be minority attorneys. We will be working with the NYS Bar Association to form

liaisons with minority bar associations and to outreach through them to members who might be interested in Environmental Law.

The Committee also intends to participate in organizing two programs over the next two years:

- A forum on diversity in the practice of Environmental Law – our thinking is that by focusing attention on the issue, i.e., by having representatives of the NYS Bar Association, the Environmental Law Section, minority bar associations, minority attorneys from the various sectors of practice, and student groups come together to confer, we will shed more light on the subject, make contacts, gather information, identify challenges, and better determine our strategies and courses of action.
- A CLE program on environmental justice – working with the Section’s Committee on Environmental Justice, we would examine, among other issues, the role of the minority legal community in advancing environmental justice.

The Committee on Diversity is also updating the Section’s Diversity Plan and its Guidelines for Selecting Speakers for Section Programs, both of which were last updated in 2011.

Finally, if and when the CLE Board adds a requirement to CLE rules for diversity and inclusion credits, the Committee on Diversity will offer to provide assistance to the Section’s CLE Committee in implementing the requirement in the context of Section CLE programs.

Legislative Forum 2016 Report

Legislation Committee Co-Chairs:

John Parker and Jillian Kasow

To Drink or Not To Drink: Clean Water Litigation Trends in New York

The Committee on Legislation has focused its energy on an issue critical to New York's economic and environmental future—clean water. Last year, our annual legislative forum focused on water infrastructure needs throughout New York State. Since then, we have continued to focus on the issues related to the current threats to our water, particularly when infrastructure upgrades and water pollution controls fail or fall behind. Overall, our inquiry to legal practitioners and government officials asks what New York actions are needed to ensure clean, viable, and sustainable water resources in the 21st Century.

Whether water is clean enough for human consumption remains a scientific inquiry that rests heavily upon environmental and public health policy. The clean water controversy in Hoosick Falls brought the complexity of this issue into clear light. In part, the apparent novel nature and importance of Hoosick Falls and Flint, Michigan, before it, demonstrates the need for active engagement by local residents. In the Hoosick Falls case, local resident Michael Hickey, suspicious of the quality of water following the death of his father from cancer and a perceived high rate of cancer within his community, tested the village water when the village would not. The ensuing controversy and its impact on local residents brought to the fore many legal questions, including the proper statute of limitations, personal injury claims based on bioaccumulation, and responsibility for blood testing and medical monitoring of those exposed to water contamination.

The annual forum addressed these complicated issues in earnest, in a panel discussion moderated by Co-Chair John Parker, and involved a robust discussion and question-and-answer session.

The Panelists

Elizabeth Moran

Water and Natural Resources Associate

Environmental Advocates of New York

Since 2014, Elizabeth Moran has served as Environmental Advocates of New York's water and natural resources associate. She leads the organization's advocacy efforts on water pollution, land use and conservation, fracking, and invasive species issues. She has authored two reports, *License to Dump*, and, most recently, *Tapped Out: New York's Clean Water in Peril*. She advocates for requir-

ing private well testing, increasing staff at the New York State Department of Environmental Conservation ("DEC"), transparency in the allocation of funding to the New York State Department of Health ("DOH") for water testing, increasing requirements to test well water prior to the sale of a home, and extension of the statute of limitations. Ms. Moran also stressed the need for manufacturing chemicals and their impact on environmental and human health to be studied prior to coming to market.

Joseph E. Coffey, Jr., P.E.

Commissioner of the City of Albany Dept. of Water & Water Supply

Mr. Coffey is a licensed professional engineer. He spent many years locally at C. T. Male Associates, and also held positions as Executive Director at University Heights Association in Albany and as Director/Section Manager at Earth Tech's (now AECOM) Latham, N.Y., office. Prior to his appointment as Commissioner in 2014, he was Director at GEL Engineering in Charleston, South Carolina, for nine years. Mr. Coffey earned his Bachelor's in Engineering from Boston University and his Master's in Environmental Engineering from RPI.

Mr. Coffey has extensive experience in engineering and environmental consulting. Over the years, he has developed a specialized expertise in water and wastewater treatment, limnology, and water resources management. A little over a year ago, Mr. Coffey returned to the Capital District and was appointed the Commissioner of the City of Albany Department of Water & Water Supply. In his short time as Commissioner, Mr. Coffey has guided the department toward a business model incorporating core values, visioning, new technologies and practices, as part of an initiative to streamline the Department's delivery of services, implement an asset management program, upgrade its systems, and focus more attention on preventive maintenance and flood mitigation.

Mr. Coffey discussed the current state of the City of Albany water supply, which enjoys a surplus of clean water. He discussed several measures to protect against corrosion of water lines and backflow. He noted that city water is tested frequently for contaminants beyond what is required under regulation and believes it is a positive duty as a licensed professional to protect public health and safety. He likened the recent Flint, Michigan, water crisis to a total collapse of professional responsibility, suggesting that violations of the public trust by licensed engineers should be punished criminally. Mr. Coffey drew a distinction between the Flint water crisis and that of Hoosick Falls, however, explaining that unregulated contaminants, such as Perfluorooctanoic acid or PFOA, carry with them an inherent un-

certainty of how to respond, which is amplified in smaller municipalities with less resources and possibly less experience in asset management.

David Engel

Of Counsel

Nolan and Heller, LLP

Since 1988, Mr. Engel's private practice has focused on environmental, toxic tort, land use, energy, and related matters. He has authored several articles on environmental, land use, and regulatory law issues and is a frequent speaker on environmental and land use matters before professional and civic organizations. He represents clients in federal and state courts, and before a variety of regulatory agencies including the DEC, the U.S. Environmental Protection Agency ("EPA"), the Federal Energy Regulatory Commission ("FERC"), and the New York State Public Service Commission ("PSC").

He also represents a wide range of business entities, municipalities, and individuals.

Between 1977 and 1984, prior to entering private practice, Mr. Engel held several positions with the DEC, including serving as the DEC's Energy Counsel. Thereafter, he served with DEC's Division of Environmental Enforcement ("DEE"). From 1975 to 1977, he served as a Staff Attorney with the New York State Department of Agriculture and Markets. Mr. Engel is a 1975 graduate of Albany Law School and a 1972 *cum laude* graduate of Union College.

Mr. Engel represents the Hickey family in Hoosick Falls regarding PFOA contamination in the water supply within and surrounding the village. He discussed an initial hesitance by the village to investigate water quality largely, he asserted, because of recent efforts to raise the livability and tourism profile of the community. He also presented some startling cancer incidence rates in the Hoosick Falls community. The prevalence of individuals aged 50-60 who were diagnosed with, or passed away from, cancer, was overwhelming. He argued for the expansion of claims to include cases where cancer is high risk yet not detected and for those who have achieved cancer remission.

Mr. Engel also presented a detailed history on the procedures at the Saint-Gobain manufacturing plant in the community that likely caused the PFOA contamination. These PFOA practices included open-oven baking, open exhaust, and dumping of contaminated sludge on surrounding grounds. Many of these practices occurred in the 1960s-70s before additional air pollution control measures were put into place.

Panel Discussion and Recommendations: A Multi-faceted Challenge Ahead

The panel discussion was lively, with several pointed questions to the three experts.

Understanding the past practices and uses of the key contaminant, PFOA, as well as finding its entry point into the environment, is critical to measuring the impact and the spread of the contamination to surrounding areas. The water contamination from these chemicals is likely to be found in other areas of the State and throughout the nation. In New York, panelists noted that state agencies need to increase their ability to identify and to monitor water contamination. Specifically, panelists recommended additional resources for improving state agency workforce skills and training on contamination monitoring, which would necessarily include a focus on expanding corresponding graduate-level studies.

A coordinated response among federal, state, and local agencies is needed to address the drinking water crisis. In the case of Hoosick Falls, clear coordination would have reduced, considerably, the time to notification of local residents. In the case of PFOA, additional studies on pathways of human exposure are needed because of the possible spread of the contamination through surface and groundwaters.

New York lacks a comprehensive water policy, further exacerbating the threat of known and emerging sources of contamination. The challenges ahead are illuminated by the differing governmental responses in this case. The lack of communication within the EPA, whose regional office was unaware of a material Toxic Substances Control Act filing by Saint-Gobain to the national office, caused delay. New York's DOH offered advice based upon regulatory standards that assumed short-term exposure, not the decades-long exposure to which residents of Hoosick Falls were subjected. The DEC's response to list the site under the superfund program was a critical step to advance investigation of the extent of the contaminant exposures. Overall, however, initial disagreement between DOH and EPA, over EPA's suggestion for heightened caution in response to high levels of contamination, lead to unjustified delays in response.

It is clear that water quality directly affects health and economic development. The lack of a clear statewide policy to assess source waters and to find ways to prevent its contamination must be addressed to reduce the possibility of contamination in other communities. As the panelists pointed out, water monitoring and crisis response systems need streamlining and additional financial resources. More specifically, smaller municipal systems may lack the resources or expertise to actively monitor water quality beyond regulatory standards, but the public and environmental health requirements of regulations must apply equally to all of the communities in the State irrespective of population. In our *2015 Legislative Forum*, greater region-

Continued on page 49



Above left, presenting on pesticides and marijuana, Keeley Peckham, Director of Cultivation, Etain Health LLC; Jeanine Broughel, Director of Pesticide Registration, NYSDEC; and Robert Perlis, Office of General Counsel, USEPA. Above right, Robert Perlis, Office of General Counsel, USEPA.



Environmental Law Section

Annual Meeting
2017



Counterclockwise from above, Thomas Smith, Bond Schoeneck & King, presenting on TSCA; attendees at a Section's program; presenting on TSCA, David Berol, Office of General Counsel, USEPA, Michael Boucher, Dentons US LLP, and Thomas Smith; and Telisport Putsavage, Putsavage PLLC.





Above left, Section Chair Larry Schnapf. Above right, Dr. Ross S. Whaley, former Adirondack Park Agency Chair and 2017 Environmental Law Section Award Honoree, and Keynote Speaker Andrew Revkin, Senior Reporter for Climate at ProPublica..

Environmental Law Section

Annual Meeting
2017



Above left, Michael Ritorto and Joseph Dumunico of Roux Associates, Section event sponsor. Left, Sally Fisk, Assistant General Counsel, Pfizer. Above, Keynote Speaker Andrew Revkin, Senior Reporter for Climate at ProPublica.



SECTION ANNUAL MEETING NEWS



Counterclockwise from above, Immediate Former Section Chair Michael Lesser, Sive Paget & Riesel, and Section Chair Larry Schnapf, Schnapf Law; Section Vice-Chair Kevin Bernstein, Bond Schoeneck & King, and Section Treasurer Marla Wieder, Office of Regional Counsel, USEPA; Nelson Johnson, Arnold & Porter Kaye Scholer; Dan Lear, Director of Industry Relations, Avvo, presenting on social media and ethics; George Rodenhausen, Law Offices of Rodenhausen Chale, LLP; and attendees listen to a speaker at a Section program.





Environmental Law Section

Annual Meeting
2017



Counterclockwise from top right, Former Section Chair Walter Mugdan, Acting Regional Administrator, Region 2, USEPA; Former Section Chair Barry Kogut, Bond Schoeneck & King; Thomas Smith, Bond Schoeneck & King; Mimi Raygorodetsky, Environmental Liability Management, LLC; and Section Treasurer Marla Wieder and Section Secretary Howard Tolin, EVP, President, Environmental, SterlingRisk Environmental Services.

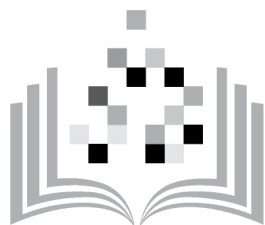
Legislative Forum Report 2016

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alization of water monitoring and asset management were suggested as a possible approach for the future. It was also asserted that, in light of the heightened cost of better monitoring and asset management, there is a public trend to resist increase in costs associated with water infrastructure. The public focus on water crises, as in Hoosick Falls, Petersburg, and the City of Newburgh, however, may change public attitudes. As statewide funding continues to

become available for water infrastructure investments, so too must state and federal agencies look to their response systems to ensure water quality is monitored at every level, for the most and for the least sophisticated municipalities. As the panel discussion made clear, more must be done to protect our communities' drinking water in the years ahead.

A special thanks is in order to participants and guests and to the Bar Association for hosting the event at the One Elk Street headquarters, and to the Bar Association team that made the event possible.



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Property Contamination and Its Impact on Commercial Leasing in NYC

By Larry Schnapf

New York City Office of Environmental Remediation Voluntary Cleanup Program (VCP)

The New York City Office of Environmental Remediation (OER) administers a Voluntary Cleanup Program (VCP)¹ that can be used to address minimally contaminated sites such as contaminated fill sites, the “E” program and oil spills that are confined to the property. OER has entered into a Memorandum of Understanding with the New York State Department of Environmental Conservation (NYSDEC) so that NYSDEC will honor cleanups completed by OER under its VCP.

The NYC VCP is a popular tool for moderately contaminated sites because of the OER’s streamlined approach that allows sites to complete remediation fairly quickly. The NYC VCP is perhaps the nimblest remedial program in the country. OER staff is particularly responsive to the needs of applicants and will work hard to find a way to accommodate the construction schedule of an applicant.

In New York City, real property sites that are complicated by presence or potential presence of detectable levels of contamination are eligible for the VCP. Properties that are remediated through the NYC VCP receive a Notice of Completion, which includes a New York City liability release, a statement from the NYSDEC showing that it has no further interest and does not plan to take enforcement or require remedial action for the property. Applicants also receive a NYC Green Property Certification that symbolizes the city’s confidence that the property is protective of public health and of the environment.²

In addition, applicants may be able to tap a modest suite of investigation/cleanup grant programs offered by OER that can help plug the funding gap caused by the need to perform remedial actions. Sites enrolled in the NYC VCP are eligible for the Brownfield Incentive Grants (BIG) Program, which funds four types of grants including pre-enrollment investigation costs, remediation, technical assistance to non-profit developers of Preferred Community Development Projects, and purchase of pollution liability insurance or cleanup cost cap insurance. BIG grants may also be used for the Hazardous Materials E-Designation and Restrictive Declaration Remediation programs (see below).³

OER also recently embarked on a brownfield “jump start” program for affordable housing and certain industrial site expansion projects that were contemplating applying to the NYSDEC BCP. For qualifying sites, OER will provide upfront refundable grants of up to \$125,000 for investigation and \$125,000 for site remediation costs. The

funds are repaid to city after the project receives BCP tax credits.

One of the key challenges facing purchasers of contaminated property is that the landowner liability protections under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) and similar state laws are self-implementing.⁴ While EPA may occasionally enter into a prospective purchaser agreement or issue a comfort letter, EPA and state environmental agencies do not have the resources to routinely review the thousands of phase 1 reports generated annually in commercial real estate or financing transactions. Thus, a purchaser will not know if it has qualified for one of these defenses until the purchaser has been sued or a defendant files a counterclaim in a contribution claim filed by the purchaser, and a court issues a final ruling.

To facilitate redevelopment, OER will issue several types of letters. The first, known as Environmental Review and Assessment (ERA) letter, may be used where the presence of contamination may complicate a real estate or financing transaction. OER will issue an ERA letter where it determines that existing conditions at a property are protective of public health. OER does not anticipate issuing letters where contamination requires further action beyond that contemplated under the transaction to render a property protective for its intended use. To obtain an ERA letter, a party will meet with OER to discuss the nature of the transaction, prior and current site uses and operational history of the property, the proposed development, known site contamination, and how the ERA letter will facilitate the transaction. As a part of the process, OER will review available data on the property, including a Phase I and all Phase II reports, and compare the identified contamination against the state cleanup standards, 6 NYCRR § 375, to determine if the existing or proposed property conditions are protective of the property’s future use. If as a result of this review OER determines further environmental investigation or remedial action is warranted, OER will consider issuing an ERA letter to identify those additional studies and remedial actions if requested by both parties

Another type of OER letter is known as an “acceptance letter.” This type of letter is particularly useful when a phase 2 report identifies contaminants above the standards established by the NYSDEC, but there are not any completed pathways because of the existence of a building foundation, paved surfaces, etc. OER will review phase 2 reports and if it agrees that no further action is

required, OER will issue a letter indicating it accepts or agrees with the conclusions of the report.

OER will also issue a pre-VCP enrollment “comfort letter.” Frequently, when a consultant recommends further sampling or cleanup, lenders may require a borrower to enroll in a voluntary cleanup program prior to the closing and require borrower to covenant to obtain a no further action letter from the appropriate regulatory agency. Unlike other remedial programs, the OER voluntary cleanup program does not accept applicants until after a site has been characterized and documented in a remedial investigation report. Thus, a borrower may not be able to actually enroll in the NYC VCP until after the closing. To provide assurance to a lender, OER will issue a pre-enrollment letter indicating that the borrower is making progress toward acceptance into the OER VCP. OER interprets this sentence very broadly and will write letters to satisfy concern of lenders

ity.⁷ In New York City, NPD has assumed responsibility for environmental review that would normally be performed by HUD.

All property proposed for use in HUD programs must be free of hazardous materials, contamination, toxic chemicals and gases, and radioactive substances where the hazard could affect the health and safety of occupants or conflict with the intended use of the property.⁸ As a result, developers of affordable projects receiving funding from HUD or HPD often have to perform environmental reviews for the presence of hazardous materials to comply with NEPA.

HPD must have an Environmental Assessment (EA) prepared to identify all potential environmental impacts, whether beneficial or adverse, and the conditions that would change as a result of the project.⁹ Environmental reviews are generally conducted for new construction,

“One of the key challenges facing purchasers of contaminated property is that the landowner liability protections under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) and similar state laws are self-implementing.”

OER has also developed a “standstill letter” which can be used when a seller seeks to sell property but environmental issues have complicated a transaction. In such a case, the seller can investigate the site and develop a generic remedy with OER. The site would then be enrolled in VCP but would be “standstill” mode with no requirement to proceed with the remedy. It is hoped the existence of an approved remedy will provide comfort to a prospective purchaser and its lender since the buyer will be able to estimate the cleanup costs. After the purchaser acquires title, it can then implement the pre-approved remedy—provided the proposed reuse is consistent with the approved remedy.

All is not lost if you have learned about the NYC BCP after construction has started or is significantly completed. OER has developed a “look back” track where projects may be able to obtain liability protection if the remedial action conforms to the OER program requirements. However, “look back” applicants will not be eligible for the NYC BCP funding incentives.

The OER VCP may also be used to satisfy requirements of the National Environmental Policy Act (NEPA)⁵ or the State Environmental Quality Review Act (SEQRA) for projects being funded by the New York City Department of Housing Preservation and Development (HPD). The federal Department of Housing and Urban Development (HUD) has established regulations implementing NEPA⁶ when HUD staff performs environmental reviews and when local governments assume HUD responsibil-

major rehabilitation, leasing, acquisition and change in use under a range of HUD programs. The most common programs for which HPD performs environmental reviews are HUD’s HOME Investment Partnership Program (HOME) and the Neighborhood Stabilization Program (NSP). HPD utilizes federal HOME funds to finance the construction of new and rehabilitation of existing housing including vacant and occupied single room occupancy buildings (SRO), small homes (buildings with fewer than 12 units) and multi-family buildings. The reviews must be completed before the release of funds and acquisition of property.

The developer will be required to conduct a phase 1. If the phase 1 identifies Recognized Environmental Conditions (RECs), the developer will have to propose a phase 2 work plan for approval by New York City Department of Environmental Protection (DEP). Note that sometimes HUD or HPD may disagree with the phase 1 findings and require a Phase II even if the phase 1 did not identify RECs. If the investigation confirms the presence of contamination above applicable levels, the developer will submit a remedial action plan (RAP) for review and approval by the DEP.

The existence of an approved RAP enables HPD to issue a Notice of Finding of No Significant Impact (FONSI) certifying that the project will not have a significant impact on the environment and therefore will not require preparation of an Environmental Impact Statement (EIS). HPD will also issue Notice of Intent to Request a Release

of Funds (NOI/RROF). The developer would normally implement the RAP and submit a remedial action report to DEP for final approval.

The DEP approval will simply confirm that the developer has satisfactorily completed the RAP. The certification will not confer any liability protection under CERCLA or the state Environmental Conservation Law (ECL) nor provide contribution protection. Moreover, the HPD funding often does not cover remediation costs, which can create a funding gap for a project that already has very tight margins.

When facing the prospect of implementing a remedial action, developers should consider enrolling the project in the NYC VCP. Developers can enter the NYC VCP even after DEP has approved a RAP. Oftentimes, all that a developer will have to do is to convert the DEP-approved RAP into the template form used by OER. This is because both DEP and OER follow the NYSDEC remedial program requirements set forth at 6 NYCRR Part 375.

New York City “E” Designation Program

OER also administers the E- Designation program,¹⁰ which began as a land use program but has morphed into an important source of cleanup obligations in New York City. An E-Designation is a NYC zoning map designation that indicates the presence of an environmental requirement pertaining to potential Hazardous Materials Contamination, Window/Wall Noise Attenuation, or Air Quality impacts on a particular tax lot. The E-designation is assigned to property lots as part of a zoning action under the City Environmental Quality Review (CEQR) Act. If the CEQR review process indicates that development on a property may be adversely affected by noise, air emissions, or hazardous materials, then the Lead Agency may assign an E- Designation on the property lot to ensure that the E-Designation requirements are satisfied prior to or during a new development or new use of the property.¹¹

A Hazardous Materials (Haz Mat) E-Designation may be assigned for a variety of reasons, including that the property contained:

- Incinerators;
- Underground and/or above ground storage tanks;
- Active solid waste landfills;
- Permitted hazardous waste management facilities;
- Inactive hazardous waste facilities;
- Suspected hazardous waste sites;
- Hazardous substance spill locations;
- Areas known to contain fill material;
- Petroleum spill locations; and

- Any past use identified in Appendix A to the CEQR Technical Manual.¹²

The Department of Building (DOB) incorporates the E-Designations in its Building Information System (BIS). The DOB examiner cannot issue a building permit for new development, changes of use, enlargements or certain other alternations to existing structures until DOB receives either a Notice to Proceed (NTP) or Notice of No Objection (NNO) from OER. To obtain an NTP from OER for a Haz Mat E-designation, the applicant has to submit a phase 1 environmental site assessment and a phase 2 workplan if recognized environmental conditions (RECs) are identified. After implementing the phase 2 report, OER will determine if a remedial action plan (RAP) is required. If OER determines that a RAP is not required, OER will issue a notice of no objection to DOB.¹³ OER may issue NNOs for actions that do not raise potential exposure to hazardous materials, or air quality or noise impacts. Indeed, approximately 50% of the E-Designation projects OER reviews result in NNOs. If OER determines a RAP is required, the applicant must submit an acceptable RAP before OER will issue an NTP.

When the applicant wants to obtain a Certificate of Occupancy from DOB, it must obtain a Notice of Satisfaction (NOS) from OER demonstrating that the applicant has complied with OER requirements. To obtain the NOS, the applicant will submit Remedial Closure Report after completion the RAP. In issuing an NOS, OER may require the execution of a Declaration of Covenants and Restrictions by the title holder for the tax lot(s) subject to the (E) Designation or the Environmental Restrictive Declaration, which shall be recorded against the property prior to the issuance of a NOS.¹⁴ If an applicant wants to remove the E-designation from the property and not have to record a Declaration of Covenants and Restrictions, it would have to implement a track 1 (unrestricted) cleanup.¹⁵

Parties can also comply or remove the E- Designation by enrolling the site in the state BCP as well as the NYC VCP. It is important to note that when lots with an E-Designation are merged or subdivided, the E- Designation will apply to all portions of the merged lot or to each subdivided lot. Because remediation done under the E-Designation program is not eligible for the state hazardous waste program fee, developers of sites with Haz-Mat E-Designations should consider enrolling the site in the NYC VCP.¹⁶

A similar approach is used for Restrictive Declarations (RD) that impose an institutional control against a property to ensure that environmental mitigation or requirements that were imposed as a condition of a land use approval are implemented. The RD runs with the land so that it binds current and future owners to comply with certain investigation and remedial requirements that may be required by OER.

Historically, RDs were used when private applicants who owned or controlled a property sought a rezoning or other action under section 11-15 of the Zoning Resolution of the City of New York. This proved to be a cumbersome process because all parties with a property interest in property including lenders, had to execute an RD. Moreover, the NYC Department of Environmental Protection (DEP) and a city agency approving the discretionary action had to expend resources reviewing the RD.

In 2012, the City Council adopted an amendment to the Zoning Resolution that authorized lead agencies to assign E-Designations for any actions, including those sought by private applicants such as rezoning, special permits or variances. The E-Designation can be imposed based on visual or historical documentation for lots not

may be liable for penalties as possibly three times the cleanup costs incurred by DEP.²⁴ In addition, any person who knowingly violates or fails to comply with any order, rule or regulation issued under this law shall be guilty of a misdemeanor and, upon conviction thereof, shall be punishable by a fine of not less than \$25,000, or by imprisonment not to exceed one year, or both, for each violation.²⁵

The categories of responsible parties are similar to those in CERCLA but are potentially broader. In general, any current owner, operator, lessee, occupant or tenant other than a residential lessee, occupant or tenant of property at the time there is a release, or a substantial threat of a release, of a hazardous substance from such property into the environment may be liable as a responsible

"The New York City DEP is authorized to respond to actual or threatened releases of hazardous substances, to recover its response costs from responsible parties and to impose a lien on the property subject to the cleanup."

under the ownership or control of the person seeking the Zoning Amendment or Zoning Action. When the applicant owns or controls the lots, a phase 1 may be required.¹⁷ Because of the zoning resolution amendments, RDs will no longer be used to impose environmental conditions on properties. However, owners and developers have to comply with existing RDs.

New York City Hazardous Substance Emergency Response Law (NYC Spill Law)¹⁸

The NYC Spill Law operates like a local superfund law. The New York City DEP is authorized to respond to actual or threatened releases of hazardous substances, to recover its response costs¹⁹ from responsible parties and to impose a lien on the property subject to the cleanup.²⁰

DEP may also issue unilateral orders requiring a responsible party to address a release or threatened release that may present an immediate and substantial danger to the public health or welfare or the environment.²¹ A responsible person who has been served with a cleanup order may submit a written request for a hearing within ten (10) working days of service of such order.²²

Any responsible person who knows or has reason to know of any release of any hazardous substance that exceeds a reportable quantity must immediately orally notify the DEP and submit a written notice within one week of discovery of the release.²³

Responsible parties may be jointly and severally liable without regard to fault for all response costs incurred by the DEP or another city agency responding to a release of hazardous substances. A responsible party that fails to respond to a cleanup order "without sufficient cause"

party.²⁶ In addition, any former owner, operator, lessee, occupant or tenant of the property at the time of disposal of any hazardous substance may be a responsible party.²⁷

Responsible parties may assert three statutory affirmative defenses (Act of God, Act of War and third party defense).²⁸ However, the law lacks an innocent purchaser's defense or bona fide prospective purchaser. Regulated financial institutions chartered under state or federal law that received title to the contaminated property through abandonment, foreclosure, a deed in lieu of foreclosure, or through a judicial or bankruptcy order will not be deemed to be a responsible party unless: (i) the institution willfully, knowingly, recklessly, or negligently caused or substantially contributed to the release or threatened release of hazardous substances, or (ii) the financial institution received title in order to secure the underlying credit extension for the purpose of allowing the responsible party from avoiding the provisions of the law.²⁹ Interestingly, one of the rare enforcement actions that DEP brought under this law was against a foreclosing lender who took control of a defunct borrower's facility to conduct an auction but left behind dozens of drums containing hazardous waste. The bank ended up footing the bill to remove the waste.

The law provides that costs incurred by the DEP or other city agency in performing a response action constitute a "debt" recoverable from each responsible party and authorizes the filing of a cleanup lien against the real property of the responsible party or the parcel that was subject to the response measures.³⁰ The lien becomes effective when either (i) a statement of account of costs is filed in the office of the City Collector and a notice of po-

tential liability is filed, or (ii) three days after a notice has been mailed by certified and registered mail to the owner of the real property that was a subject of the cleanup action.³¹ The amount set forth in the statement of accounts continues to be a lien on the property until it is paid.³² However, the lien is subordinated to a previously perfected mortgage.³³

NYC Petroleum and Hazardous Materials Storage Rules

The New York City Fire Code requires owner or operators storing certain quantities of petroleum or hazardous materials to obtain permits and comply with certain design standards. Storage tanks that are not subject to regulation by NYSDEC under the Petroleum or Chemical Bulk Storage Acts may still be subject to regulation under the Fire Code.

The regulations promulgated by the New York City Fire Department provided that storage tanks that have not been used for more than 30 days but less than one year must undergo temporary closure. For fuel oil tank storage systems with a total capacity of 330 gallons or more, closure must be performed by a licensed person. The owner or operator of the temporarily abandoned tank system or the permit holder must file an affidavit with the NYFD certifying that such system complies with the temporary closure requirements.³⁴ Owner and operators of temporarily out of service tank systems must continue to comply with the Fire Department's permit and testing requirements as well as the registration, reporting, inspection and testing regulations of NYSED.

Tank systems used for storing gasoline, diesel, fuel oil or other flammable or combustible liquids that have not been used for one (1) year or more must undergo permanent closure. For fuel oil tank systems exceeding 330 gallons, the permanent closure must be performed by licensed individuals. The owner or operator of a permanently out-of-service storage system or the permit holder for the tank system must also file an affidavit with the Fire Department certifying that the tank system was removed and disposed or abandoned in place in compliance with the requirements of Fire Code.³⁵ If an environmental site assessment is required by federal or state law or regulations, the owner/operator of the storage system, the permit holder for the system, or the person filing the affidavit of compliance must submit a written statement to the Fire Department that such environmental site assessment has been performed in accordance with such law and regulations.³⁶

The Fire Code prohibits discharges of hazardous material unless permitted under federal or state law. The Fire Commissioner must be notified of discharges of hazardous materials that exceed the applicable reportable quantity for that substance.³⁷ The owner of a facility or other person responsible for a discharge shall undertake all actions necessary to remediate such discharge. When

deemed necessary by the commissioner, cleanup may be initiated by the department or other city agency. Costs associated with such cleanup shall be borne by the owner or other person responsible for the discharge. The department shall give such owner or other person written notice of such costs and an opportunity to be heard. Payment of such costs shall be recoverable in any manner authorized by law, rule or regulation. Failure to pay such costs shall cause a lien to be placed upon the premises pursuant to the provisions of FC117.4.³⁸

NYC Asbestos Law

Federal, state and local asbestos regulations can impose significant and unexpected costs and delays for building renovation and demolition projects. Owners and tenants conducting renovation or demolition projects that are likely to disturb asbestos-containing materials are responsible for notifying regulatory agencies and ensuring that asbestos abatement activities performed by their agent or contractor comply with certain asbestos notifications and work-practice requirements.

Beginning in the 1970s, EPA has banned the use of many forms of asbestos in building materials. As a result, many building owners, tenants and lenders mistakenly believe that newer buildings do not contain any asbestos-containing materials (ACM). Contrary to this popular misconception, there are a number building materials in use today that may still contain asbestos. The more common types asbestos-containing building materials, include vinyl-asbestos tile, roofing felt, roofing coatings, caulking putties, construction mastics, textured coatings, asbestos-cement shingle, corrugated sheet, asbestos-cement flat sheet, pipeline wrap, millboard, asbestos-cement pipe, and asbestos-cement. As a result, it is still important for parties contemplating building renovation or demolitions and their lenders not to assume a building does not have ACM based on its construction date, but to assess the presence and condition of suspect ACM. Building owners and tenants performing renovation may consider inserting requirements in their construction contracts requiring contractors and architects to use asbestos-free material

It should be noted that ACM is considered a "non-scope item" in the standard phase ASTM E1527-13 environmental site assessment (Phase 1 ESA) that is customarily used in real estate transactions. This means that the presence of ACM will not be evaluated as part of the Phase 1 ESA unless the party hiring the environmental consultant specifically requests that ACM be included as part of the scope of services.

The asbestos regulations adopted by the NYC Department of Environmental Protection (DEP) are stricter than the federal requirements and can apply to smaller projects that are not subject to the federal asbestos requirements.³⁹

The NYC DEP asbestos rules define an “Asbestos project” as any work performed in a building or structure or in connection with the replacement or repair of equipment, pipes, or electrical equipment not located in a building or structure that will disturb more than 25 linear feet or more than 10 square feet of asbestos-containing materials. A large asbestos project is defined as one that will disturb 260 linear feet or 160 sq./ft.⁴⁰

Prior to the state of alteration, renovation, demolition, or even plumbing work, the building owner or tenant is responsible for having an asbestos survey performed by a DEP-certified asbestos investigator to determine if asbestos-containing material may be disturbed during the course of the work.⁴¹

If after a survey performed the DEP-certified asbestos investigator determines that the building (or the portion affected by the work) is free of asbestos-containing material or the amount of ACM to be abated constitutes a minor project, the ACP-5 Form is filed with the NYC DEP.⁴² Where the work to be performed constitutes an asbestos project, an asbestos project notification (ACP-7 Form) shall be submitted to DEP at least one week before the work is scheduled to commence.⁴³ It is important to note that the NYC DEP asbestos-notification obligation is separate and different from the federal asbestos-notification requirement, which is ten days. If the start date changes, both the federal and NYC rules require a new notification be submitted.

Endnotes

1. RCNY § 14-1401 et seq.
2. See *NYC Voluntary Cleanup Program*, NYC OFFICE OF ENVIRONMENTAL REMEDIATION, <http://www.nyc.gov/html/oer/html/voluntary-cleanup-program/vcp.shtml> (last updated 2016) for more information about the NYC VCP.
3. See *Grant Types: BIG*, NYC OFFICE OF ENVIRONMENTAL REMEDIATION, <http://www.nyc.gov/html/oer/html/brownfield-incentive-grants/grant-types.shtml> (last updated 2016) for more information about the BIG program.
4. See Larry Schnapf, *Property Contamination and Leasing: The Federal Law*, Environmental Law Net (May 2015), www.environmental-law.net/wp-content/uploads/2011/05/Schnapf-May-2015.pdf.
5. 42 U.S.C. § 4321 et seq.
6. 24 C.F.R. pt 50.
7. 24 C.F.R. pt 58.
8. See 24 C.F.R. pts 50.3(i) and 58.5(i)(2).
9. 24 C.F.R. pt 58.40(b).
10. See RCNY § 24-02 et seq. (where the “e” rules are authorized by § 1403 of the New York City Charter and § 11-15 of the Zoning Resolution of the City of New York).
11. See *CEQR Documents*, NYC OFFICE OF ENVIRONMENTAL REMEDIATION, <http://www.nyc.gov/html/oer/html/e-designation/ceqr-documents.shtml> (last updated 2016) for the “e” requirements for individual properties.
12. 15 RCNY § 24-04.
13. 15 RCNY § 24-06.
14. 15 RCNY § 24-07.
15. 15 RCNY § 24-08.
16. See *State Hazardous Waste Fee and Special Assessment Exemption*, NYC OFFICE OF ENVIRONMENTAL REMEDIATION, <http://www.nyc.gov/html/oer/html/voluntary-cleanup-program/hazardous-waste.shtml> (last updated 2016) for more information about NYC sites qualifying for the hazardous waste program fee.
17. 15 RCNY § 24-04.
18. 15 RCNY § 24-600 et seq.
19. 15 RCNY § 24-604.
20. 15 RCNY § 24-605.
21. 15 RCNY § 24-608.
22. 15 RCNY § 11-05.
23. 15 RCNY § 11-03.
24. 15 RCNY § 24-610(c).
25. 15 RCNY § 24-610(d).
26. 15 RCNY § 24-603(g)(1).
27. 15 RCNY § 24-603(g)(3).
28. 15 RCNY § 24-604.
29. 15 RCNY § 24-603(g)(1).
30. 15 RCNY § 24-605.
31. 15 RCNY § 24-605(c).
32. 15 RCNY § 24-605(g).
33. 15 RCNY § 24-605 (h).
34. 3 RCNY § 3404-01(c).
35. 3 RCNY § 3404-01(d).
36. 3 RCNY § 3404-01(d)(3).
37. FC § 2703.3.1.
38. FC § 2703.3.1.4.
39. The federal renovation and demolition rules apply to projects that are likely to disturb 260 linear feet, 160 sq./ft. or 35 cubic feet of ACM.
40. 15 RCNY § 1-02.
41. 15 RCNY § 1-23.
42. 15 RCNY § 1-23(c).
43. 15 RCNY § 1-25.

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Requiring Energy Efficiency Improvements in New York City's Homes: A Legal Analysis

By Danielle Spiegel-Feld & Augusta C. Wilson

Introduction

If New York City hopes to achieve its goal of reducing greenhouse gas emissions by 80% below 2005 levels by 2050 it will have to dramatically improve the energy efficiency of its building sector, which accounts for nearly three-quarters of the City's total emissions.¹ In light of this challenge, officials have taken important steps in recent years to improve building energy efficiency, such as strengthening the energy code for new construction² and requiring large existing properties (25,000 square feet or bigger) to release annual energy use data.³ Large buildings have also been obligated to make certain energy-saving upgrades to their building systems.⁴ But because existing buildings under 25,000 square feet are exempt from these rules, a significant opportunity to reduce emissions is being squandered. Just a subset of buildings under 25,000 square feet 1 to 4 family homes ("small residential buildings") is responsible for 20% of the City's greenhouse gas emissions on its own.⁵

Fortunately, efforts to improve the energy efficiency of small residential properties elsewhere provide insight into how New York City can boost performance in the sector. In particular, a number of jurisdictions in the United States and abroad have required residential property owners to implement energy efficiency upgrades (or "retrofits") prior to executing various transactions such as a sale or re-lease of the property. This approach holds considerable promise; if properly calibrated, a retrofit requirement should produce meaningful greenhouse gas reductions without unduly burdening owners. In fact, it may benefit owners by lowering utility bills, thereby improving affordability of housing.

This article will examine the case for a retrofit requirement and explain why we believe it should be part of a comprehensive strategy for the small residential sector. We will also consider legal mechanisms the City could use to implement such a requirement and assess the strength of potential legal challenges that may be lodged against it. Our analysis builds upon a separate forthcoming Policy Brief in which we examine other jurisdictions' experiences with retrofit policies to suggest how New York City should design its own ordinance. Although a detailed discussion of the reasoning behind our recommendations is beyond the scope of this article, our proposal can be summarized as follows: we believe that the City should adopt a simple, prescriptive checklist of required retrofits, which will be approachable even for homeowners with relatively little technical expertise. Further, owners should only be required to implement retrofits that have short payback periods and that require only

modest capital outlays from homeowners. Finally, the retrofit ordinance should be flexible and offer multiple paths to compliance.

I. The Case for a Retrofit Requirement for Small Residential Buildings

A wealth of research indicates that retrofits can significantly reduce residential energy consumption.⁶ For instance, a 2012 Department of Energy ("DOE")-supported study of retrofitted homes in Atlanta, Georgia found that energy efficiency improvements produced an average of 32% savings in utility expenses during a heating season.⁷ Another recent DOE-supported study, which conducted a metaanalysis of studies of deep retrofits, found consistent energy savings ranging from 30% to 70%.⁸ Some researchers have gone so far as to argue that retrofits of existing homes represent the majority of all potential energy savings in the building sector in the U.S.⁹

Not only can residential retrofits produce meaningful energy, and therefore greenhouse gas savings, but they also appear to be a highly cost-effective means of doing so.¹⁰ Some types of retrofits are even predicted to pay for themselves within just a few years. To illustrate, a recent study that modeled the predicted costs and benefits of implementing three types of home retrofits in different American cities with varying climates found that all measures had payback periods of less than six years in the cities with relatively cool climates.¹¹ Replacing standard thermostats with programmable thermostats was found to be particularly cost-effective; the payback period was less than two years in each city examined.¹² After that point, the technology was predicted to save homeowners approximately \$100 per year in energy costs.¹³ In cities with colder climates, air sealing and attic insulation were also predicted to have short payback periods, ranging from approximately two to four years.¹⁴

These cost savings could be significant for low-income households, which often spend large portions of their income on energy bills.¹⁵ In New York State, the statistics are particularly stark: households at or below the federal poverty level in New York "have home energy bills that amount to 22 percent of their annual income or more."¹⁶ Many of New York City's residents fall within this category; Con Edison serves approximately 530,000 low-income gas and electric customers in New York City, and National Grid serves another 35,000 low-income customers.¹⁷ Low-income individuals who rent their homes could benefit significantly from a requirement that landlords retrofit their properties. Provided the mandated

retrofits have relatively fast payback periods, low-income homeowners should benefit from such a mandate as well.

Given that energy efficiency retrofits produce cost-savings for homeowners, some may ask why it is necessary to mandate them—won't homeowners make cost-effective improvements on their own? In fact, research indicates that households routinely neglect to implement energy efficiency upgrades that would save them money.¹⁸ This problem—which has been coined “the energy paradox”¹⁹—stems in part from market failures, such as information deficits.²⁰ For instance, current homeowners may not know that cost-effective savings are available, and prospective buyers or tenants may not have the information needed to distinguish efficient properties from inefficient ones. Both scenarios lead to inefficient pricing. Energy audit and disclosure policies can mitigate these inefficiencies.²¹

But audits and disclosure won't eliminate the energy efficiency gap entirely because property owners do not always behave rationally even when presented with full information about energy efficiency.²² For example, due to the so-called “endowment effect,” individuals may be reluctant to dispense with an appliance that has already been paid for even if they know it makes financial sense to replace it with something more efficient.²³ Even more simply, “people procrastinate; attention wanders.”²⁴ A retrofit requirement would provide a backstop against these types of behavioral anomalies and ensure that all buildings meet minimum energy efficiency standards. If there were a complementary disclosure requirement in place, consumers would also be able to identify properties that surpass the minimum standards.²⁵ In short, a retrofit requirement is an important part of a comprehensive strategy for improving the efficiency of all existing buildings.

II. Legal Pathways to Implementation

New York City has ample authority to implement a retrofit requirement. The doctrine of municipal “home rule” enshrined in the New York State Constitution gives the City substantial leeway to regulate issues affecting its “property, affairs, or government”²⁶ as it sees fit.²⁷ Reducing building energy use in the City—along with the greenhouse gas emissions attributable to such energy use—clearly relates to the preservation of the City's property. Indeed, Mayor DeBlasio has argued that New York City faces direct existential threats from climate change due to rising sea levels, heat waves, and increasing frequency of intense storms.²⁸

There are two distinctive legal pathways the City could use to implement a retrofit requirement: first, the City Council could enact a local law instructing a City agency to administer such a program; second, a City agency could issue a new administrative rule establishing the program. Of the two approaches, new legislation is preferable because it would allow the City to avoid any potential separation of powers problem. Codifying the

retrofit requirements would also make the rules more durable, since a local law is more difficult to repeal than are administrative rules.

The City recently encountered a high-profile separation of powers problem of this sort when the New York City Board of Health (“BOH”) adopted a rule restricting the size of containers used by food service establishments to serve sugary beverages. Beverage industry trade groups attacked the rule, popularly known as the “soda-ban,” arguing that BOH had exceeded the scope of its delegated authority in issuing it. The New York Court of Appeals agreed. Specifically, the Court held that, in adopting the soda ban rule, BOH had crossed the line from administrative rule-making into legislative policy making, violating the principle of separation of powers set out in the New York State Constitution.²⁹ Had the rule come about as a result of legislative action on the part of the New York City Council, this separation of powers problem would not have existed.³⁰ Thus, the safest route for an energy efficiency retrofit regulation would be for the City Council to enact enabling legislation.

This leaves open the question of which agency the Council should charge with implementing the retrofit requirement. The agency that appears best equipped to administer a retrofit program is the Department of Buildings (“DOB”). As set out in the New York City Charter, the DOB is responsible for enforcing the building code as it governs the construction and alteration of buildings in the City, as well as the issuance of permits relating to such construction.³¹ Moreover, the DOB already administers the energy efficiency requirements that apply to buildings over 50,000 square feet under the *Greater, Greener Buildings Program*.³² The proposed energy efficiency retrofit requirement thus falls squarely within the realm of the DOB's authority and its expertise.

III. Anticipating Potential Legal Challenges

If enacted through the proper pathways, the retrofit requirement should stand on strong legal footing. Indeed, to our knowledge, none of the other American jurisdictions' retrofit ordinances has been challenged in court. Yet, with any new regulation, there is a possibility of litigation. It is therefore worth examining what types of claims challengers might raise and how strong their case would be.

We can envision two types of attack that could be lodged against the regulation: (1) that it represents an unconstitutional taking of private property, and (2) that it is preempted by federal or state law. We review each of these potential arguments below but ultimately find them both unpersuasive.

A. Takings

The “takings clause” of the Fifth Amendment to the U.S. Constitution prohibits the taking of private property for public use without just compensation.³³ The New

York State Constitution reiterates this protection against takings³⁴ and State case law on the subject largely tracks the relevant Supreme Court precedents.³⁵

In the landmark case *Loretto v. Teleprompter Manhattan CATV Corp.*, the Supreme Court established a categorical rule that compensation will be required where the government authorizes a permanent physical invasion of private property.³⁶ The retrofit ordinance at issue here is unlikely to violate the *Loretto* rule. While some may be tempted to argue that certain types of retrofits, such as installing ceiling attic insulation, constitute a “permanent physical invasion” akin to the cables at issue in *Loretto*, there is a significant difference between the proposed retrofit ordinance and the law at issue in *Loretto*: in *Loretto* and all other prior cases where a Court has found that a regulation effected a permanent physical invasion of which we are aware, a third party—be it a governmental or a private entity—has benefited from the intrusion.³⁷ In this case, by contrast, the City—the entity requiring the retrofits—would not benefit from their presence in individual homes. Instead, the regulation merely requires

only found regulations to effect a taking in “exceptional cases.”⁴⁴ Typically, the injury to the property owner must not only be substantial,⁴⁵ but there must also be evidence that the individual is being made to bear “a burden that should be borne by the public as a whole.”⁴⁶ In the present case, not only would the economic burden of the ordinance be minor, but it will be distributed across the entire class of residential property owners in New York City. A takings claim therefore seems highly unlikely to succeed.

B. Preemption

1. Federal Preemption

The Supremacy Clause of the U.S. Constitution grants Congress the power to preempt state and local laws.⁴⁷ Congress often exercises this authority by including a provision in a statutory scheme that expressly prohibits states from regulating in a given area.⁴⁸ But even in the absence of express preemption language, courts will find Congress to have preempted state law by implication in two scenarios. First, preemption will be implied where a state or local law directly conflicts with a federal law.⁴⁹

“Even if the government does not physically invade private property, a regulation can nonetheless be deemed to effect a taking if it ‘goes too far.’”

homeowners to maintain the property to a particular standard. In this sense, the proposed regulation is more similar to a requirement that homeowners install smoke detectors, which many jurisdictions, including New York, have implemented.³⁸

Even if the government does not physically invade private property, a regulation can nonetheless be deemed to effect a taking if it “goes too far.”³⁹ Here, too, a court would also be unlikely to find that the proposed retrofit ordinance violated the requisite standard. In determining whether a government regulation “goes too far” and thus effects a taking, the courts apply a *per se* rule that a regulation that deprives the landowner of “all economically viable use” of the property in question is automatically a taking requiring compensation.⁴⁰ If the regulation does not do so—and there is no reasonable argument that the contemplated retrofit ordinance does—courts proceed to apply a multi-factored balancing test first articulated in *Penn Central v. New York City*,⁴¹ which considers the following: (1) the regulation’s economic effect on the landowner; (2) the extent to which the regulation interferes with reasonable investment-backed expectations, and (3) the character of the government action.⁴²

While the *Penn Central* test has been criticized as being imprecise and therefore unpredictable,⁴³ it is important to bear in mind that the Supreme Court has

This is known as “conflict preemption.” Second, state and local laws will be preempted if Congress has so thoroughly occupied a legislative field as to “make reasonable the inference that Congress left no room for the States to supplement it.”⁵⁰ This is known as “field preemption.”

Courts are unlikely to find that federal law preempts the proposed ordinances under either a conflict or field preemption test. The federal government does not set energy performance standards for existing buildings, or require retrofits of buildings, unless the building is occupied by a federal agency,⁵¹ which should leave the states with broad latitude to enact this kind of local regulation. However, there is one area where the City will have to tread lightly: appliance standards. The Energy Policy and Conservation Act of 1975 (“EPCA”)⁵² directs the DOE to set efficiency standards for a variety of home appliances, such as refrigerators, freezers, and boilers. EPCA also contains an express preemption provision that broadly prohibits states from enacting regulations “concerning the energy efficiency, energy use, or water use of [a product covered by EPCA].”⁵³ Although EPCA does allow for preemption waivers under some limited circumstances, it is very unlikely that the proposed ordinance could qualify for such a waiver.⁵⁴ Therefore, to avoid running afoul of EPCA, New York City should take care not to include anything in the retrofit ordinance that would require

homeowners to install appliances that are more efficient than the minimum federal standards.⁵⁵

2. State Preemption

Just as Congress can preempt acts of state and local government, the New York State legislature can preempt local legislation that is inconsistent with state law. And, just as with federal preemption doctrine, even in the absence of express preemption language State law can preempt a local law if there is a conflict between the two⁵⁶ or there is evidence that the State intended to occupy the field.⁵⁷ Below we review potential arguments that state law preempts a New York City retrofit ordinance. Like the Supreme Court's takings jurisprudence, New York State's implied preemption jurisprudence has been criticized as being somewhat unpredictable.⁵⁸ However, the particular facts at issue in this case seem to militate against any preemption finding. This is not, in our view, a close case.

a. New York Real Property Law

Litigants attacking a retrofit ordinance may attempt to argue that it is conflict preempted by a provision of the New York State Real Property law that confers a general right to transfer real property.⁵⁹ Yet, this argument is unlikely to prevail because the ordinance, as contemplated, would not actually prevent the transfer of property. Instead, it would condition the right to transfer on the completion of certain upgrades. Moreover, sellers would be allowed to assign purchasers' responsibility for making the upgrades after the sale is completed, which further undercuts any potential claim that the ordinance impedes property sales. Finally, New York City already imposes various limitations on the right to transfer property without giving rise to conflict preemption.⁶⁰

b. New York Energy Conservation and Construction Code

Opponents of a retrofit ordinance might also argue that it is preempted by the New York State Energy Conservation Construction Code ("ECCC"), which applies to new construction as well as to certain alterations of existing buildings.⁶¹ Here, too, the argument is unpersuasive. There is no explicit preemption language in the ECCC, so the ordinance could only be preempted if it were in direct conflict with the ECCC, or if there was evidence that the State intended to occupy the field. The ECCC does not address energy efficiency retrofits except to the extent that renovated elements must conform with current efficiency standards, so there is no basis for arguing that the two laws are in tension with each other and thus no basis for finding conflict preemption.⁶² The field preemption argument is equally weak. Absent statements evincing an intent to preclude local regulation, New York Courts have typically only found field preemption where the State has an interest in uniform application of a policy throughout the State that would be undermined by application of the local law.⁶³ In the present case, the local law would only further the Code's policy goal, which is to ensure that "en-

ergy conservation techniques [are] used in the design and construction of . . . buildings throughout the State."⁶⁴

For all of the above reasons, the retrofit ordinance is not likely to be preempted by any provision of federal or State law.

V. Conclusion

To protect itself against the worst effects of climate change, New York City will have to do all that it can to rein in energy use in its buildings. This includes improving the energy efficiency of its small residential properties. Leading cities throughout the United States and abroad have started to make progress towards that end and New York City should follow suit. A modest retrofit mandate, something New York City clearly has the authority to enact, would be an important step in that direction.

Endnotes

1. *One City Built to Last: Technical Working Group Report on One City Built to Last, Transforming New York City Buildings for a Low-Carbon Future*, New York City Mayor's Office of Sustainability 19 (2016), www1.nyc.gov/assets/subsustainability/downloads/pdf/publications/TWGrpport_04212015.pdf [hereinafter Technical Working Group Report].
2. See Donna DeCostanzo, *Beefed-Up NYC Energy Code Will Cut Carbon, Improve Buildings*, Natural Resources Defense Council (July 18, 2016), <https://www.nrdc.org/experts/donna-de-costanzo/beefed-nyc-energy-code-will-cut-carbon-improve-buildings>; see also Christopher Halfnight, *New Energy Code Means Big Efficiency Gains for City and State*, Urban Green Council (July 14, 2016), <http://urbangreencouncil.org/content/news/new-energy-code-means-big-efficiency-gains-city-and-state>.
3. 2009 NYC. Local Law No. 84. Initially, Local Law 84 only covered buildings over 50,000 square feet. However, in October of 2016, the City Council voted to extend the law cover buildings between 25,000 and 50,000 square feet as well. New York City Local Law No. 133 (2016).
4. See Greener, *Greater Buildings Plan*, NYC: Mayor's Office of Sustainability, Greener Buildings & Energy Efficiency (2017), www.nyc.gov/html/gbee/html/plan/plan/shtml. New York City enacted these requirements as part of a comprehensive effort to improve the energy efficiency the City's large existing buildings. The relevant legislation, referred to as the Greener Greater Buildings Plan ("GGBP"), covered buildings over 50,000 square feet and consists of four regulations: (1) Local Law 84, which requires covered buildings to benchmark their energy and water consumption; (2) Local Law 85, which is New York City's local energy code; (3) Local Law 87, which requires covered large buildings to conduct an energy audit and perform retro-commissioning every 10 years; and (4) Local Law 88, which requires covered buildings to upgrade the lighting in non-residential space and to provide large commercial tenants with sub-meters by 2025.
5. See *Technical Working Group Report*, *supra* note 1, at 25-26, Figs. 6 and 7.
6. See, e.g. Brennan Less & Iain Walker, Lawrence Berkeley National Laboratory, *A Meta-Analysis of Single-Family Deep Energy Retrofit Performance in the U.S.* 10, tbl. 1 (2014); Malcolm Bell & Robert Lowe, *Energy Efficient Modernization of Housing: A UK Case Study*, 32 *Energy and Buildings* 267, 276 (2000) (finding houses that received energy efficiency retrofits in a demonstration project in York, England used 20-47% less energy than a group of control houses); R.J. Brecha et al., *Prioritizing Investment in Residential Energy Efficiency and Renewable Energy—A Case Study for the U.S.*

- Midwest, 39 Energy Policy 2982, 2988, tbl. 4 (2011) (computer models of energy savings associated with various retrofits to homes in rural Ohio showed that households could cut natural gas usage 28% just by adding attic insulation and sealing air ducts).
7. The retrofit measures employed were duct sealing, air infiltration reductions, attic sealing and roof deck insulation, crawlspace sealing, HVAC and water heating equipment replacement, and lighting and appliance upgrades. Roderick Jackson et al., American Council for an Energy-Efficient Economy (“ACEEE”) 2012 Summer Study on Energy Efficiency in Buildings, Advancing Residential Energy Retrofits, 1-127, 1-127 (2012).
 8. There was substantial variation in the types of retrofits implemented in the studies analyzed. However, all studies included in the meta-analysis self-identified as having performed “deep energy retrofits” that targeted all or nearly all building assemblies, services and end uses. Less & Walker, *supra* note 8, at 9.
 9. See e.g., Less & Walker, *supra* note 6, at 8; Chris Neme, Meg Gottstein & Blair Hamilton, Regulatory Assistance Project, Residential Efficiency Retrofits: A Roadmap for the Future, 12 (2011).
 10. Among the various sectors where energy efficiency improvements could be made, the buildings sector is believed to offer the greatest potential for improvement at the lowest cost. See Jonathan L. Bradshaw, Elie Bou-Zeid, & Robert H. Harris, *Greenhouse Gas Mitigation Benefits and Cost-Effectiveness of Weatherization Treatments for Low-Income, American, Urban Housing Stocks*, 128 Energy and Buildings 911, 911 (2016).
 11. The six cities examined were Orlando, Los Angeles, Seattle, Philadelphia, Detroit and Milwaukee. *Id.* at 912. Payback periods only exceeded 6 years for two types of retrofits—installing attic insulation and envelope sealing—in the cities in hot climates, Orlando and Los Angeles. *Id.* at 919.
 12. *Id.* at 918, fig. 9. Notably, the calculation of payback periods incorporates a \$37 Social Cost of Carbon (SCC) for each ton of greenhouse gas emissions reduced. *Id.* at 917.
 13. *Id.* at 916, fig. 6.
 14. *Id.* at 918, fig. 9.
 15. See Ariel Drehtobl, Lauren Ross, ACEEE, Lifting the High Energy Burden in America’s Largest Cities: How Energy Efficiency Can Improve Low Income and Underserved Communities 4, tbl. ES1 (2016) (finding that the median energy burden for low-income households in the United States is 7.2%, as compared to 2.3% for non-low-income households).
 16. Press Release, New York Public Service Commission, *PSC Looks to Strengthen, Improve Utility Assistance for Low-Income Families* (June 2, 2015).
 17. Comments of the City of New York, Proceeding on Motion of the Commission to Examine Programs to Address Energy Affordability for Low Income Utility Customers, Case 14-M-0565, Sr. No. 102, n.2 (March 5, 2015).
 18. See, e.g., Susanne Dyrbøl & Søren Aggerholm, Implementation of the EPBD in Denmark 2 (2008) (noting “there seems to be a high inertia in investments which are not related to visible building improvements despite a high return on investments”); Hannah Choi Granade et al., McKinsey & Co., *Unlocking Energy Efficiency in the U.S. Economy* 23 (2009).
 19. See Todd D. Gerarden, Richard G. Newell & Robert N. Stavins, Harvard Environmental Economics Program, *Assessing the Energy-Efficiency Gap* 1 (2015); Kenneth Gillingham & Karen Palmer, Resources for the Future, *Bridging the Energy Efficiency Gap: Insights for Policy from Economic Theory and Empirical Analysis* 2 (2013).
 20. Gerarden et al., *supra* note 19, at 20-22 (noting that there is compelling evidence that information asymmetries and split incentives both contribute to failures to invest in energy efficiency).
 21. See Richard G. Newell & Juha V. Siikamäki, *Nudging Energy Efficiency Behavior: The Role of Information Labels*, 1 J. of the Ass’n of Env’tl. & Resource Econ. 555, 593 (2014).
 22. A Canadian study from 2013 provides a clear example of this problem. The study examined 188,000 houses that received a home energy audit; households that elected to undertake a second energy audit to confirm that upgrades recommended in the initial audit had been implemented were eligible to receive grant payments of up to \$3,348. Despite this incentive, only 19% of participating homes underwent a second audit. See Samuel Faye Gamtessa, *An Explanation of Residential Energy-Efficiency Retrofit Behavior in Canada*, 57 Energy and Buildings 155, 156 (2013).
 23. Dylan Sullivan, Carrie Armel, & Annika Todd, When “Not Losing” Is Better Than “Winning:” Using Behavioral Science to Drive Customer Investment in Energy Efficiency, ACEEE 2012 Summer Study on Energy Efficiency in Buildings 13-284, 13-287 (2012).
 24. Hunt Allcott & Sendhil Mullainathan, *Behavior and Energy Policy*, 327 Science 1204, 1204 (2010). See also Tsvetan Tsvetanov & Kathleen Segerson, *Re-evaluating the Role of Energy Efficiency Standards: A Behavioral Economic Approach*, 66 J. Env’tl. Econ. and Mgmt. 347, 347 (2013) (finding that, due to behavioral failures, policies that incorporate a Pigovian tax and mandatory standard generate higher social welfare than policies utilizing Pigovian taxes alone).
 25. The New York Energy Efficiency Code, NYCRR tit. 19, pt. 1240, already ensures that all new construction meets certain minimum energy efficiency standards. The retrofit requirement would thus ensure that new and existing buildings are treated similarly to new construction, with both being required to meet certain minimum standards.
 26. N.Y. Const. art. IX; N.Y. Mun. Home Rule § 2(b)(2).
 27. Some commentators have argued that the New York State Court of Appeals expanded the scope of state authority to regulate local affairs in its 2013 decision in *Greater N.Y. Taxi Ass’n v. State*, 21 N.Y.3d 289 (2013). See, e.g., Roberta A. Kaplan & Jacob H. Hupart, *Can New York City Govern Itself? The Incongruity of the Court of Appeals’ Recent Cases Regarding Regulation of New York City by New York City*, 78 Alb. L. Rev. 105, 108-109 (2015). However, while *Greater N.Y. Taxi* did take an expansive view of states’ jurisdiction to regulate local matters, and therefore reduced the scope of the City’s exclusive jurisdiction over such matters, the decision did not reduce the domain in which the City is permitted to regulate. Instead, the case seems to have enlarged the number of subject matters over which the City and State have concurrent jurisdiction. Indeed, Judge Pigott opens his discussion of home rule in *Greater N.Y. Taxi* by citing to an earlier Court of Appeals opinion in which Justice Cardozo noted that “[a] zone... exists where State and city concerns overlap and intermingle.” See *Greater N.Y. Taxi*, 21 N.Y.3d at 301 (citing *Adler v. Deegan*, 251 N.Y. 467, 489 (1929) (Cardozo, C. J., concurring)).
 28. See, e.g., *One City Built to Last, Transforming New York City’s Buildings for a Low-Carbon Future*, New York City Mayor’s Office of Long-Term Planning and Sustainability 3 (2014); *Technical Working Group Report*, *supra* note 1, Letter from the Mayor.
 29. *NY. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene*, 23 N.Y.3d 681, 702 (2014).
 30. Kaplan et al., *supra* note 27, at 111 (quoting *Levine v. Whalen*, 39 N.Y.2d 510, 515 (1976)) (“there is no constitutional prohibition against the delegation of power . . . to an agency or commission to administer the law as enacted by the Legislature.”).
 31. New York City Charter ch. 26, § 643 (amended 2004).
 32. Several of these rules will soon also apply to buildings with between 25,000 and 50,000 square feet of floor area.

33. The Fifth Amendment of the U.S. Constitution applies to the states as well, through the operation of the Fourteenth Amendment. See *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226 (1897).
34. N.Y. Const. art. 1, §7.
35. See *Uhlfelder v. Weinshall*, 810 N.Y.S.2d 275, 289 n.12 (N.Y. Sup. Ct. 2005), aff'd, 845 N.Y.S.2d 41 (N.Y. App. Div. 2007); David Schoenhaar, *New York State Constitutional Decisions: 2006 Compilation Takings Clause*, 22 Touro L. Rev. 339 (2006).
36. 458 U.S. 419 (1982). At issue in *Loretto* was a New York State law that required landlords to permit cable companies to install wires on their property. Though the size of the wires was minimal, the Court held that New York State could not obligate the property owners to accept any such intrusion without compensation).
37. See e.g., *United States v. Cress*, 243 U.S. 316 (1917) (holding that the U.S. government was obligated to pay compensation to a landowner whose property was flooded by the creation of a dam); *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) ("A taking may more readily be found when the interference with property can be characterized as a physical invasion by government.").
38. See Christopher Serkin, *The Law of Property* 257 (Foundation Press 2013) ("[I]nstead of requiring the property owners to permit cable equipment on their property, the government could perhaps have required property owners to install such equipment themselves. If this seems far-fetched, think about smoke detectors or carbon monoxide detectors.").
39. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922).
40. *Smith v. Town of Mendon*, 789 N.Y.S.2d 696 at 699 (N.Y. App. Div. 2005). See also *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720, (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) ("[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.").
41. *Penn Cent.*, 438 U.S. at 124.
42. *Palazzolo*, 533 U.S. at 617.
43. See, e.g., Lee Anne Fennel, *Taking Eminent Domain Apart*, 2004 Mich. St. L. Rev. 957, 959, 981 (2004).
44. Joseph Singer, *Justifying Regulatory Takings*, 41 Ohio N.U. L. Rev. 601, 606 (2015).
45. Indeed, as the Supreme Court recognized early on its takings jurisprudence, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal*, 260 U.S. at 413. See also *Penn Cent.*, 438 U.S. at 131 (noting that multiple decisions had already sustained other land-use regulations that were "reasonably related to the promotion of the general welfare" and had "uniformly reject[ed] the proposition that diminution in property value, standing alone, can establish a 'taking'").
46. *Yee et al. v. City of Escondido*, 503 U.S. 519 (1992).
47. U.S. Const. art. VI, cl. 2. See also *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012); *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707, 714 (1985) ("[F]or the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.") (internal citations and quotations omitted).
48. *Arizona*, 132 S. Ct. at 2500 ("There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision.").
49. See *Pacific Gas & Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n*, 461 U.S. 190, 204 (1983).
50. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).
51. National Energy Conservation Policy Act, 42 U.S.C. § 8253(f)(3) (B).
52. 42 U.S.C. § 6295 *et seq.*
53. *Id.* § 6297(c).
54. The first challenge would be that, while EPCA allows states to request a preemption waiver, *id.* § 6297(d), there is no provision for cities to do so. Even if New York State could be convinced to seek a waiver on the City's behalf, for the waiver to be granted the State would have to persuade DOE that State regulation were needed to meet "unusual and compelling" state energy interests that are "substantially different" from the prevailing conditions in the United States. 42 U.S.C. §§ 6297(d)(1)(B), (C).
55. Notably, in 2012 a federal court struck down a provision of an Albuquerque green building ordinance that established energy efficiency standards for new buildings on preemption grounds. The ordinance permitted regulated entities to demonstrate compliance by meeting either a performance standard or a prescriptive standard. If a party chose the prescriptive pathway, she would have to install certain appliances that surpassed the minimum federal efficiency standards. A consortium of appliance manufacturers argued that the prescriptive requirements were preempted by EPCA because they essentially supplanted the federal efficiency standards and the court agreed. See *Air Conditioning, Heating and Refrigeration Inst. v. City of Albuquerque*, 835 F. Supp. 2d 1133 (D.N.M. 2010).
56. *Jacyn Mfg. Corp. v. Suffolk County*, 518 N.E.2d 903, 905 (1987).
57. *Matter of Chwick v. Mulvey*, 915 N.Y.S.2d 578 (N.Y. App. Div. 2010).
58. Report and Recommendations Concerning Constitutional Home Rule, New York State Bar Association, Committee on the New York State Constitution 19-22 (2016).
59. The relevant provision states: "A person other than a minor, a mentally retarded person, or person of unsound mind, seized of or entitled to an estate or interest in real property, may transfer such estate or interest." N.Y. Real Prop. Law, art. II, §11.
60. To cite one example, the City requires sellers to pay a Real Property Transfer Tax equal to as much as 1.425% of the sale price. N.Y.C. Admin. Code, tit. 11, ch. 21.
61. 19 NYCRR pt. 1240.
62. See *Chwick*, 915 N.Y.S.2d at 584 (quoting *In re Lansdown Entm't Corp. v. New York City Dep't of Consumer Affairs*, 543 N.E.2d 725 (1989)) ("The crux of conflict preemption is whether there is a head-on collision between the . . . ordinance as it is applied' and a state statute.").
63. See e.g., *Consol. Edison Co. of N.Y. v. Town of Red Hook*, 60 N.Y.2d 99 (1983) (finding that a local law requiring electric generators to receive local authorization to site a generation facility within the municipal limits frustrated application of a state law that sought to create a "unified certificating procedure" for generation assets throughout the State; *Jacyn*, 518 N.E.2d at 905-906 ("[Local laws will be field preempted where] such laws were they permitted to operate in a field preempted by State law, would tend to inhibit the operation of the State's general law and thwart the operation of the State's overriding policy concerns.")).
64. N.Y. Energy Law, art. 11, § 11-101.

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When Cleaning Makes Things Worse

By Walter Mugdan

The old saying goes: “Cleanliness is next to Godliness.” But not always. Far too often during the 20th century we fouled our own nest when we cleaned our fine clothes.

To clean something that is dirty, one typically needs a *solvent* to dissolve and carry away the dirt. For most of human history, and still today, the most widely used solvent to clean clothes has been water. But to clean clothes with water—even with soap or detergents—the clothes have to be washed pretty hard. They can be scrubbed against a stone in the river; they can be rubbed across an old-fashioned washboard; or they can be agitated in a modern washing machine. This works well for your blue jeans and tee shirts, cotton underpants, and socks. But, delicate garments can be damaged by the vigorous treatment needed when cleaning with water.

Enter dry cleaning. Which isn’t really dry . . . it uses a solvent other than water. The idea dates back at least to Roman times, when materials such as ammonia and lye were used. Starting in the 17th century, as clothing became fancier, cleaners experimented with turpentine and camphene. In 1855, a Frenchman, Jean-Baptiste Jolly, found that kerosene was a suitable solvent and he coined the term “*nettoyage à sec*”—that is, dry cleaning. Other petroleum-based solvents like gasoline were soon added to the repertoire. They worked well enough, but they had a troubling habit of causing frequent explosions and fires. Dry cleaning establishments were, therefore, heavily regulated and often prohibited from locating in residential areas.

Enter chlorinated solvents. After World War I, cleaners discovered this newly developed group of chemicals, which were far less flammable and—better yet—got the clothes cleaner. By the late 1930s, the cleaning industry had largely settled on one chemical in particular, known variously as tetrachloroethylene or perchloroethylene, and commonly shortened to “perc.” Perc is among the most widely used solvents in the world. It is what you smell when you enter the dry cleaner store, and the smell may linger in the wool suit or silk dress you bring home and hang in your closet. Because of the low flammability of perc, dry cleaners were now allowed to locate throughout densely populated areas, convenient to their customers.

Alas, as has often happened in human history, the solution (pun intended) to one problem became the cause of another—or many others. Perc is almost certainly a cancer-causing chemical. Workers in the industry were regularly exposed to harmful vapors; and if that wasn’t bad enough, entire communities were often exposed as a consequence of the industry’s casual disposal practices. The solvent would typically be discarded once it became

too dirty to do its job effectively, and the easiest way to discard it was to pour it down the drain or into a convenient hole in the ground.

The National Priorities List (NPL) compiled by the U.S. Environmental Protection Agency (EPA) under the federal Superfund¹ law includes many of the highest priority hazardous waste disposal sites in the nation. As would be expected, the NPL includes sites associated with many chemical manufacturers. Perhaps more unexpectedly, the list is replete with *dry cleaning* sites.

It was not until the 1970s that we started to look more carefully at what chemicals we might find in our drinking water supplies. In community after community, what we found was perc. The waste solvent, dumped by the cleaners, seeped through the soil and mixed with the groundwater below. As a contaminant travels with the groundwater downgradient² from its point of entry, it spreads out horizontally and vertically. This creates a “plume of contamination.” Such plumes can extend for miles, and can poison the water in both municipal drinking water supply wells and individual homeowners’ wells.

The EPA and many states have since issued rules requiring dry cleaners to handle their wastes responsibly. Dry cleaning is now done on a “closed loop” basis, with modern equipment, which prevents discharges into the environment. (There are also an increasing number of “green” dry cleaners that use non-hazardous cleaning products.)

But the damage from past disposal practices has been done. As a result, EPA has spent hundreds of millions of dollars to clean up scores of dry cleaner sites all around the country, and states have cleaned up many more. Under CERCLA, the companies that generated and disposed of the hazardous wastes are responsible for the costs of cleanup,³ even if—as is common—there was nothing illegal about what they did at the time they did it. But with dry cleaners, this provision is usually a hollow one. That is because most dry cleaners have always been small, independently owned businesses. Even if the business is still operating by the time liability for a Superfund site is assigned, there are probably few or no assets to cover the cleanup costs. In that case, it’s the taxpayers who pay for the cleanup.

Cleanup is expensive, but at least it’s technically feasible. Perc, like other volatile organic compounds, can be “stripped” out of water by passing air through it. The contaminated water is pumped to the surface; it’s then sprayed in small droplets through a column of blown air. The perc leaves the water and joins the air, from which it can in turn be captured by passing it through a column of activated carbon (similar to granulated charcoal). The

water can also be passed through the activated carbon directly, or as a second “polishing” step after passing through the air stripper.

Various technologies allow the groundwater to be cleaned *in situ*—that is, underground. Air can be injected through one set of wells, and vacuumed out through another set, carrying along the perc; benign compounds can be injected to chemically transform the perc into a harmless compound; or heating elements can be placed underground to drive out the perc.

These technologies can provide residents with clean drinking water, which is vitally important. But a century of dry cleaning with perc has created a second, equally insidious pathway for the carcinogenic chemical to threaten people's health. Perc is a volatile compound, which means it evaporates easily. This can happen underground where either soil or groundwater is contaminated. The perc vapors work their way up through the ground. If they reach the foundation of a building, they can build up until they find their way inside through a crack or opening (e.g., where a pipe or electrical conduit passes through). This is called vapor intrusion. Once inside, the colorless, mostly odorless vapors are breathed in by the residents, presenting another risk to their health.

Endicott, New York is regarded as the birthplace of IBM, the computer giant. IBM was known, for many years, as a “white shirt” company, where most of the employees (who were mostly men in those days) had to wear white shirts and dark suits. Those suits had to be cleaned regularly. Endicott is reputed to have had the largest number of dry cleaners *per capita* anywhere in the world. In the late 1970s the groundwater under Endicott was found to contain perc (along with related chemicals such as trichloroethylene, used widely in degreasing metals parts like those used in computer manufacturing).

Under government direction, in 1979 IBM began pumping and treating the groundwater. It has been quite

successful at this task. Nearly a million pounds of contaminants have been removed, and the groundwater is below or close to levels mandated for drinking water. Until 2002 most people thought that meant the risk of vapor intrusion for the houses above the plume would also have been mitigated. Wrong. Over 400 homes were found to have significant levels of solvent vapors. The homeowners were offered vapor mitigation systems, and most accepted. These work well; but it is virtually certain that the residents were exposed to the vapors for many years prior. It is likely that the health of some of these residents—or many, or maybe even most—suffered as a consequence. It is difficult to prove causation, but we do know that a significant number of those residents died of cancer.

Sometimes cleanliness comes at too high a price.

Endnotes

1. See Comprehensive Environmental Response, Compensation & Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq* (2016). Establishment of the NPL is required by Section 105 of CERCLA, 42 U.S.C. § 9605 (2016).
2. Groundwater moves in much the same way as surface water—that is, with gravity. On the surface the direction of that movement is called “downstream;” for groundwater it is called “downgradient.”
3. See CERCLA § 107, 42 U.S.C. § 9607 (2016).

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Long Island: An Environmental Update for 2016

By Lilia Factor

A lot happened in 2016 in the environmental field, and Long Island is one of the places making news. Below is a summary of the main developments and initiatives.

Water Quality

A. LINAP

Last year saw the launch of the Long Island Nitrogen Action Plan (LINAP), a joint project of NYSDEC, the Long Island Regional Planning Council (LIRPC), Suffolk and Nassau counties and other stakeholders, funded with a \$5 million grant in the New York State Budget for 2015-2016.¹ LINAP's stated goals are to study the impact of nitrogen on surface and groundwater, set nitrogen load reduction targets, and recommend strategies to meet those targets. The project comes at a time when toxic algae blooms, fish kills, dead zones of low oxygen, and threats to drinking water are becoming a serious concern in many coastal areas. These problems are caused in large part by excessive levels of dissolved nitrogen in the water, which come from fertilizer runoff, sewage treatment plant effluent, and private cesspools and septic tanks. Exacerbating the problem is the fact that more than two-thirds of homes in Suffolk County and 10 percent in Nassau are not connected to public sewers.² The cesspools do not filter out nitrogen and other nutrients, but rather release them directly to the surrounding soil and groundwater.

The final scope of LINAP was published in June 2016. It includes an Early Action component to be completed within 12 to 18 months or by the first quarter of 2018. The idea is to assemble existing data and modeling, address near-term management strategies, identify tiered priority areas, estimate preliminary load reduction goals for surface waters and for public water supply wells, review wastewater alternatives, and prepare a draft wastewater plan.

Stakeholders participating in LINAP include all local municipalities, public water suppliers, environmental groups, agricultural, trade and civic associations, and federal, state and tribal representatives.

B. Suffolk County Sanitary Code Changes

In the context of trying to reduce nitrogen pollution, Suffolk County is going ahead with an overhaul of its Sanitary Code aimed to introduce alternative on-site wastewater treatment systems, which filter out the nitrogen and prevent it from seeping into the groundwater.

In August 2016, the County enacted Article 19 of the County's Sanitation Code,³ granting the Suffolk County Department of Health Services (DHS) authority to formulate procedures and protocols in order to approve the use of alternative on-site wastewater treatment systems (OWTS) throughout the county. An approved OWTS must be registered with DHS prior to installation and, within

60 days of a transfer of the property, the transferor must notify the DHS. The registration is renewable every three years.⁴ To address the problem of homeowners failing to maintain their systems, the Code further requires the owner of an OWTS to have a valid maintenance contract and to notify DHS of any change in the maintenance provider or maintenance contract cancellation.⁵ Finally, while setting current standards for the OWTS, the law demands an annual review by DHS to consider improved technologies and recommend amendments to Article 19.⁶

The first alternative on-site wastewater treatment system was approved by DHS on September 20, 2016.⁷ Hydro-Action Industries was one of the initial technologies to be used when the Septic Demonstration Pilot Program launched in December 2014. The system has effectively reduced nitrogen levels to 19 mg/l for six consecutive months, thereby achieving the standard set by the County. There are 39 homeowner participants in the Pilot Program.

Additional changes to the Sanitary Code, which would mandate such systems for new construction and substantial re-construction, are expected in 2017.

Renewable Energy

A. Solar—Nassau and Suffolk Counties

Nassau County has passed Local Law 6-2016,⁸ thereby creating a Sustainable Energy Loan Program and the Energize New York Benefit Financing Program. A similar bill was enacted by the Suffolk County Legislature on December 7, 2015, and became effective in April 2016.⁹ The County programs implement the State's new model of Property Assessed Clean Energy Financing (PACE), which seeks to encourage energy efficiency improvements and solar installations in commercial buildings. Pursuant to these programs, the Energy Improvement Corporation, as agent for the County, may provide funds to Qualified Property Owners to finance the acquisition, construction, and installation of Renewable Energy Systems and Energy Efficiency Improvements. Although the term "Qualified Property Owner" is defined as an owner of eligible residential or commercial property, the loans are not available for single-family homes or for commercial property that is not owned by a corporation. However, multi-family homes are eligible, and there is also a mechanism for non-profit organizations to access the financing.

The amount of the loan is the full cost of the improvement, up to 10% of the appraised value of the property. Re-payment of the loan, which can have a term of five to 20 years, is to be made through payments on the real property tax bill. Therefore, this obligation will take precedence over a first mortgage. Another advantage of the loan, from the perspective of the property owner, is that the funds can be applied to the replacement of a roof,

which is often a necessary part of a rooftop solar project. Solar providers hope the law will allow more property owners to obtain financing for the improvements and facilitate the transfer of ownership in the solar systems. However, one must keep in mind that the loan is disbursed only upon the completion and formal certification of the project by PSEG-LI. Thus, interim financing, either by the building owner or the contractor, is required. Another condition is that the project must be cash flow positive, meaning that the amount of the energy savings obtained as a result of the improvements must be greater than the loan payment amount.

Note that, in Nassau County, the bill is not yet in effect, as it awaits the signature of the County Executive, which has been delayed for unrelated reasons.

B. Solar—Town of Brookhaven

On October 27, 2016, the Town of Brookhaven amended its Solar Energy Production Code—Chapter 85.¹⁰ The amendment prohibits commercial size solar arrays in residential areas or if tree clearing (over 6" in diameter) is required. The law provides incentives for siting solar on rooftops, in parking lots, and on previously disturbed property. For example, shopping centers and office buildings with rooftop solar may expand by up to 20%. The minimum lot area for a solar facility is 5 acres. The law requires a minimum vegetated buffer area of 25 feet from residential properties and roads and a minimum setback of 100 feet from residentially zoned areas. The changes were motivated, in part, by public opposition to a proposed solar array on 350 acres of woodland surrounding the decommissioned Shoreham nuclear plant. The prohibition on tree clearing will make it more difficult for National Grid and partner NextEra Energy Resources to obtain permits. The Town's decision puts it on one side of the wider debate among planners and environmentalists on the concept of "trading green for green" by allowing solar production facilities to replace trees.

C. Offshore Wind

On January 25, 2017, LIPA, Long Island's electric utility, approved a contract with Deepwater Wind to supply 90 megawatts of electricity from its proposed South Fork Wind Farm to be located 30 miles off the Montauk coast.¹¹ If constructed as planned by 2022, the 15 turbine wind farm will be the second operational offshore wind farm in the United States, following the December 2016 activation of a smaller project off of Block Island. Deepwater Wind, a private company, won the first federal Bureau of Ocean Energy Management (BOEM) auction, a lease to a 256-square-mile area of the outer continental shelf. Also in December, the company announced plans to build a 120 MW wind farm about 17 nautical miles off the coast of Maryland.¹²

At the same time, plans to develop an additional 127 square mile area off Long Island's coast for wind power have met with opposition from the fishing industry. On

December 7, 2016, several groups filed a lawsuit against BOEM in an attempt to prevent the auction of rights to this area.¹³ Plaintiffs claim that the federal agency violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 706; the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370e; and the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331, *et seq.* by failing to consider alternative sites for wind turbines, not allowing for sufficient public comment, and segmenting environmental review by expressly refusing to address the impact of any specific project in the lease area. By Stipulation, the parties agreed to let the auction go forward, but to have BOEM give plaintiffs 14 days' notice prior to executing any prospective lease. In the auction, held on December 15-16, 2016, Statoil Wind, a Norwegian company, won the lease with a record-setting bid of \$42.46 million. How it navigates the stormy waters of changing federal policy, New York politics, and interest groups remains to be seen.

Disposal of Dredging Materials

The EPA published a Final Rule amending restrictions on the use of the central and western Long Island Sound dredged material disposal sites.¹⁴ The two sites are in addition to two other locations designated by the US Army Corps of Engineers in areas off Connecticut's coast for the deposit of dredged spoils from the rivers and harbors along the coastline of Connecticut. The EPA's decision to continue the practice of depositing dredged materials in the open waters of the Sound has been criticized by local municipalities and environmental groups opposed to ocean dumping. They insist that the agency should seek alternatives, such as using dredged sand for beach nourishment. In December 2016, New York State joined the fray by announcing its intent to sue the EPA over the decision to designate eastern Long Island Sound as a permanent dredge dumping site.¹⁵

Fire Island to Montauk Point Project

The US Army Corps of Engineers has issued its proposed plan for Coastal Storm Risk Management for the 83 miles of shoreline along the south shore of Long Island. It includes a combination of: (1) inlet modifications (continuation of authorized navigation projects, dredging, down-drift placement of dredge, placement of dune and berm, and monitoring); (2) non-structural measures (primarily building retrofits, with limited relocations and buyouts); (3) rapid breach closure for the barrier islands; (4) beach and dune fill with renourishment: up to 30 years, approximately every 4 years; (5) sediment management; (6) groin modifications; (7) coastal process features; (8) adaptive management; and (9) integration of local land use regulations and management.¹⁶ The public comment period for the Draft Environmental Impact Statement ended on October 19, 2016.¹⁷ The plan has drawn criticism from the Town of Brookhaven, which argues that the Army Corps relied on outdated data and conservative sea level rise estimates and did not provide a comprehensive solution for protection against future storms.

Suffolk County Farmland Preservation Program

A decision by the Supreme Court, County of Suffolk¹⁸ has undermined the structure and policy of the County's Farmland Preservation Program. On September 28, 2016, Justice Thomas Whelan annulled two laws, passed in 2010 and 2013, that allow farmers to get special use permits and hardship exemptions to build structures such as greenhouses, commercial stores, and restaurants on land where the public had purchased the farmers' development rights (PDR). Plaintiff, the Long Island Pine Barrens Society, argued that taxpayers spent millions of dollars to keep such farmland in use solely for direct "agricultural production" that would preserve its natural, scenic beauty for the public. The court agreed that the laws are inconsistent with public policy (GML Section 247) and violate the public trust doctrine. It also accepted the claim that the PDR program, established by referendum, may not be changed unilaterally by the legislature. The County has filed a Notice of Appeal.

Community Preservation Fund

On November 8, 2016, voters in each of the five towns of Long Island's East End approved a referendum to extend the Peconic Bay Region Community Preservation Fund to 2050 and allow up to 20 percent of its revenues to be used for projects that improve water quality pursuant to a specific plan for each town. The Fund was originally created in 1999, to improve water quality and preserve open space and farmland on the East End.

Endnotes

1. Long Island Nitrogen Plan Scope, http://www.dec.ny.gov/docs/water_pdf/linapscope.pdf.
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3. <http://www.suffolkcountyny.gov/portals/0/health/pdf/SCSanCodeArt19%207-15-16.pdf>.
4. Art. 19, Section 760-1905.
5. Art. 19, Sections 760-1905(G)(b), 760-1906.
6. Art. 19, Section 760-1907.
7. <http://www.suffolkcountyny.gov/Departments/CountyExecutive/tabid/101/ctl/details/itemid/5707/mid/876/bellone-announces-key-milestone-in-suffolk-county-septic-demonstration-pilot-pr.aspx>.
8. <https://www.nassaucountyny.gov/DocumentCenter/View/16829>.
9. Resolution No. 919-2015 adopting Local Law No. 38-2015, a local law to establish a Sustainable Energy Loan Program.
10. <http://ecode360.com/documents/BR0012/source/LF933431.pdf#search=solar>.
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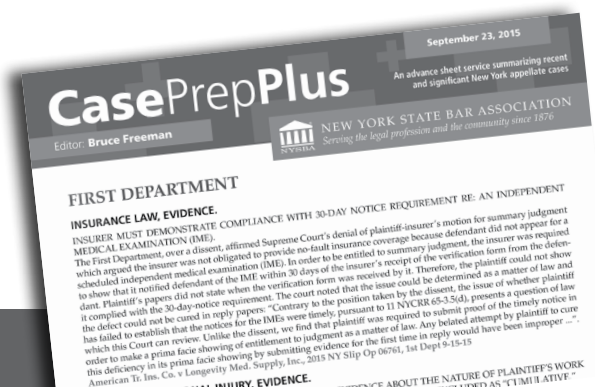


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Energy Efficiency as Best Available Control Technology: Practices and Possibilities

By Channing Jones

I. INTRODUCTION

Energy efficiency will be an essential component of any meaningful federal, state, or local effort to control greenhouse gas (“GHG”) emissions.¹ The Obama administration’s Clean Power Plan (“CPP”), previously poised to become a centerpiece of U.S. climate action, would have included ambitious energy efficiency measures.² However, with the CPP unlikely to come to fruition under the presidency of Donald Trump,³ this Article examines an avenue through which energy efficiency may be deployed by other means, including by states: the Prevention of Significant Deterioration (“PSD”) provisions of the Clean Air Act (“CAA”).⁴ These provisions require certain pollution controls for most new construction of, or major modifications to, power plants and other major stationary sources of air pollution.

The Environmental Protection Agency (“EPA”) began regulating GHGs under the PSD program in 2011.⁵ In *Utility Air Regulatory Group v. EPA* (2014), the Supreme Court largely upheld EPA’s approach, allowing EPA to require GHG controls for sources otherwise subject to PSD regulation.⁶ EPA’s approach to PSD permitting for GHG emissions is outlined in a 2011 guidance document (“GHG Guidance”) that explains, among other things, the role envisioned for energy efficiency as “best available control technology” (“BACT”) to be employed on-site at regulated facilities.⁷

This article argues that EPA’s approach in the GHG Guidance is legally valid; that it should be pursued more aggressively, and that there is a plausible legal basis for an interpretation of BACT to include demand-side efficiency.⁸ Part II provides a background on energy efficiency and the PSD program. Part III examines energy efficiency as BACT as it has been employed in practice. Part IV examines legal issues pertaining to different types of efficiency under the PSD program. Part V concludes.

II. BACKGROUND

A. The PSD Program and Best Available Control Technology

The PSD provisions of the CAA operate essentially nationwide,⁹ requiring PSD permits for the construction of new major air-polluting facilities, or modifications to existing facilities, that meet threshold pollution levels.¹⁰ PSD permits are issued by either a state agency or an EPA regional office as the permitting authority.¹¹ To receive a permit, a facility must be “subject to the best available control technology” for each PSD-regulated pollutant emitted by the facility.¹² As noted, EPA treats

GHGs as a pollutant subject to regulation under the PSD provisions.¹³

The CAA provides that a permitting authority’s selection of best available control technology (“BACT”) for a pollutant under a given permit is a case-by-case determination made by balancing benefits with costs among achievable emission limitation options. These options broadly include “production processes and available methods, systems, and techniques” for pollution control. It is worth repeating the relevant statutory language in full, which defines BACT as

an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. . . .¹⁴

In 1990, EPA issued a draft guidance document to assist permitting authorities in conducting analyses to select BACT for PSD permit applicants.¹⁵ Most permitting authorities follow these guidelines, which set forth a “top down” method for determining BACT for a given facility: Step 1 identifies emission limitation options; Step 2 eliminates unfeasible options (considering both commercial availability and technical feasibility); Step 3 ranks remaining options by emission control effectiveness; Step 4 balances costs with environmental benefits, and often results in elimination of more stringent control options; and Step 5 selects the BACT.¹⁶ Generally permit applicants will themselves propose BACT, often by walking through the top-down process; this often forms the basis of the permitting authority’s own top-down analysis.

EPA has described BACT as including either or both of: “inherently lower polluting processes/practices,” i.e., making changes to processes, inputs, or equipment to reduce pollution; and “add-on controls,” i.e., technologies that remove pollutants from an emissions stream.¹⁷ While state permitting authorities have flexibility in the BACT selection process, and significant discretion to consider

BACT on a case-by-case basis, EPA may step in where a state makes an unreasonable BACT determination.¹⁸

B. Energy Efficiency as Potential BACT

Without delving into legal issues yet,¹⁹ it is worth initially reviewing some available and emerging energy efficiency options that may arguably serve as “production processes and available methods, systems, and techniques” to control pollution (GHGs or otherwise) as BACT at stationary sources.

For the purposes of this article, although there are various ways to define it,²⁰ the term “energy efficiency” (or “efficiency,” where used herein) refers to the reduction in energy production needed to accomplish a given end use. This article focuses on efficiency methods within the scope of the PSD program—specifically, efficiency in the generation and use of energy produced at new or modified major stationary sources, including power plants and industrial sources. This article generally groups applicable efficiency targets into three categories: energy generation at a source facility (“generation-stage”); energy use on-site at a source facility (“facility-use”); and energy use off-site from a source facility (“demand-side”).

First, generation-stage efficiency focuses on the process of combusting fuel to produce power, seeking to reduce the amount of fuel burned to produce a given amount of usable energy. Generation-stage efficiency is necessarily implemented on location at a regulated facility, whether the power produced will be used on-site (in the case of some industrial sources) or used off-site (in the case of power plants). Efficiency measures at generation stage might include: efficient designs or equipment, such as by using supercritical rather than subcritical boilers to minimize energy loss at coal-fired power plants; operational systems and practices, such as optimization of fuel and air flow via combustion controls, or in the case of some industrial facilities, the timing of energy production such to avoid energy waste; supplemental processes, such as heat loss recovery; and use of pre-treated fuels, such as coal with reduced moisture content.²¹

Second, facility-use efficiency may also be employed to reduce a facility’s emissions in the case of regulated industrial sources that generate and use energy on-site. These efficiency measures might include: adoption of efficient production equipment, such as by using efficient motors in pumps, air compressors, and fans at petroleum refineries;²² equipment retrofitting, such as by insulating kilns at cement plants;²³ energy recovery, such as with the application of lost process heat to other uses;²⁴ energy-saving processes, such as the use of gravity-type homogenizing silos in the mixing of raw meal at cement plants,²⁵ or the use of certain debarking methods to reduce energy demand in pulp and paper manufacturing;²⁶ and general operational equipment

and practices, such as with the use of automated lighting controls and energy efficient lights at a facility.²⁷

Third, demand-side efficiency would reduce energy production needed to accomplish a given set of consumer uses, reducing emissions from electric power generators supplying an electric grid.²⁸ Here, energy efficiency would apply just to power plants and not industrial sources, and would involve measures to promote the uptake of certain equipment and methods by downstream residential, commercial, and industrial energy users, including through: building design and retrofitting to retain warm air in the winter²⁹ and cool air in the summer; efficient equipment, such as efficiency-certified appliances; and systems and practices, such as automatic or remote light and heat controls.³⁰ As discussed in Part IV.C. below, EPA considered but rejected demand-side efficiency as an element of the Clean Power Plan.³¹

In theory, a power plant operator (or a combination of operators acting together) might employ any number of measures to promote downstream demand-side efficiency uptake. For example, an operator might: offer or pay for home assessment services to help energy users understand where they can make energy-saving improvements;³² offer low-interest loans for users to make efficiency upgrades;³³ offer appliance rebates³⁴ or buybacks;³⁵ or fund or offer incentives for efficiency retrofits.³⁶ Perhaps most likely, a PSD-regulated source might purchase tradable credits in a regulated scheme, earned by companies directly undertaking aforementioned measures—i.e., a PSD permit’s BACT requirement might provide that a facility must hold a given number of demand-side efficiency credits, which a facility could acquire either by undertaking demand-side efficiency-promoting activities directly, or by purchasing credits from others who have done so.

III. CURRENT PRACTICE FOR ENERGY EFFICIENCY AS BEST AVAILABLE CONTROL TECHNOLOGY

Having canvassed a range of efficiency “production processes and available methods, systems, and techniques” that might plausibly serve as BACT, this Part now explores the current approach of EPA and state permitting authorities in implementing energy efficiency as BACT. Section III.A. discusses EPA’s approach to energy efficiency as BACT, specifically in the context of GHG regulation. Section III.B. then examines the reality of energy efficiency as BACT in recent air permitting determinations and BACT analyses.

A. EPA Treatment of Efficiency as BACT

As noted, “inherently lower polluting processes/practices” have long been recognized by EPA as within the scope of BACT, along with or in combination with add-on controls.³⁷ This category of BACT would seem to include energy efficiency methods, which are perhaps

more inherently lower polluting than any pollution controls.³⁸ Yet EPA had not clearly focused on energy efficiency as BACT until it began regulating GHGs through the PSD program.

EPA's approach to PSD permitting for GHG emissions is outlined in a 2011 guidance document ("GHG Guidance") explaining, among other things, how permitting authorities and regulated entities should approach the BACT selection process for GHGs using the five-step "top-down" process described in Section II.B. above.³⁹ In the GHG Guidance, EPA acknowledges that end-of-stack (or "add-on") controls for GHGs, such as carbon capture and sequestration, are still largely undeveloped.⁴⁰ For this reason, the GHG Guidance advises that efficiency measures will be the foundation of BACT for GHGs for the time being.⁴¹

Notably, the GHG Guidance interprets BACT to include the first two efficiency targets identified in the previous Part: generation-stage and facility-use.⁴² As to generation-stage efficiency measures, EPA puts forward certain examples, including that combined cycle combustion turbines (more efficient than simple cycle turbines) might be included in the BACT process for natural gas-fired facilities, and that integrated gasification combined cycle might be a BACT consideration for proposed coal-fired facilities.⁴³ As to facility-use efficiency, EPA suggests focusing on efficiency improvements in a facility's "higher-energy-using equipment, processes or operations." For example, "the design, operation, and maintenance of a steam distribution and utilization system may influence how much steam is needed to complete a specific task," and may be optimized to reduce energy need.⁴⁴

However, EPA limits its consideration of facility-use efficiency controls to BACT determinations for new facilities; it does not consider such controls for modifications.⁴⁵ EPA also declines to consider, as within the scope of BACT, energy used at a regulated facility but which is not generated at the facility, because such a control measure would not reduce the facility's own emissions originating "within the property boundary."⁴⁶ The GHG Guidance does not discuss demand-side efficiency—that is, measures undertaken "beyond the fence line" but which reduce emissions within the property boundary. As discussed in Part II above, demand-side efficiency may serve as BACT in a practical sense, insofar as it reduces power plant emissions; further, as discussed in Part IV below, this article adopts the position that demand-side efficiency may plausibly serve as BACT as a legal matter.

In the GHG Guidance, EPA also notes that energy efficiency "helps reduce the products of combustion, which includes not only GHGs but other regulated [] pollutants," so "energy efficiency should be considered in BACT determinations for all regulated [] pollutants (not just GHGs)."⁴⁷ This article adopts the same point of

view: energy efficiency is relevant as BACT for all PSD-regulated pollutants. GHG regulation merits special attention as BACT because, for the foreseeable future, GHGs will likely be controlled through the PSD program only through efficiency measures, until and if carbon sequestration becomes viable. But in general, discussion of practical and legal issues in this article is applicable to efficiency as BACT for any pollutant.

B. Energy Efficiency as BACT in Practice

As noted above, EPA had not focused on energy efficiency as BACT until it began regulating GHGs under the PSD program. Similarly, a search of state BACT determinations suggests that state permitting authorities had not expressly considered energy efficiency as a distinct category of BACT prior to GHG regulation, even if some BACT methods also brought efficiency benefits.⁴⁸ However, with the GHG Guidance, EPA and states began requiring energy efficiency as BACT in 2011. Around that same time, EPA put out a series of white papers discussing "available and emerging technologies" for controlling GHG emissions, mostly through energy efficiency, at various PSD-regulated facilities including power plants and certain industrial sources.⁴⁹ These white papers were intended to assist permitting authorities and regulated entities in conducting BACT analyses for GHGs, though in the intervening years, only a limited range of efficiency measures have been required as BACT—generally in the form of efficient generation equipment and practices, or heat recovery and loss methods in industrial processes. Review of BACT decisions for GHG control also suggests that permitting authorities have not generally imposed efficiency requirements beyond what permittees have themselves proposed in their PSD applications.

In recent years, EPA as a permitting authority⁵⁰ has issued numerous BACT determinations considering energy efficiency measures for GHG control. In some cases, these EPA-issued PSD permits have set forth just GHG emissions limits without any specified methods prescribed to do so.⁵¹ More commonly, EPA BACT determinations have set forth efficiency performance requirements in terms of thermal efficiency or GHG intensity, often to be achieved just through the proper use and optimization of the permittee's chosen combustion technology according to its specifications; such measures are referred to with terms like "good combustion practices," "good operating practices," and "good maintenance practices."⁵² Good combustion practices include efficiency-oriented measures such as proper combustion zone mixing of air and fuel, minimization of fuel gas quality fluctuations, and proper maintenance.⁵³ This term can overlap with the good *operating* practices, which may also include, for instance, startup and shutdown procedures that minimize energy waste.⁵⁴ There is also some overlap between these two terms and good *maintenance* practices, which encompass such

activities as equipment inspections, optimization, and repair.⁵⁵

Beyond general good practices, some EPA-issued PSD permits have specifically identified efficient equipment and design to be employed by the permittee as BACT. For instance, some permits have required particular turbine designs,⁵⁶ while others have required designs that accomplish waste heat recovery.⁵⁷ However, it is not clear that equipment- or design-based BACT requirements have generally accomplished more stringent efficiency controls than what permittees would otherwise have adopted on their own as cost-saving measures; indeed, EPA has generally selected BACT as proposed by permit applicants.⁵⁸ The case of a 2012 EPA Region 1 permit for a new gas-fired power plant is particularly illustrative: although the final PSD permit called for the use of an efficient combined cycle turbine as BACT,⁵⁹ this same equipment had been originally proposed in the permittee's 2008 project application—submitted prior to any BACT requirement for GHGs.⁶⁰ As currently implemented, it is not clear that efficiency as BACT is having a technology-forcing effect.

In the case of industrial facilities specifically, EPA-issued PSD permits often set forth both generation-stage and facility-use energy efficiency measures as BACT. Generation-stage measures are generally focused on good combustion practices, while facility-use measures often focus on heat loss and recovery in process heat applications.⁶¹ Facility-use efficiency controls are more rare outside of process heat applications, though in one EPA Region 6 BACT determination for an iron production plant, the permit applicant proposed, and EPA adopted, certain energy use measures as BACT for application at different production stages: efficient materials transfer equipment in the form of mechanical conveyors, and process controls to optimize energy use.⁶² One reason that facility-use efficiency measures may not be getting employed widely as BACT is that even in the case of industrial PSD-regulated sources, certain on-site industrial equipment is powered from grid-supplied electricity rather than on-site power-generation, so reductions in energy use from such equipment would not lower a facility's own emissions.

A review of state-issued PSD permits paints a similar picture as with EPA requirements for energy efficiency as BACT.⁶³ As with EPA regional offices, states have generally required some combination of efficiency measures to control GHG emissions at PSD-regulated sources, typically as proposed by the permit applicant: good combustion and operating practices;⁶⁴ combustion equipment specifications;⁶⁵ supplemental measures, such as waste heat recovery;⁶⁶ and efficiency improvements to on-site energy uses.⁶⁷ Some state-issued PSD permits have instead provided a numeric GHG emissions limit or efficiency measure without any specified technologies or practices to employ.⁶⁸

Neither EPA nor any state permitting authority has apparently sought to require off-site (demand-side) efficiency as BACT. At least one state authority has expressly rejected the converse notion that BACT may address “GHG emissions that could be generated [off-site] as a result of the operation of the plant.”⁶⁹ This would include, for example, a facility's use of electricity generated elsewhere. However, that agency's position that “[t]he BACT analysis is specific to the emission source”⁷⁰ is not inconsistent with this article's proposal that BACT analysis may arguably consider efficiency measures applied to off-site energy *uses* linked to on-site energy *generation*.

IV. LEGAL FRAMEWORK FOR ENERGY EFFICIENCY AS BEST AVAILABLE CONTROL TECHNOLOGY

In the time since energy efficiency has directly entered into BACT analysis with GHG regulation under the PSD program, no case law has yet emerged speaking directly to the legal validity of energy efficiency as BACT, although the Supreme Court in *Utility Air Regulatory Group v. EPA* (2014) “assum[ed] without deciding that BACT may be used to force some improvements in energy efficiency.”⁷¹ Meanwhile, published Environmental Appeals Board (“EAB”) decisions include a handful of challenges to EPA and state BACT determinations related to efficiency measures, though these challenges have been brought by those seeking to impose more stringent efficiency controls, and not by regulated entities challenging energy efficiency as BACT.⁷² Moreover, because no permitting authority has sought to impose demand-side efficiency as BACT, its permissibility under the PSD provisions has not been adjudicated. This Part considers generation-stage, facility-use, and demand-side efficiency under the statutory and regulatory text and relevant legal doctrine, and, in the case of demand-side efficiency, in light of recent litigation over the Clean Power Plan—concluding that, as a legal matter, all three types of efficiency may be used as BACT, although demand-side efficiency stands on shakier ground.

A. Accordance with the Statutory and Regulatory Language

The language of the Clean Air Act's BACT definition and requirement, and of the EPA's corresponding regulatory definition and requirement,⁷³ does not appear to preclude energy efficiency measures as BACT—whether on-site or beyond the fence line.

In relevant part, the CAA defines BACT as “an emission limitation” that is “achievable . . . through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques”⁷⁴ The regulatory definition

is relevantly identical, except that it omits “clean fuels” as an enumerated BACT option.⁷⁵

Generation-stage efficiency easily fits into the BACT definition as the application of a “[p]roduction process[],” in that any efficiency measures would apply to the *energy* production process. Facility-use efficiency should also fit into this definition as a “[p]roduction process[]” to the extent that such an efficiency measure would apply to the production of physical products such as materials or goods. Further, any of the efficiency measures discussed herein—generation-stage, facility-use, or demand-side—may surely fit within what appears to be a broad catchall element of the BACT definition: “available methods, systems, and techniques.” The implementation of efficient lighting or heating equipment and practices on-site at a regulated industrial facility, even if not going directly to production, would be a method, system, or technique that would reduce emissions. In addition, the demand-side implementation of an efficiency measure, such as through a community efficiency program, or by participating in an efficiency credit trading scheme, can be characterized as using a method or technique for limiting emissions.⁷⁶

Further, all three efficiency types may also be characterized under the BACT definition as an “emission limitation,” which is defined separately as

a requirement . . . which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter.[]⁷⁷

Generation-stage, facility-use, and demand-side efficiency may all be “requirement[s]” to reduce pollution on a continuous basis—which is, in fact, a hallmark feature of energy efficiency. While generation-stage and facility-use efficiency also fit comfortably within the various enumerated limitation options (“operation or maintenance,” “design,” etc.), this non-exclusive list does not preclude demand-side efficiency.

Even if energy efficiency may fit into the definition as BACT, it is a separate question whether efficiency may be *applied* as BACT. The PSD provisions of the CAA require that a facility regulated under the PSD program be “subject to” BACT for each PSD-regulated pollutant.⁷⁸ Similarly, the regulations provide that a PSD-regulated facility “shall apply” BACT.⁷⁹

Whether a facility is “subject to” BACT, as worded in the statute, or whether it “shall apply” BACT, as worded in the regulations, the language of the BACT requirement easily harmonizes with the use of energy efficiency as

BACT for the purpose of on-site efficiency measures, at either use or generation stage. A facility may plainly be “subject to” efficiency measures in generating or using energy. Similarly, a facility may plainly “apply” efficiency measures in the course of generation or other on-site processes.

As to demand-side efficiency, whether a facility may be “subject to” off-site measures is at least somewhat more questionable, in that a PSD-regulated facility would not be directly subject to the efficiency *technology* itself—a demand-side user would be subject to the technology (such as new equipment or building retrofits), while the regulated facility would be subject only to making the technology available to the user. Yet as noted above, the CAA and its regulations define BACT not as technology per se, but as an “emission limitation.”⁸⁰ Reading this definition in conjunction with the BACT requirement allows off-site efficiency to fit more comfortably within the language of the CAA: indeed, a facility’s deployment of demand-side efficiency would make that facility “subject to” the “emission limitation” resulting from the off-site efficiency measures. Further, off-site efficiency does easily fit with the language of the regulatory BACT requirement, in that a facility would be “apply[ing]” BACT with demand-side measures, albeit applying it off-site.⁸¹

Another potential challenge in fitting demand-side efficiency within the CAA language is that the statutory BACT requirement specifically applies for “each pollutant subject to [PSD] regulation . . . emitted from, or which results from,” a regulated facility.⁸² The regulatory BACT requirement is relevantly the same.⁸³ As to generation-stage and facility-use efficiency, measures employed on-site at a regulated facility would plainly reduce emissions originating at the same facility. However, demand-side efficiency measures employed by a particular facility would be uncertain to reduce emissions from that facility. Because multiple power plants supply energy to a grid, a contraction in energy demand due to consumer efficiency would not bring a proportional generation reduction from all power producers supplying that grid; rather, certain production facilities (namely, those with higher marginal costs) would get turned off while other facilities continue to run at full capacity.⁸⁴ For this reason, a demand-side efficiency program implemented by a PSD-regulated facility might result in reduced emissions, but not necessarily in reduced emissions from the individual permitted facility itself.

However, this apparent obstacle is surmountable. Whether a demand-side efficiency measure can then be seen as acting to reduce a “pollutant . . . emitted from” a regulated facility, in accordance with the language of the BACT provisions, depends upon how the statutory and regulatory language is interpreted. Under one reading, BACT must reduce the very pollutants, regarded as a specific collection of physical matter, that would have

been emitted but for the BACT. Under this reading, demand-side efficiency would not apply unless the plant itself would experience reduced emissions due to energy demand reduction on the grid. However, a closer reading of the statute and regulations leaves room for demand-side efficiency. Looking closely at the text, BACT is applied to reduce “each pollutant subject to [PSD] regulation.”⁸⁵ The use of “pollutant” in the singular indicates that pollutants are being treated categorically. Under this reading, BACT must just reduce the emissions of a pollutant that is emitted from a facility, but it is not necessary that BACT reduces hypothetical molecules of that pollutant that would otherwise have come from that very facility. Under a direct reading of the statutory and regulatory language, it is sufficient for BACT that foregone emissions due to emission limitations applied by a PSD-regulated facility are occurring *somewhere*.⁸⁶

In summary, on-site efficiency measures, whether generation-stage or facility-use, fit comfortably within the statutory and regulatory language of the BACT definition and requirement. Regulated facilities can plainly be “subject to” on-site efficiency, just as they can “apply” on-site efficiency. Such measures are also indisputably “methods, systems, [or] techniques” that act to limit emissions of regulated pollutants from regulated facilities employing those measures. Less plainly but still arguably, regulated facilities can be “subject to” off-site, demand-side efficiency measures insofar as the facilities must implement such measures. Further, demand-side efficiency fits easily within the “methods, systems, and techniques” catchall of the BACT definition. And while demand-side efficiency measures undertaken by a given PSD-regulated facility may not reduce emissions at that very facility, the CAA and its regulations appear to require only that a pollutant *type* emitted from the facility be reduced by the emission limitation. For the foregoing reasons, the statutory and regulatory language setting forth and defining the BACT definition and requirement do not preclude the use of generation-stage, facility-use, or demand-side efficiency as BACT.

B. Impact of “Redefining the Source” Principle

Briefly, it bears discussion that EPA, the EAB, and the federal courts all hold that BACT need not include methods that would “redefine” a source—i.e., at Step 1 of the BACT process, permitting authorities need not consider alternatives that would frustrate a project’s fundamental purpose and design. This should not preclude the use of efficiency as BACT, however.

EPA has long articulated its position that it does not consider BACT analysis as a “means to redefine the design of the source,” for example, by requiring a permitting authority to consider a gas turbine as an alternative to a proposed coal-fired boiler.⁸⁷ EPA has stated, however, that a permitting authority is not precluded from considering alternative production processes, even if they represent significant redesigns.⁸⁸

Along these lines, the EAB has since reiterated that a permitting authority should consider a permit applicant’s purpose and basic design for its proposed facility, assess which design elements are fundamental to the purpose, and in most cases, refrain from redefining that purpose.⁸⁹ A leading case on the issue is *Sierra Club v. EPA*, a Seventh Circuit decision in which Judge Posner held that the BACT analysis for a coal-burning plant located at a coal seam did not need to consider the alternative of low-sulfur coal mined elsewhere, because the plant was specifically designed to take advantage of the nearby coal.⁹⁰ Further, according to Judge Posner, it was within EPA’s authority to not require consideration of source redefinitions as BACT, and within its discretion to identify the line where control technology crosses into redefinition.⁹¹

Turning to the respective categories of efficiency under consideration here: It would be difficult to characterize generation-stage efficiency as a redefinition of a source; by nature, such measures seek to accomplish a given energy output, just with a lower input. The same would be true of facility-use efficiency—as long as alternative production or operational processes under consideration would not alter the nature of the facility’s end product, the facility’s purpose would remain intact. As for demand-side efficiency, there may be arguments both ways: demand-side measures would not undermine the basic design of the source, but simply add an additional process (efficiency deployment) to the existing design; however, to the extent that demand-side efficiency might reduce a source’s output, the fundamental purpose of the facility (to sell energy and earn revenue) would be undermined.

But in any event, the “redefining the source” principle is an EPA-developed one. Under Judge Posner’s reasoning in *Sierra Club v. EPA*, the agency could promulgate an explicit exception for demand-side efficiency from its source redefinition policy while remaining within the statutory text. Moreover, while such EPA action may be unlikely under a Trump presidency, a state permitting authority is not precluded from considering alternatives that would change a source’s design, as noted by EPA and the EAB. Hence, a state agency could act to require demand-side efficiency as BACT, even if EPA would not require it to do so.

C. Applicability of “Beyond the Fence Line” and “Generation Shifting” Debate

As noted in Part I, the Clean Power Plan (“CPP”) has been stayed pending litigation in the D.C. Circuit. While the direction of this litigation is uncertain in light of Donald Trump’s election, the dispute is fully briefed. Relevant here, certain legal issues facing the CPP in the litigation are closely analogous to what would be a likely basis upon which to challenge demand-side energy efficiency as BACT: whether pollution controls can be required that must be implemented off-site from the

physical source or that shift generation away from the source.⁹²

The CPP relies on Section 111(d) of the CAA to direct states to implement, in the electric power sector, a GHG emissions “standard of performance”—statutorily defined as a “standard for emissions . . . which reflects the degree of emission limitation achievable through the application of the best system of emission reduction . . . [EPA] determines has been adequately demonstrated” (“BSER”).⁹³ In the CPP rulemaking, EPA specified that BSER for GHGs would include generation-stage energy efficiency measures, along with “generation-shifting”—that is, shifting power generation from coal to gas plants, and from fossil fuel plants to renewable energy sources.⁹⁴ A state might accomplish generation-shifting by, for example, establishing a GHG intensity emission standard with tradable credits.⁹⁵ Petitioners opposing the CPP challenge it on numerous grounds, including that these generation-shifting provisions are invalid because BSER only encompasses emission reduction methods employed on-site at a regulated facility, and in a way that reduces emissions for given output.⁹⁶ As discussed below, these same bases of challenge would be relevant to demand-side BACT.

There are of course distinctions between “best available control technology” and “best system of emission reduction.” They use differently worded standards; BACT is set by the permitting authority, often a state agency, while BSER is set by EPA; BACT is explicitly a case-by-case determination; and BACT must simply be “available,” while BSER must be “adequately demonstrated.”⁹⁷ The standards also apply to different sources, but their roles are similar. Under the PSD program, new and modified sources are “subject to [BACT] for each [applicable] pollutant”; under the CPP, state plans “establish[]” BSER “for any existing [stationary] source for any [applicable] air pollutant.”⁹⁸ Both are also broad standards: BACT is achieved through the “application of production processes and available methods, systems, and techniques”; BSER is a “system of emission reduction.”⁹⁹ BACT is perhaps even more broad than BSER because it includes “systems” among other equally broad terms, while BSER is limited to just “system[s]”—though the term “system” is alone quite open-ended.

EPA has agreed that “system” is an open-ended term¹⁰⁰—though the CPP opponents would construe “system” at least somewhat narrowly. These challengers argue that under the CAA generally, performance standards have always been

technological controls or low-polluting production processes that: (i) are capable of being implemented at the source, (ii) limit the individual source’s emissions while it operates, and (iii) do not limit the individual source’s level of production.¹⁰¹

According to this understanding, generation-shifting is generally invalid as an emission standard under the CAA (whether BSER or otherwise) because it is not implemented at the source, and because it limits a source’s operating time and energy output. This understanding would also preclude demand-side efficiency as BACT, in that demand-side measures would not be implemented at the PSD-permitted source, and further, because the measures would act to reduce energy output (and therefore production) rather than reducing emissions while holding production equal. However, EPA has not dwelt on the CPP petitioners’ tradition-based challenge, finding generation-shifting to fit easily within a broad reading of “system” in BSER.¹⁰² This article concurs. The fact that a statute has been applied more narrowly does not graft in additional limitations, or preclude a statute’s new, more expansive use when necessary to achieve the goals of the statute, and when within the scope of the statutory language. This reasoning should also apply to demand-side efficiency as BACT, including because BACT may, as with BSER, include emission reduction “systems.”

The CPP challengers also argue that BSER may only apply to a “source” as a physical thing—and for this reason, BSER cannot include actions that an *operator* would take to meet emission limits beyond the source’s physical operations (e.g., engaging in credit trading).¹⁰³ This understanding would analogously preclude demand-side efficiency as BACT. A credit-trading scheme would likely be the most effective way to implement demand-side BACT, but even if demand-side efficiency deployment was carried out directly by a source operator, the regulated source as a physical thing would not be subject to the demand-side efficiency upgrade (e.g., new equipment or a building retrofit). However, the CAA does not facially restrict the application of either BSER or BACT to a source as a physical thing. Moreover, assuming for argument’s sake that BSER must apply to a source as a physical thing, the CPP challengers ignore that generation-shifting does act as a means of “emission reduction” for the physical source—that is, the reduction still applies to the source, even if the action creating the reduction/limitation is undertaken beyond the fence line.¹⁰⁴ The same goes for BACT: demand-side efficiency acts as a means of “emission limitation” on the energy production end, even if the efficiency mechanism operates off-site at the energy consumption end.¹⁰⁵

For the foregoing reasons, demand-side efficiency as BACT may share overlapping legal vulnerabilities as generation-shifting as BSER. However, there are strong arguments that the CPP’s interpretation of Section 111(d) accords with the statutory language, and likewise, that this Article’s interpretation of the PSD provisions could survive analogous challenges.

Before moving on from the CPP, one final issue warrants discussion: that in the course of promulgating

the CPP, EPA had considered, but ultimately rejected, off-site energy efficiency as an element of BSER for GHGs. Demand-side efficiency had initially been proposed alongside generation-stage efficiency and generation-shifting, but was omitted from the final rule.¹⁰⁶ There is no indication that this rejection was motivated by a belief that the language of the CAA necessarily precludes off-site demand-side BSER where it permits (as EPA sees it) off-site supply-side BSER; or that the CAA precludes the generation reduction from a source due to lack of demand where it permits (as EPA sees it) generation-shifting from one source to another.¹⁰⁷ Rather, under the statutory language, EPA states only that BSER is constrained in that it must “apply to sources” and be attainable by “actions the sources themselves can implement.”¹⁰⁸ These constraints accord with the language of Section 111(d), which provides for the “application” of BSER “for” an existing source. Relevant here, the PSD program’s BACT requirement is analogous in providing that a new or modified source will be “subject to” BACT.¹⁰⁹

As discussed above, however, the “subject to” requirement of the PSD regulations should not be a problem for demand-side efficiency as BACT—nor should the “apply to” requirement have been a problem for demand-side efficiency as BSER under the CPP, since demand-side efficiency measures *can* apply to, and be implemented by, sources as BACT. Indeed, the determinative reason for EPA’s ultimate rejection of demand-side efficiency as BSER is not entirely clear, though it appears to have been motivated in part by concern for crossing a boundary in its statutory mandate from the regulation of air pollution to the regulation of consumer electricity use and demand.¹¹⁰

EPA was surely reasonable to consider overbroad regulation, and related litigation risk, in its final promulgation of the CPP. Yet this article challenges the notion that a line exists between supply-side and demand-side regulation under either BSER or BACT. Again, EPA has not questioned the accord of demand-side efficiency with the statutory language of the BSER requirement. Further, where demand-side efficiency can serve to reduce air pollution (whether as BSER or BACT), it would surely serve to advance the purpose of the CAA to “promote public health and welfare by addressing air pollution”—as described and emphasized by the EPA in its justification of generation-shifting BSER.¹¹¹ For these reasons, this article disagrees with EPA that demand-side efficiency lies outside the scope of BSER—or, by extension, that it would lie outside the scope of BACT.

V. CONCLUSION

Energy efficiency will be an important piece of meaningful climate change action. The PSD program, in particular with its regulation of GHGs, provides a promising mechanism through which EPA and—especially now—state permitting authorities may require

energy efficiency measures to reduce air pollution. Particularly with on-site efficiency, these measures fit snugly within the definition of BACT. But although EPA has laid promising groundwork, evidence suggests that more can be done to use BACT as a technology-forcing instrument to require stationary sources to adopt new and more stringent efficiency measures.

Furthermore, given the significant efficiency gains that can be made with greater demand-side efficiency deployment, regulators should seriously consider employing demand-side efficiency as BACT in some form, as EPA initially considered for BSER in the CPP. In particular, credit-trading schemes have worked well to reduce pollution and promote clean energy in other contexts, and may work well here too. In any event, while demand-side efficiency fits less naturally inside the definition of BACT, it arguably still fits. And while demand-side efficiency would surely face similar challenges as generation-shifting in the CPP, those challenges appear surmountable.¹¹²

In addition, while BSER requires EPA action, BACT is in the hands of both states—to apply on a case-by-case basis—and EPA—to promulgate regulations, provide guidance, and step in where states fail to regulate properly. Thus, both EPA and the states may play an important role in either pushing the envelope on generation-stage and facility-use efficiency as BACT, or in creating a spark for demand-side efficiency as BACT.

Endnotes

1. See EPA Administrator Gina McCarthy, *Remarks at the Energy Efficiency Forum, as Prepared*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (June 12, 2014), <https://yosemite.epa.gov/opa/admpress.nsf/8d49f7ad4bbcf4ef852573590040b7f6/a367f91fc a9c07d985257cf6004b89cf1OpenDocument>.
2. See generally *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) [hereinafter *CPP Rulemaking*].
3. As of this Article’s writing, the CPP regulations have been finalized but are stayed pending review by the D.C. Circuit Court of Appeals. See *West Virginia v. EPA*, 136 S. Ct. (Mem) 1000 (2016). It is unclear precisely how President Trump will treat the CPP, but it does seem clear that his administration will seek to dismantle the regulations, or render them ineffectual, by some means. See Chelsea Harvey, *Trump Has Vowed to Kill the Clean Power Plan. Here’s How He Might—and Might Not—Succeed*, WASHINGTON POST (Nov. 11, 2016), https://www.washingtonpost.com/news/energy-environment/wp/2016/11/11/trump-has-vowed-to-kill-the-clean-power-plan-heres-how-he-might-and-might-not-succeed/?utm_term=.9c5029d9d531.
4. See generally 42. U.S.C. §§ 7470–79.
5. EPA determined in 2009 that GHG emissions from new motor vehicles contribute to higher atmospheric GHG concentrations, driving climate change and thereby endangering human health. *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,523, 66,537 (Dec. 15, 2009) (to be codified at 40 C.F.R. pt. 1). In 2010, EPA then issued its “Triggering Rule” suggesting that GHGs, upon regulation under the mobile source provisions of Clean Air Act, would also be subject to regulation under the PSD program. *Reconsideration of Interpretation of Regulations That Determine*

- Pollutants Covered by Clean Air Act Permitting Programs*, 75 Fed. Reg. 17,004 (Apr. 2, 2010). Section 165(a)(4) of the CAA provides that a PSD-regulated facility will be subject to BACT “for each pollutant subject to regulation under [the CAA] emitted from, or which results from, such facility.” 42 U.S.C. § 7475(a)(4). With the Triggering Rule, EPA concluded that pollutants “subject to regulation” within the meaning of section 165(a)(4) are those pollutants that are subject to emission controls under the CAA statute or regulations. *Reconsideration of Interpretation of Regulations*, 75 Fed. Reg. at 17,007–09. Once EPA announced the anticipated GHG regulations for motor vehicles, *id.* at 25,324 (2011), GHG regulation under the PSD program was thereby triggered.
6. *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2448–9 (2014). Although the Supreme Court also held that EPA could not regulate GHGs for sources that would not otherwise be subject to PSD regulation, *id.* at 2444–6, these smaller facilities do not represent a considerable share of stationary source emissions of GHGs, *id.* at 2438–39 (noting the Solicitor General’s representation that such facilities account for only three percent of U.S. stationary source GHG emissions, versus eighty-three percent from otherwise PSD-regulated sources).
 7. *PSD and Title V Permitting Guidance for Greenhouse Gases*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY: OFFICE OF AIR AND RADIATION 17–46 (Mar. 2011), <https://www.epa.gov/sites/production/files/2015-07/documents/gugguid.pdf> [hereinafter *GHG Guidance*].
 8. Although GHG regulation has brought energy efficiency to the fore as a distinct BACT option, as mentioned below, efficiency necessarily reduces emissions of any pollutants that would have resulted from any avoided emissions.
 9. Specifically, the PSD provisions apply in areas in attainment with national air pollution standards for at least one pollutant for which those standards exist. *See* 42 U.S.C. § 7472(b). Nearly all areas in the country are in attainment for at least one such pollutant. *Counties Designated “Nonattainment,”* United States Environmental Protection Agency, <https://www3.epa.gov/airquality/greenbook/manpoll.html> (last updated Sept. 22, 2016).
 10. 42 U.S.C. § 7475(a). Note that the CAA uses the term “major emitting facility” to describe PSD-regulate sources, *see id.*, while the PSD regulations use the term “major stationary source,” *see* 40 C.F.R. §§ 51.166(b)(12), 52.21(b)(12). This article uses these terms interchangeably. Furthermore, unless otherwise specified, the terms “source” and “facility” are also used to refer to PSD-regulated air emissions sources.
 11. Some states administer the PSD program via their own state implementation plans under the CAA; for these states, 40 CFR § 51.166 provides the applicable federal regulations. Other states administer the federal PSD program, and follow 40 C.F.R. § 52.21. The two sets of regulations are relevantly identical.
 12. 42 U.S.C. § 7475(a)(4).
 13. *See supra* note 5 and accompanying text.
 14. 42 U.S.C. § 7479(3). The regulatory definition is longer, *see* 40 C.F.R. §§ 51.166; 52.21(b)(12), and is discussed where relevant in Section IV.A. below. In general, state laws implementing the federal requirements are relevantly identical. *See, e.g.,* N.H. Rev. Stat. Ann. § 125-C:10-b(I)(a) (New Hampshire’s statutory definition of BACT); NH ADC ENV-A 101.31 (New Hampshire’s regulatory definition of BACT).
 15. *See generally* *New Source Review Workshop Manual: Prevention of Significant Deterioration and Nonattainment Area Permitting*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (draft Oct. 1990), <https://www.epa.gov/sites/production/files/2015-07/documents/1990wman.pdf> [hereinafter *NSR MANUAL*].
 16. *See id.* at B. 5–9.
 17. *See id.* at B. 10.
 18. *See Alaska Dep’t of Envtl. Conservation v. EPA*, 540 U.S. 461, 490–91 (2004).
 19. *See infra* Part IV.
 20. *See* Hank Schilling, *Energy Efficiency*, in *ENVIRONMENTAL LAW: FROM RESOURCES TO RECOVERY* 448–50 (Celia Campbell-Mohn et al. eds., 1993).
 21. *See generally* U.S. EPA, *AVAILABLE AND EMERGING TECHNOLOGIES FOR REDUCING GREENHOUSE GAS EMISSIONS FROM COAL-FIRED ELECTRIC GENERATING UNITS* 27–28 (2010); U.S. EPA, *AVAILABLE AND EMERGING TECHNOLOGIES FOR REDUCING GREENHOUSE GAS EMISSIONS FROM THE PETROLEUM REFINING INDUSTRY* 19–20 (2010).
 22. U.S. EPA, *AVAILABLE AND EMERGING TECHNOLOGIES FOR REDUCING GREENHOUSE GAS EMISSIONS FROM THE PETROLEUM REFINING INDUSTRY* 20 (2010).
 23. U.S. EPA, *AVAILABLE AND EMERGING TECHNOLOGIES FOR REDUCING GREENHOUSE GAS EMISSIONS FROM THE PORTLAND CEMENT INDUSTRY* 21 (2010).
 24. *See* U.S. EPA, *DRAFT GREENHOUSE GAS PREVENTION OF SIGNIFICANT DETERIORATION PRECONSTRUCTION PERMIT FOR THE OCCIDENTAL CHEMICAL CORPORATION, INGLESIDE CHEMICAL PLANT* 9–21 (2014).
 25. *Id.* at 18.
 26. U.S. EPA, *AVAILABLE AND EMERGING TECHNOLOGIES FOR REDUCING GREENHOUSE GAS EMISSIONS FROM THE PULP AND PAPER MANUFACTURING INDUSTRY* 32 (2010).
 27. U.S. EPA, *AVAILABLE AND EMERGING TECHNOLOGIES FOR REDUCING GREENHOUSE GAS EMISSIONS FROM THE PETROLEUM REFINING INDUSTRY* 21–22 (2010).
 28. As stated by outgoing Energy Secretary Ernest Moniz, “I just don’t see solutions to our biggest energy and environmental problems without a very strong demand-side response, and that’s why it’s logical to focus on energy efficiency.” Speech at 2013 *Energy Efficiency Global Forum*, GEF (May 21, 2013), <https://www.thegef.org/events/2013-energy-efficiency-global-forum>.
 29. Heat retention would be most applicable as a power plant emission limitation in areas where more buildings are heated with electric power.
 30. *See generally* ENERGY STAR, <https://www.energystar.gov>.
 31. *See infra* notes 106–111 and accompanying text.
 32. *Cf. Application for HPWES Express Audit Program*, NYSERDA <https://nyserdera.energysavvy.com/start-your-project/hpwes-express-audit/?s=contact> (last visited Apr. 30, 2016).
 33. *Cf. Home Performance with ENERGY STAR*, NYSERDA, <http://www.nyserdera.ny.gov> (last visited Apr. 30, 2016).
 34. *Appliance Rebates and Offers*, PUGET SOUND ENERGY, <http://pse.com/savingsandenergycenter/Rebates/Appliances/Pages/default.aspx> (last visited Apr. 30, 2016).
 35. *Cf. CASH FOR CLUNKERS*, <http://www.cashforclunkers.org> (last visited Apr. 30, 2016).
 36. *Assisted Home Performance with ENERGY STAR*, NYSERDA, <http://www.nyserdera.ny.gov> (last visited Apr. 30, 2016); *EmPower New York*, NYSERDA, <http://www.nyserdera.ny.gov> (last visited Apr. 30, 2016).
 37. *See* NSR Manual, *supra* note 15, at B. 10, 13.
 38. *See GHG Guidance*, *supra* note 7, at 29 (framing energy efficiency designs and processes as within the category of inherently lower polluting technology).
 39. *GHG Guidance*, *supra* note 7, at 17–46.
 40. *Id.* at 29.
 41. *Id.*
 42. *Id.* at 29–31.
 43. *Id.* at 29–30.
 44. *Id.* at 30.
 45. *Id.* at 30–31. The guidance does not explain why facility-use

measures should be considered only for new greenfield facilities.

46. *Id.* at 24.

47. *Id.* at 21.

48. See generally *RACT/BACT/LAER Clearinghouse (RBLC)*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://cfpub.epa.gov/RBLC> (searchable database of BACT and other technology standard determinations) (last visited Apr. 30, 2016). “Good combustion practices,” i.e., the optimization of air and fuel flow to minimize incomplete combustion, is an example of a BACT method with the dual benefits of reducing specific pollutants while improving overall fuel efficiency.

49. See *Clean Air Act Permitting for Greenhouse Gases*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/nsr/clean-air-act-permitting-greenhouse-gases> (last visited Apr. 30, 2016) (“These papers provide basic technical information which may be useful in a BACT analysis, but they do not define BACT for each sector.”).

50. In many cases, EPA has acted as the PSD permitting authority specifically for the purpose of GHG regulation, with state authorities continuing to handle other aspects of PSD permits. See, e.g., 40 C.F.R. § 52.2305 (providing for federal administration of PSD permitting for GHGs in Texas).

51. U.S. EPA Region IX, *PSD Permit: Pio Rico Energy Center*, SD 11-01 7 (Feb. 28, 2014).

52. See, e.g., U.S. EPA Region VI, *PSD Permit: Air Liquide Large Industries*, PSD-TX-612-GHG 7, 9–10, 12 (Nov. 21, 2013); U.S. EPA Region VI, *PSD Permit: ExxonMobil Chemical Company*, PSD-TX-102982-GHG 7–8 (Nov. 25, 2013); U.S. EPA Region VI, *PSD Permit: Rohm and Haas Texas Incorporated*, PSD-TX-1320-GHG 7 (Feb. 5, 2014); U.S. EPA Region IV, *PSD Permit: Florida Power & Light Company*, PSD-EPA-4010 4 (Dec. 25, 2013); U.S. EPA Region VI, *Statement of Basis for PSD Permit: Tenaska Roan’s Prairie Partners*, PSD-TX-1378-GHG 35–36 (May 2013).

53. U.S. EPA Region VIII, *Statement of Basis for PSD Permit: Sinclair Wyoming Refining Company*, PSD-WY-000002-2011.001 10 (Mar. 21, 2013).

54. U.S. EPA Region VI, *PSD Permit: Rohm and Haas Texas Incorporated*, PSD-TX-1320-GHG 8 (Feb. 5, 2014) (setting forth startup and shutdown practices for gas-fired steam boilers).

55. U.S. EPA Region VI, *PSD Permit: Rohm and Haas Texas Incorporated*, PSD-TX-1320-GHG 7–8 (Feb. 5, 2014).

56. E.g., U.S. EPA Region VI, *Statement of Basis for PSD Permit: PL Propylene LLC*, PSD-TX-18999-GHG 9–11 (Apr. 2013).

57. U.S. EPA Region VIII, *Statement of Basis for PSD Permit: Sinclair Wyoming Refining Company*, PSD-WY-000002-2011.001 19–21 (March 21, 2013); U.S. EPA Region VI, *PSD Permit: C3 Petrochemicals*, PSD-TX-1342-GHG 11 (June 12, 2014) (requiring economizer in boiler design as means to preheat boiler feedwater for waste heat recovery).

58. Compare, e.g., Zephyr Environmental Corporation for PL Propylene, *Application for PSD: PL Propylene* 21–22 (Dec. 2012) (setting forth proposed BACT for GHGs), with U.S. EPA Region VI, *Statement of Basis for PSD Permit: PL Propylene*, PSD-TX-18999-GHG 9–11 (Apr. 2013) (adopting BACT as proposed by permit applicant). Cf. U.S. EPA Region VI, *Statement of Basis for PSD Permit: Invenergy Thermal Development*, PSD-TX-1366-GHG 11 (Apr. 2014) (declining to impose more efficient alternative design where such alternative had not been demonstrated to meet project purpose of applicant).

59. U.S. EPA Region I, *PSD Permit: Pioneer Valley Energy Center*, 052-042-MA15 5–6 (Apr. 2012) (providing for design and installation of “energy efficient” combined cycle turbine).

60. See ESS Group for Westfield Land Development Company, *Application for PSD Permit: Pioneer Valley Energy Center 3* (Nov. 24, 2008).

61. See, e.g., U.S. EPA Region VI, *Statement of Basis for PSD Permit: C3*

Petrochemicals, PSD-TX-1342-GHG 16–17 (Apr. 2014); U.S. EPA Region VI, *Statement of Basis for PSD Permit: Ingleside Chemical Plant*, PSD-TX-1338-GHG 19 (Mar. 2014); U.S. EPA Region VIII, *PSD Permit: Green River Soda Ash Plant*, PSD-WY-000004-2012.001 8–9 (Jan. 27, 2014).

62. U.S. EPA Region VI, *Statement of Basis for PSD Permit: Voestalpine Texas Portland Direct Reduced Iron (DRI) and Hot Briquette Iron (HBI) Portland Production Plant*, PSD-TX-1344-GHG 13–14, 23, 28 (Apr. 24, 2014).

63. See generally *RACT/BACT/LAER Clearinghouse (RBLC)*, *supra* note 48. The RBLC is a useful place to identify permits to then track down on state agency websites, though the information contained in the database itself is often incomplete.

64. E.g., Iowa Department of Natural Resources, *PSD Technical Support Document: Iowa Fertilizer Company* 12–219; Virginia Department of Environmental Quality, *Engineering Analysis: Gateway Cogeneration* 1 5–7 (Aug. 23, 2012).

65. E.g., Louisiana Department of Environmental Quality, *Permit Modification Approval: Geismar Ethylene Plant* 9.

66. E.g., Alaska Department of Environmental Conservation, *Preliminary Permit: Kenai Nitrogen Operations*, AQ0083CPT06 10 (Dec. 2, 2014).

67. See, e.g., Illinois EPA, *Project Summary for a Construction Permit Application from Universal Cement, LLC*. 35–38 (for application received Dec. 10, 2008).

68. E.g., Connecticut Department of Energy & Environmental Protection, *New Source Review Permit: CVP Towantic*, 144-0023 6 (Nov. 30, 2015); New Jersey Department of Environmental Protection, *Air Pollution Operating Permit: Newark Energy Center*, BOP140005 24, 26 (Nov. 1, 2012). It may also be that non-numeric limitations are provided in related agency documents not made available by the agency.

69. South Carolina Department of Health and Environmental Control, *Final Determination and Notice of MACT Approval: PyraMax Ceramics* 30 (Feb. 9, 2012) (responding to public comment suggesting that BACT analysis should consider “traffic to and from the plant and potential emissions from the use of the final products . . . by the oil and natural gas industry”).

70. *Id.*

71. *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2448 (2014). The Court’s approval in *UARG* of most GHG permitting under the PSD program may also be understood as its implicit non-concern with energy efficiency as BACT, at least as understood by EPA—i.e., on-site efficiency.

72. E.g., *In re La Paloma Energy Ctr., LLC*, PSDAPLPEAL13-10, 2014 WL 1066556 (ABAWQWCN Mar. 14, 2014); *In re: Pio Pico Energy Ctr.*, 12-05, 2013 WL 4038622, at *1 (ABAWQWCN Aug. 2, 2013). In these appeals, the EAB upheld the challenged BACT determinations.

73. See 42 U.S.C. §§ 7475(a), 7479(3); 40 C.F.R. §§ 51.166(b)(12), 52.21(b)(12).

74. 42 U.S.C. § 7479(3).

75. 40 C.F.R. §§ 51.166(b)(12), 52.21(b)(12).

76. The statutory language contains another conceivable hook with which to find BACT applicable to both on- and off-site efficiency: The statutory definition of BACT enumerates “clean fuels” as an “available method[], system[], [or] technique[]” for reducing a PSD-regulated pollutant. 42 U.S.C. § 7475(a). In a physical sense, energy efficiency is plainly not a fuel—on the contrary, it displaces fuel. But as terms of art in energy circles, “energy resource,” “fuel source,” and similar expressions are sometimes used to include energy efficiency among actual sources (in a physical sense) of energy. Nevertheless, where “clean fuel” is undefined in the CAA, its plain, literal meaning ought to trump a sometimes-used term of art. In the context of the Federal Power Act, the Supreme Court has recently upheld a Federal Energy Regulatory Commission

rule effectively treating certain demand-side energy conservation as a commodity sellable in wholesale energy markets. See *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 773–75 (2016), as revised (Jan. 28, 2016). While that decision allowed conservation (and by extension, efficiency as a subset of conservation) to be treated as a commodity, the Court did not rely upon any designation of conservation or efficiency as a “fuel” or “energy source.” For these reasons, this article does not propose to treat efficiency as BACT on the basis of any characterization of efficiency as a “clean fuel.”

77. 42 U.S.C. § 7602(k).
78. 42 U.S.C. § 7475(a).
79. 40 C.F.R. §§ 51.166(j)(2)–(3), 52.21(j)(2)–(3). In the case of a major modification, the BACT requirement applies to those “emissions unit[s]” for which emissions of a given PSD-regulated pollutant will increase as a result of the modification. 40 C.F.R. §§ 51.166(j)(3), 52.21(j)(3).
80. 42 U.S.C. § 7479(3); 40 C.F.R. §§ 51.166(b)(12), 52.21(b)(12).
81. For a discussion (and rejection) of the argument that a *facility’s* application of BACT (as with on-site controls) must be understood as distinct from a *facility operator’s* application of BACT (as with off-site activities), see *infra* notes 103–105 and accompanying text.
82. 42 U.S.C. § 7475(a) (emphasis added). See also 42 U.S.C. § 7479(3) (using essentially identical language in BACT definition).
83. See 40 C.F.R. §§ 52.21(j)(2)–(3), 51.166(j)(2)–(3) (requiring a regulated facility to apply BACT “for each [] regulated [] pollutant that it would have the potential to emit in significant amounts”). See also 40 C.F.R. §§ 52.21(b)(12), 51.166(b)(12) (defining BACT as applicable to “each [] regulated [] pollutant which would be emitted from” a regulated facility).
84. See FED. ENERGY REG. COMM’N, ENERGY PRIMER: A HANDBOOK OF ENERGY MARKET BASICS 7–8 (2015).
85. 42 U.S.C. §§ 7475(a), 7479(3). See also 40 C.F.R. §§ 52.21(b)(12), (j)(2)–(3), 51.166(b)(12), (j)(2)–(3) (“each regulated [] pollutant”).
86. There is potential for a slippery slope problem under this reasoning. For example, could it be BACT for a PSD-regulated facility to pay for efficiency programs for energy users on an entirely different electric grid? Or to pay for efficiency improvements to vehicle engines produced by an automobile manufacturer? In either scenario, the result could still be to beneficially reduce emissions of a pollutant category that is one emitted from the PSD facility—yet the result might be difficult to square as within the scope of congressional intent. For this reason, should a regulatory authority adopt off-site efficiency as within the definition of BACT, it may be advisable for it to do so in recognition of the nexus between the regulated facility at issue and the downstream users connected to the grid into which that facility supplies energy. This would insulate the BACT determination from attack on “absurd results” grounds.
87. NSR MANUAL, *supra* note 15, at B. 13.
88. *Id.*; GHG Guidance, *supra* note 7, at 26–27.
89. See generally *In re Am. Elec. Power Serv. Corp., Sw. Elec. Power Co., John W. Turk Plant*, Petition No. VI-2008-01 (Order on Petition) (Dec. 15, 2009); *In re of Cash Creek Generation, LLC*, Petition Nos. IV-2008-1 & IV-2008-2 (Order on Petition) (Dec. 15, 2009).
90. *Sierra Club v. EPA*, 499 F.3d 653, 657 (7th Cir. 2007).
91. *Sierra Club*, 499 F.3d at 655.
92. See generally Opening Brief for Petitioners on Core Legal Issues at 29–60, *West Virginia v. EPA* (D.C. Cir.) (No. 15-1363) [hereinafter CPP Pet. Br.].
93. See generally *CPP Rulemaking*, *supra* note 2; 42 U.S.C. § 7411(a)(1) (defining “standard of performance”). Section 111(b) of the CAA

directs EPA to list categories of stationary sources responsible for endangerment to public health, and accordingly, to prescribe performance standards for new or modified sources. 42 U.S.C. § 7411(b)(1)(A)–(B). Section 111(d) of the CAA requires EPA to establish regulations under which states implement plans to regulate existing sources for non-criteria pollutants that are regulated elsewhere under Section 111. 42 U.S.C. § 7411(d)(1).

94. *CPP Rulemaking*, *supra* note 2, at 64,666–67, 64,744–51.
95. See *id.* at 64,731–33. This would effectively increase the cost of GHG intensive energy sources and serve to shift more generation to cleaner sources, while also creating a disincentive for the new construction of GHG-intensive sources.
96. See generally CPP Pet. Br., *supra* note 92, at 41–50.
97. Compare 42 U.S.C. § 7479(3), with 42 U.S.C. § 7411(a)(1). Differences in wording aside, it is not abundantly clear what the distinction may be between the levels of stringency of the two standards: both BACT and BSER must be the best “achievable,” and both must take into account cost, environmental, and energy considerations.
98. 42 U.S.C. §§ 7475(a)(4), 7411(d)(1).
99. 42 U.S.C. §§ 7479(3), 7411(a)(1).
100. See Respondent EPA’s Initial Brief at 27, *West Virginia v. EPA* (D.C. Cir.) (No. 15-1363) [hereinafter CPP EPA Br.] (“The plain meaning of the word ‘system’ is expansive, encompassing ‘a set of things or parts forming a complex whole’ or ‘a set of principles or procedures according to which something is done.’ (quoting *Oxford Dictionary of English* (3d ed. 2010)).
101. CPP Pet. Br., *supra* note 92, at 8. See also *id.* at 48–50 (making argument in more detail).
102. See CPP EPA Br., *supra* note 100, at 26–28, 68–69.
103. CPP Pet. Br., *supra* note 92, at 43–45.
104. *Id.* at 61–64.
105. See *supra* notes 80–81, 85–86 and accompanying text.
106. *CPP Rulemaking*, *supra* note 2, at 64,778–79.
107. See *id.*
108. CPP EPA Br., *supra* note 100, at 28 (citing *CPP Rulemaking*, *supra* note 2, at 64,778–79).
109. 42 U.S.C. § 7411(a)(1), (d)(1); 42 U.S.C. § 7475(a)(4).
110. See *id.* Whether EPA or state permitting agencies should share similar concerns with respect to demand-side efficiency as BACT is beyond the scope of this article.
111. CPP EPA Br., *supra* note 100, at 6 (citing 42 U.S.C. § 7401(b)(1)); see also *id.* at 3, 22, 44, 51 (invoking congressional purpose and intent as support for EPA’s interpretation of Section 111(d)).
112. The CPP litigation may or may not resolve on the merits, such that some of the questions discussed in Section IV.C. herein would be answered by the courts.

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Administrative Decisions Update

By Robert A. Stout Jr.

In re Alleged Violation of Article 17 of the New York State Environmental Conservation Law (ECL) and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) by Greene Technologies Incorporated, Respondent.



Ruling of the Commissioner

November 10, 2016

Summary of the Decision

The Commissioner denied Department staff's motion for a default judgment related to certain alleged State Pollution Discharge Elimination System ("SPDES") violations. In so doing, the Commissioner rejected the ALJ's recommendation to grant a default judgment and impose a civil penalty of one hundred ten thousand dollars (\$110,000).

Background

Department staff alleged Respondent operates a metal fabricating and plating facility with a wastewater treatment plant, which discharges effluent to a creek. The amended complaint, sent by DEC on December 15, 2015, and received by Respondent on December 17, 2015, further alleged that Respondent's SPDES permit expired on October 31, 2014, and that Respondent:

1. Failed to submit quarterly whole effluent toxicity sampling and submitted incomplete quarterly discharge monitoring reports ("DMRs") in 2014 and 2015;
2. Failed to submit semi-annual mercury sampling and submitted incomplete DMRs for certain months in 2014 and 2015;
3. Exceeded the limit for zinc contained in its SPDES permit during certain months in 2014 and 2015;
4. Failed to report daily maximum loadings for hexavalent chromium, nickel, copper, zinc, and iron during certain months in 2014 and 2015; and
5. Failed to submit a DMR for November 2014.

Respondent failed to file or serve an answer to the amended complaint and did not file a response to Department staff's motion for a default judgment. The Commissioner noted that the following was submitted in support of the motion for a default judgement:

a Motion for Default Judgment and Order; and
(ii) the [Department staff attorney] Affirmation, which: (a) alleges that respondent com-

mitted the violations set forth in the amended complaint; (b) attaches proof of service on respondent of the notice of hearing and amended complaint, and asserts that respondent has defaulted; (c) discusses the basis for the proposed civil penalty; and (d) attaches a proposed "Judgment and Order.

The Commissioner further observed that Department staff did not provide an affidavit of anyone with personal knowledge of the facts alleged or any other documents relating to claims asserted in the amended complaint.

Ruling of the Commissioner

The Commissioner, underscoring the gravity of a \$110,000 default judgment, made clear that submission of proof of facts sufficient to support the claims charged is necessary, which proof he found completely lacking in this matter. Such proof, he noted, should include one or more affidavits based upon personal knowledge and related documents. The related documents could include notices of violation, inspection reports or a copy of the permit at issue as appropriate based on the circumstances of the matter. The Commissioner noted that in this instance, neither a copy of the SPDES permit nor an affidavit of a Department staff representative responsible for monitoring Respondent's compliance were provided. He further noted the lack of support for the notion that Respondent could have committed violations of its SPDES permit after its expiration.

Moreover, the Commissioner expressly rejected the ALJ's conclusion that "[i]t is reasonable to infer from the affirmation of [the staff] attorney...that she reviewed the Department's records regarding the facility, respondent and the SPDES permit at issue, and verified the alleged violations detailed in the amended complaint." Instead, the Commissioner concluded that "an attorney's affirmation without more is insufficient to establish any fact regarding the underlying violation." The Commissioner further took issue with the ALJ's inference that the staff attorney verified the actual violations, noting that the record did not support the conclusion that any verification had occurred.

In this matter, the size of the default judgment weighed on the importance placed on the predicate substantive requirements. However, the ruling does not suggest that the obligations are in any way limited for lesser judgement amounts or enhanced for larger amounts. Accordingly, the ruling provides critical considerations for default judgment motions.

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Recent Decisions and Legislation in Environmental Law

Recent Decisions

***Catawba Riverkeeper Foundation v. North Carolina Department of Transportation*, 2016 U.S. App. LEXIS 22108 (4th Cir. 2016)**

Facts

Catawba Riverkeeper Foundation and Clean Air Carolina (the “Conservation Groups”) brought suit against the North Carolina Department of Transportation (NCDOT) and the Federal Highway Administration concerning environmental analysis conducted for a proposed highway connector that would run 22 miles crossing the South Fork and Catawba Rivers.¹ The conservation groups claimed that NCDOT’s Environmental Impact Statement (EIS) for the proposed highway violated the National Environmental Policy Act (NEPA) by conducting deficient environmental analysis.² The conservation groups claimed that NCDOT used the same set of socioeconomic data that assumed the construction of the highway to create a baseline to analyze the environmental impacts of building the highway.³

Prior to the district court’s ruling, the North Carolina General Assembly repealed the statute that authorized the project and retracted funding.⁴ The Assembly passed legislation creating a system that ranks proposed transportation projects based on a number of factors including congestion and cost.⁵ The proposed highway received a very low score based on the new ranking system making it unlikely to be built.⁶ After the district court’s decision, state and local authorities removed the project from future development plans.⁷

Procedural History

After the Assembly passed legislation creating the new ranking system, the district court directed the parties to prepare briefs as to whether the court still had subject matter jurisdiction over the case. Both parties claimed that a dispute remained because NCDOT could build the highway as an unspecified project using federal funds.⁸ The district court granted summary judgment in favor of the Conservation Groups.⁹ After that decision, the project was removed from state and local plans, making it ineligible for federal funding.¹⁰ NCDOT appealed the decision, arguing that due to developments that make the project inoperable, the case is moot and the district court’s summary judgment should be vacated.

Issue

1. Whether the case is moot due to developments, making it improbable that the highway will be built.
2. If the case is moot, whether the district court’s decision should be vacated.

Rationale

First, the court looked to Article III of the constitution, which limits the federal courts’ jurisdiction to “cases and controversies.”¹¹ For the court to have jurisdiction, the controversy must stay alive through the entire litigation process.¹² A case becomes moot when the court’s “resolution of an issue could not possibly have any practical effect on the outcome of the matter.”¹³

NCDOT argued that the case became moot when state and local authorities removed the highway from future development plans, making the project ineligible for federal funding.¹⁴ The Conservation Groups argued that despite the lack of funding, the highway project could move forward at a later date if political priorities shifted back in favor of the proposal.¹⁵

The court rejected the Conservation Groups’ arguments, reasoning that the project would have to overcome multiple obstacles to move forward including overcoming the low ranking it received under the General Assembly’s ranking system, and it would have to be integrated back into the development plans of the state and local leaders.¹⁶ NCDOT would also have to secure the \$900 million in funding required to complete the project.¹⁷ Due to these obstacles, the court found that the highway construction was improbable and to issue a decision would be akin to “an opinion advising what the law would be upon a hypothetical state of facts.”¹⁸ Based on these facts, the court determined the case to be moot.

Next, the court determined whether the district court’s summary judgment in favor of the Conservation Groups should be vacated. The general practice of the Court of Appeals is to vacate the moot elements of the district court’s decision.¹⁹ However, the Supreme Court has distinguished circumstances where the losing parties intentional actions have rendered a case moot to be an exception to the general practice.²⁰ The rationale being that one party “should not be allowed to escape the preclusive effect of an adverse district court judgment simply by taking a unilateral action during the pendency of their appeal to moot the matter.”²¹

The Conservation Groups argued that when NCDOT lobbied the General Assembly to enact a new ranking system and formally remove the highway from the state’s transportation plans, the case was rendered moot.²² The court disagreed with this contention, noting that NCDOT is an agency wholly separate from the General Assembly and any attempt NCDOT made to influence the legislature is insufficient to attribute the actions of the Assembly to NCDOT.²³ The court reasoned that because NCDOT cannot control the General Assembly, or the state or local leaders that removed the highway from future plans, the case is moot due to happenstance, not NCDOT’s own actions.²⁴

Conclusion

The court vacated the district court's summary judgment in favor of the Conservation Groups and remanded the decision to the district court with instructions to dismiss because the case had been made moot by circumstances beyond the control of either party.²⁵

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Endnotes

1. *Catawba Riverkeeper Foundation v. N.C. DOT*, 2016 U.S. App. LEXIS 22108 at 1 (4th Cir. 2016).
2. *Id.* at 7–8.
3. *Id.* at 8.
4. *Id.* at 2.
5. *Id.* at 6.
6. *Id.* at 6–7.
7. *Id.* at 7.
8. *Id.*
9. *Id.* at 8.
10. *Id.*
11. U.S. CONST. art. III, § 2, cl.1.
12. *Bahnmler v. Derwinski*, 923 F.2d 1085, 1088 (4th Cir. 1991).
13. *Catawba Riverkeeper Foundation*, LEXIS 22108 at 9 (4th Cir. 2016) (quoting *Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 161 (4th Cir. 2010)).
14. *Catawba Riverkeeper Foundation*, LEXIS 22108 at 9 (4th Cir. 2016).
15. *Id.* at 10.
16. *Id.*
17. *Id.*
18. *Id.* at 11 (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)).
19. *Id.* at 11 (citing *Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 161 (4th Cir. 2010)).
20. *Id.* at 13.
21. *Id.* at 13 (quoting *United States v. Springer*, 715 F.3d 535, 541 (4th Cir. 2013)).
22. *Id.* at 14.
23. *Id.*
24. *Id.* at 15.
25. *Id.* at 18.

***Juliana v. United States*, No. 6:15-cv-01517-TC,
2016 U.S. Dist. LEXIS 156014 (D. Or. Nov. 14, 2016)**

Facts

Several children sued the United States government for knowingly allowing emission of dangerous amounts of carbon dioxide (CO₂) into the air. Such emissions will “destabilize[e] the climate system in a way that would significantly endanger plaintiffs, with the damage persisting for millennia.”¹ The plaintiffs contended that the president and government agencies bear responsibility for climate change damage and must exercise authority to regulate CO₂, especially when deciding to give tax breaks to fossil fuel industries, to permit the import and export

of fossil fuels, and to subsidize the fossil fuel industry, among other decisions.²

Procedural History

Defendants moved the magistrate to dismiss the action for lack of subject matter jurisdiction and failure to state a claim.³ Magistrate Judge Coffin issued a Findings and Recommendation (F&R), in which he recommended denial of the motion to dismiss.⁴ This matter was then referred to the United States District Court for the District of Oregon, and the Court adopted the opinion of Judge Coffin and denied the defendant's motion to dismiss.⁵

Issue

This case does not address the factual predicate of whether human activity contributes to climate change. The issues include:

1. Whether the defendants are responsible for harm caused by climate change to children and future children.
2. Whether the defendants' climate change policies can be challenged in court.
3. Whether the court is empowered to provide relief to plaintiffs, or whether ordering defendants to change climate change policies would violate the separation of powers doctrine.⁶

Rationale

The court rejected the political question doctrine challenge to the court's subject matter jurisdiction.⁷ A court does not have subject matter jurisdiction if the question is political because, as a function of separation of powers, a court should avoid answering questions of a uniquely political nature.⁸ A political question is decided under six factors identified in *Baker*. Judge Aiken found that “[b]ecause no *Baker* factor is inextricable from the merits of this case, the political question doctrine is not a barrier to plaintiffs' claims.”⁹

The court next looked at whether the plaintiffs had standing to sue. Standing requires a showing that (1) plaintiffs suffered an actual or imminent injury; (2) the injury was caused by the defendant's conduct; and (3) the injury can be redressed if the court rules in favor of the plaintiffs.¹⁰ Here, as to the first prong, the court found that the plaintiffs alleged sufficient injury, including: that algae blooms made one plaintiff unable to drink water; that drought conditions harmed the productivity of a family farm; and that dry conditions aggravated plaintiffs' asthma.¹¹ With regard to the second prong, the judge found that there was causation between the injuries and the defendants because

fossil fuel combustion accounts for the lion's share of greenhouse gas emissions produced in the United States; defendants have the power to increase or de-

crease those emissions; and defendants use that power to engage in a variety of activities that actively cause and promote higher levels of fossil fuel combustion.¹²

Finally, the court found satisfaction of the third prong because the plaintiffs did not demand reversal of climate change; rather, plaintiffs requested that the defendants initiate planning to substantially reduce CO₂ emissions. As such, the court found that success on the merits would likely redress the plaintiffs' injuries.¹³

The third issue addressed was the plaintiffs' due process allegation. To support the claim, plaintiffs alleged that the rising levels of carbon dioxide in the atmosphere infringed upon their fundamental rights to "life, liberty, or property."¹⁴ In what may be the most significant ruling to date on climate change litigation, the court identified a fundamental interest at stake: "the right to a climate system capable of sustaining human life is fundamental to a free and ordered society."¹⁵

Finally, the court discussed the plaintiffs' assertion that the public trust doctrine protects their right to clean air.¹⁶ Under the public trust doctrine, the government cannot abdicate its obligation to protect the core public values: "the sovereign's public trust obligations prevent it from "depriving future legislature of the natural resources necessary to provide for the well-being and survival of its citizens."¹⁷ The public trust doctrine has traditionally applied to the control of water and submerged lands, but here the plaintiffs argued that it also should apply to atmospheric harm.¹⁸ Although the Court did not go as far as determining that the public trust doctrine should apply to the atmosphere, it asserted that because the alleged injuries "relate to the effects of the ocean acidification and rising ocean temperatures, they have adequately alleged harm to public trust assets."¹⁹ Also, the defendants claimed that the public trust doctrine applies only to the states and not the federal government based on the holding in *PPL Montana, LLC v. Montana*, 565 U.S. 576 (2012).²⁰ Here, however, the court determined that the reasoning in the *PPL* case was substantially distinguishable. Because the public trust obligates the government to protect the trust, the defendants' argument that the trust does not apply to the federal government does not hold.²¹

Conclusion

This groundbreaking case looks at governmental action and inaction rather than any specific environmental impacts. With this in mind, the Court determined that the judiciary would face the issues and denied the defendants' motion to dismiss.

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Endnotes

1. *Juliana v. United States*, No. 6:15-cv-01517-TC, 2016 U.S. Dist. LEXIS 156014, at 4 (D. Or. Nov. 14, 2016).
2. *Id.* at 4-7.

3. *Id.* at 5-6.
4. *Id.* at 6.
5. *Id.*
6. *Id.* at 8.
7. *Id.* at 11.
8. *Id.*
9. *Id.* at 27.
10. *Id.* at 28-9.
11. *Id.* at 30.
12. *Id.* at 40.
13. *Id.* at 42-4.
14. *Id.* at 45.
15. *Id.* at 47, 50.
16. *Id.* at 58.
17. *Id.* at 58-9.
18. *Id.* at 61, 64.
19. *Id.* at 68.
20. *Id.* at 69.
21. *Id.* at 78.

***Matter of Sierra Club v. Martens*, 2016 N.Y. Misc. LEXIS 3463 (N.Y. Sup. Ct.)**

Facts

The Consolidated Edison Company of New York, Inc. ("Con Edison") East River Station is an electricity generating facility located on the Lower East Side of Manhattan.¹ Two of the station's generating units have drawn cooling water from the East River via the "once-through" process since the 1950s.² The "once-through" process involves taking water from the East River, circulating it through pipes to condense and absorb the heat and steam to generate electricity.³ The cooling water is used once, and then is sent back to the East River at an increased temperature.⁴ The discharged heated water is considered a pollutant, and the screens through which the water passes at intake into the pipes negatively impacts aquatic life.⁵ The screens hold the larger fish against them, and while fish eggs and larvae are small enough to pass through the screens, they still become tangled in the cooling systems after passing through the screens.⁶ An alternative to the "once-through" system is a "closed-cycle" cooling system, which ultimately cools the water pulled from the river after it has been used, and recycles it for later use without negatively impacting the aquatic life.⁷

The Department of Environmental Conservation (DEC) had issued the East River Station permits for further water withdrawals and had renewed permits under State Pollutant Discharge Elimination System (SPDES) in 2001, 2007, 2010, and 2014.⁸ In January 2010, the DEC released a public notice to modify the East River Station's SPDES permit to incorporate its impending Best Technology Available (BTA) determination.⁹ The notice states that the modified permit would require Con Edison to install

traveling intake screens with fish protective features, as well as require the use of fine mesh intake screen panels and a low stress fish return system.¹⁰ The public notice also communicated the DEC's issuance of a "Negative Declaration" regarding the 2010 permit.¹¹ A Negative Declaration ensures that a proposed action would not result in any significant adverse environmental impact such that an environmental analysis under New York's State Environmental Quality Review Act (SEQRA) would be required.¹² Con Edison spent three years and \$44 million completing the installation of the BTA requirements.¹³

Meanwhile, the New York State Legislature amended the laws governing water withdrawals requiring Con Edison to file annual forms to make further withdrawals.¹⁴ In June 2014, the DEC found that Con Edison's application complied with the statutory requirements, and as such, DEC had no discretion and approved the permit request.¹⁵ The DEC also determined that Con Edison did not require environmental review under SEQRA.¹⁶

Procedural History

Con Edison cross-moved for dismissal in response to petitioner's challenge of the initial permit and assertion that a "closed-cycle" system had to be installed at the East River Station.¹⁷

Issue

1. Whether issuance of the permit was arbitrary and capricious under the statutory scheme with respect to the DEC's own policies and procedures.¹⁸

Rationale

SEQRA is meant to "inject environmental considerations directly into governmental decision making; thus the statute mandates that [s]ocial, economic, and environmental factors shall be considered together in reaching decisions on proposed activities."¹⁹ The court found that the DEC's issuance of the initial permit was exempt from environmental review under SEQRA because it met statutory requirements under Section 15-1501(9) of the ECL.²⁰ Because the East River Station complied with the statutory reporting requirements, the DEC had no discretion but to approve the permit.²¹ Petitioners also contended that Con Edison violated the Waterfront Act. However, because the Waterfront Act does not implicate SEQRA, the DEC's determination became irrelevant to coastal consistency review under the Waterfront Act.²² Lastly, the court held that revoking Con Edison's permit and requiring the installation of a "closed-cycle" system would impose "immense unjust costs" on Con Edison, considering that it had spent \$44 million to meet the BTA requirements for the permit.²³

Conclusion

The court granted Con Edison's cross-motion to dismiss, upheld the issuance of the initial permit, and

refused to require Con Edison to install a "closed-cycle" system at the East River Station.²⁴

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Endnotes

1. *Matter of Sierra Club v. Martens*, 2016 N.Y. Misc. LEXIS 3463 (N.Y. Sup. Ct.).
2. *Id.* at 2.
3. *Id.*
4. *Id.* at 6.
5. *Id.*
6. *Id.* at 7.
7. *Id.* at 3.
8. *Id.* at 6.
9. *Id.* at 11–2.
10. *Id.* at 12.
11. *Id.* at 13.
12. *Id.*
13. *Id.* at 3–4.
14. *Id.* at 4.
15. *Id.*
16. *Id.*
17. *Id.* at 5.
18. *Id.* at 25.
19. *Id.* at 26.
20. *Id.* at 27–8.
21. *Id.*
22. *Id.* at 33.
23. *Id.*
24. *Id.* at 39.

***Matter of Clair v. City of New York*, 40 N.Y.S.3d 33
(N.Y. App. Div. 2016)**

Facts

In 2005, the New York City Taxi and Limousine Commission (TLC) enacted NYC Administrative Code 19-533, which states that the City will approve one or more mass-produced hybrid electric vehicles to be used as taxis.¹ Further, § 19-533 explained the legislative intent behind the statute, citing the goal of improving air quality and conserving fuel.²

In 2014, the TLC passed the Accessibility Rules, which would begin the process of making 50 percent of NYC taxis accessible to those with physical disabilities by the year 2020.³ The "Accessible Conversion Start Date is the date which is the earlier of," either, "the date on which there is available an Accessible Taxicab Model that meets the specifications of Section 67-05.2 of these Rules and the requirements of §19-533 of the Administrative Code, as certified by the Chairperson, or January 1, 2016."⁴ The TLC implemented a mandatory replacement initiative requiring owners of multiple taxis to retire and

replace at least 50 percent of their current taxis with accessible taxis. The TLC also implemented a lottery process for any person owning a single taxi, mandating the owner put his name in the lottery and if chosen, he will have to replace his current taxi with an accessible taxi.⁵

Procedural History

This is a hybrid CPLR Article 78 and a Declaratory Judgment claim.⁶ The judgment of the Supreme Court of New York County denied the petition in this hybrid action and denied injunctive and declaratory relief. The proceeding was dismissed.⁷

Issue

January 1, 2016 was the pre-determined date for conversion to accessible vehicles, and at that time no hybrid electric accessible vehicle existed.⁸ Because of this, the issues include:

1. Whether the Accessibility Rules are in irreconcilable conflict with Administrative Code § 19-533.
2. Whether the TLC has the authority to mandate medallion owners to replace the “vehicles being retired with non-hybrid electric wheelchair-accessible vehicles.”⁹

Rationale

The Court determined that although petitioners made a “skillful” argument, the TLC cannot mandate taxi owners to replace retired vehicles with non-hybrid wheelchair-accessible vehicles as that argument is incompatible with the reading of Section 19-533 and the clear intent of the TLC.¹⁰ Section 19-533 does not explicitly state that a vehicle purchased or leased by a medallion owner must be both hybrid and accessible, the vehicle model just has to be eligible for immediate or future use.¹¹ Further, in *Greater New York Taxi Ass’n v New York City Taxi & Limousine Comm’n*, the court determined that § 19-533 did not require the TLC to limit the entire fleet to hybrid vehicles, or preclude the approval of a non-hybrid taxi.¹²

It is the clear intent of § 19-533 and the TLC to encourage the use and development of alternative fuel vehicles to reduce greenhouse gas emissions (a main contributor to climate change), improve air quality, and conserve fuel.¹³ Further, not long after § 19-533 was enacted, the City Council enacted Administrative Code § 19-534, which “mandated that the TLC approve and implement a plan to increase the number of both clean air and accessible vehicles.”¹⁴ Prior to 2014 and the adoption of the Accessibility rules, the City council had shown its intent to increase the number of both clean air and accessible vehicles, rather than just producing hybrid electric vehicles.¹⁵ Section 19-533 states that the TLC shall approve one or more hybrid electric vehicles and the vehicles must be eligible for immediate use by all current and future medallion owners.¹⁶ The Accessibility Rules state that the taxicab conversion program provides implementation to

increase the number of accessible vehicles in New York City to 50 percent by 2020.¹⁷ Thus, the court found that “[n]one of the provisions of the Accessibility Rules are inconsistent with the section 19-533,” and therefore the respondents did not violate §19-533 by implementing the Accessibility Rules.¹⁸

Conclusion

The Supreme Court of New York decision was modified to the extent of declaring that the Accessibility Rules were not violative of Administrative Code § 19-533, and otherwise affirmed, without costs.¹⁹

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Endnotes

1. *Matter of Clair v City of New York*, 40 N.Y.S.3d 33, 35 (N.Y. App. Div. 2016) (citing NYC Administrative Code § 19-533).
2. *Id.*
3. *Id.* at 37.
4. *Id.* at 36 (citing 35 RCNY 51-03).
5. *Id.*
6. *Id.* at 35.
7. *Id.*
8. *Id.* at 36.
9. *Id.*
10. *Id.*
11. *Id.* at 37.
12. *Id.* (quoting *Greater New York Taxi Ass’n v New York City Taxi & Limousine Comm’n*, 121 A.D.3d 21, 35 (1st Dept. 2014)).
13. *Id.* at 35 (citing NYC Administrative Code § 19-533).
14. *Id.* at 37.
15. *Id.*
16. *Id.* at 35 (citing NYC Administrative Code § 19-533).
17. *Id.* at 37.
18. *Id.* at 37–8.
19. *Id.* at 41.

Leonard v. Planning Board of the Town of Union Vale, No. 16-199-cv, 2016 U.S. App. LEXIS 16343 (2d Cir. Sept. 2, 2016).

Facts

In 1987, the Town Board of Union Vale (“Board”) issued a negative declaration under the N.Y. State Environmental Quality Review Act (“SEQRA”), attesting that a 950-acre subdivision project proposed by plaintiffs would not result in significant adverse environmental impacts.¹ The plaintiffs developed a portion of the land, and then in 2009, applied for preliminary approval to subdivide the remainder of the property.² By resolution in 2012, the Board rejected plaintiffs’ 2009 application, finding that the 1987 negative declaration no longer applied.³ The federal court granted annulment of the resolution but also held that the Board could rescind or amend the negative declaration under SEQRA.⁴ Subsequently, the Board

held a public hearing and workshop, then adopted a new resolution rescinding the 1987 negative declaration.⁵ The Board cited substantial changes to the project that had not been considered during prior review and would result in significant adverse environmental impact.⁶ Plaintiffs sued the Board, claiming the assertions made in the resolution related to the adverse environmental impact of plaintiffs' project were erroneous.⁷

Procedural History

The U.S. District Court for the Southern District of New York dismissed plaintiffs' claims of substantive and procedural due process violations with prejudice, finding that plaintiffs lacked a cognizable property interest in the negative declaration.⁸ Plaintiffs appeal.

Issue

Whether claims of substantive and procedural due process violations are ripe for adjudication when a negative SEQRA declaration is rescinded.

Rationale

Ripeness is subject to a two-prong test: (1) whether the local regulatory body rendered a "final decision" on the matter, and (2) whether the plaintiff has sought compensation through available state procedures.⁹ The Court of Appeals for the Second Circuit recognizes a "futility exception" for the "final decision" requirement: the exception is applicable "when an 'agency lacks discretion to grant variances or has dug in its heels and made clear that all such applications will be denied,' or when an agency imposes 'repetitive or unfair land-use procedures in order to avoid a final decision.'"¹⁰

Here, the Court reasoned that the plaintiffs had not satisfied the first prong of the ripeness test because the Board's rescission of its negative declaration is only part of a multi-step approval process, and that "[even] a positive declaration pursuant to SEQRA is not a final agency decision reviewable under New York law."¹¹ Once the Board publishes its positive declaration, plaintiffs could submit an Environmental Impact Statement ("EIS") under SEQRA to address the Board's concerns.¹²

The District Court held that the futility exception applied "because 'it would be futile to require Plaintiffs to seek a final determination' in light of plaintiffs' allegations that the Board had improperly rescinded the negative declaration."¹³ The District Court was guided by the *Westchester Day School v. Village of Mamaroneck*¹⁴ decision, which held that the exception applied when a negative declaration was rescinded "based on issues that 'ha[d] already been thoroughly studied and found appropriate by professionals reviewing the project' and where the refusal to approve the project prior to the completion of the EIS would 'significantly delay the Project and dramatically increase the cost to plaintiff.'"¹⁵

Here, the Court of Appeals found that the *Westchester* court had likely misapplied the futility exception because, notwithstanding the additional cost and delay that would result from producing an EIS, the EIS would not have prevented the Board from approving the project.¹⁶ That same outcome is possible here because the court determined the plaintiffs can still address the Board's concerns in a Draft EIS (DEIS) or Final EIS (FEIS).¹⁷

Conclusion

The Court vacated the District Court's judgment to dismiss the plaintiff's due process claims with prejudice and remanded the case with instructions to dismiss the claims without prejudice, holding that the claims were not yet ripe for adjudication in federal court.¹⁸

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Endnotes

1. *Leonard v. Planning Board of the Town of Union Vale*, No. 16-199-cv, 2016 U.S. App. LEXIS 16343 at 3 (2d Cir. Sept. 2, 2016) (quoting 6 N.Y.C.R.R. § 617.2(y)).
2. *Id.*
3. *Id.* at 4.
4. *Id.*
5. *Id.*
6. *Id.* at 5.
7. *Id.*
8. *Id.* at 2.
9. *Id.* at 6 (citing *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186-7 (1985)).
10. *Id.* at 6-7 (quoting *Sherman v. Town of Chester*, 752 F.3d 554, 561 (2d Cir. 2014)).
11. *Id.* at 8 (quoting *Homefront Org., Inc. v. Motz*, 570 F. Supp. 2d 398, 406 (E.D.N.Y. 2008)).
12. *Id.* at 7.
13. *Id.* at 8 (quoting *Leonard v. Planning Bd. of the Town of Union Vale*, 154 F. Supp. 3d 59, 66-7 (S.D.N.Y. 2016)).
14. *Westchester Day School v. Village of Mamaroneck*, 236 F. Supp. 2d 349, 355 (S.D.N.Y. 2002).
15. *Leonard*, 2016 U.S. App. LEXIS 16343, at 8-9 (quoting *Westchester*, 236 F. Supp. 2d at 355).
16. *Id.* at 9.
17. *Id.*
18. *Id.* at 10.

***Brodsky v. United States Nuclear Regulatory Comm'n*, 650 F. App'x 804 (2d Cir. 2016).**

Facts

In 2007, the United States Nuclear Regulatory Commission (NRC) granted exemption from compliance with fire safety regulations to a nuclear power plant known as Indian Point No. 3.¹ Richard Brodsky (Brodsky), a former New York State Assemblyman, commenced an action in the Southern District of New York, arguing that the NRC's exemption violated the Administrative

Procedure Act, the Atomic Energy Act, and the National Environmental Policy Act (NEPA).² On appeal, the panel affirmed the decision of the NRC to exempt Indian Point 3 from the federal fire-regulation, however, the panel did find that the agency had failed to comply with the public-participation provision of NEPA.³ The NEPA issue was remanded, and the NRC solicited public comment before they made the decision not to modify or rescind the challenged exemption.⁴ Brodsky petitioned to challenge the decision, arguing that the “NRC violated NEPA’s public-participation requirement by refusing to consider comments regarding the environmental consequences of a terror attack.”⁵ The district court previously rejected the argument that NEPA “required consideration of public comments on possible terrorism,” when they granted summary judgment for the defendant, and Brodsky failed to raise the claim on initial appeal.⁶ However, Brodsky argued that since the NRC reconsidered the challenged exemptions, it engaged in a separate NEPA process and the new issues of fact and law should be looked at in this litigation.⁷

Procedural History

The plaintiff appealed the judgment from the United States District Court for the Southern District of New York, in which the court granted summary judgment for the NRC.

Issue

1. Whether the NRC was in violation of NEPA’s public-participation requirement when they granted exemptions of certain fire safety regulations to Indian Point 3.⁸

Rationale

The district court previously decided that the NRC was not required to consider the public comments “regarding the environmental consequences of a terrorist attack,”⁹ as it fell outside the scope of a NEPA analysis. Plaintiff effectively abandoned this claim when he failed to raise it on initial appeal.¹⁰

Plaintiff argued that since the NRC made the choice to reconsider the challenged exemptions, new issues of fact and law were raised, and the court would not have been able to resolve them in prior litigation. However, this argument did not apply here because the NRC actually did consider the risks from determining whether a terrorist attack would have an environmental impact, thus asserting that no new facts or law were raised.¹¹

The plaintiff failed to identify any “shortcoming[s] in the NRC’s consideration of public comments...that renders arbitrary or capricious its determination that...granting the...exemption would have no significant impact on the environment.”¹² As such, even if the argument had not been “procedurally barred,” it would have failed based on its merits.¹³

Conclusion

The Court rejected the Plaintiff’s argument and affirmed the previous decision. The court denied the argument because the argument was procedurally barred and because the plaintiff’s argument was without merit since the NRC considered the environmental risks of any potential terrorist attacks.¹⁴

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Endnotes

1. *Brodsky v. United States Nuclear Regulatory Comm’n*, 650 F. App’x 804 (2d Cir. 2016).
2. *Id.*
3. *Id.* at 806.
4. *Id.*
5. *Id.* at 808.
6. *Id.* at 806.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 808.
13. *Id.*
14. *Id.*

***Nat’l Parks Conservation Ass’n v. United States Dep’t of Interior*, 835 F.3d 1377 (11th Cir. 2016).**

Facts

In 1988, Congress authorized the National Park Service (NPS) to acquire approximately 112,400 acres of additional land (“Addition Lands”) to add to the Big Cypress National Preserve in Florida.¹ The NPS began the process of drafting a general management plan (GMP) and an environmental impact statement (EIS) in 1996, that would include a plan for the existing 244 miles of Off-Road Vehicle (ORV) trails within the Addition Lands.² As required by the Wilderness Act, the NPS assessed the Addition Lands for wilderness designation eligibility and convened three separate wilderness workshops in 2006, 2009, and 2010.³ Following these workshops and public comment periods, the NPS determined that of the original acreage, 71,260 acres of the Addition Lands were eligible for wilderness designation excluding 140 miles of the ORV trails with a ½ mile buffer.⁴ The 140 miles of ORV trails were ineligible based on the presence of lasting human disturbance.⁵ In late 2010, the NPS finalized the GMP and EIS for the Addition Lands.⁶ Additionally, pursuant to the Endangered Species Act (ESA), the NPS consulted the U.S. Fish and Wildlife Service (FWS) to determine the potential effects of the Addition Lands GMP on the eastern indigo snake and the Florida panther. The NPS and FWS jointly concluded that the use

of the ORV trails was unlikely to adversely affect these species.⁷

Procedural History

The United States District Court for the Middle District of Florida held that the NPS did not act arbitrarily, capriciously or in violation of the Wilderness Act, the Organic Act, or the ESA. The plaintiffs appealed.⁸

Issue

1. Whether the NPS acted arbitrarily, capriciously, or in violation of the Wilderness Act, Organic Act, or the ESA by determining that a portion of the ORV trail network within the Addition Lands was ineligible for wilderness designation.

Rationale

The Administrative Procedures Act (APA) allows a court to set aside an agency's decision only if it is determined to be arbitrary, capricious, an abuse of discretion, or contrary to law.⁹ A decision is arbitrary and capricious when the agency relies on unintended factors, fails to consider a significant aspect, or offers an explanation that is contrary to the evidence or so implausible that it could not be the result of a difference in view or expertise.¹⁰ Here, the appellants alleged that the NPS acted arbitrarily and capriciously when it heightened the standard for wilderness eligibility when making its decision regarding the Addition Lands.¹¹

With respect to the Wilderness Act, the court reasoned that the NPS appropriately applied the objective statutory directives when it determined that the ORV trails did not appear to have been affected primarily by the forces of nature and that the human imprint was not substantially unnoticeable.¹² The NPS did not require the land to be pristine or untouched by humans, just that it be free of a noticeable human imprint.¹³

In addition, the appellants argued that the NPS violated the Organic Act by raising recreational use above preservation.¹⁴ The court reasoned that the fundamental purpose of this act is to conserve park resources and values, and by analyzing numerous potential impacts and developing methods of mitigation, the NPS did not advance recreational use over conservation.¹⁵

Finally, the appellants argued that the NPS and FWS violated the ESA by failing to analyze the impacts of the ORV trails on the eastern indigo snake and the Florida panther.¹⁶ Here, the Court afforded the NPS and FWS due deference and reasoned that because the agencies relied on several scientific studies the effects of the ORV use on these species was appropriately analyzed.¹⁷

Conclusion

The Court affirmed the decision of the lower court, holding that the agencies used reasoned decision-making supported by substantial evidence in the wilderness as-

essment of the Addition Lands acquired for the Big Cypress National Preserve.¹⁸

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Endnotes

1. *Nat'l Parks Conservation Ass'n v. United States Dep't of Interior*, 835 F.3d 1377, 1380 (11th Cir. 2016).
2. *Id.* at 1381.
3. *Id.* at 1381–82.
4. *Id.* at 1382.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 1382–83.
9. *Id.* 1383.
10. *Id.*
11. *Id.*
12. *Id.* at 1385.
13. *Id.*
14. *Id.* at 1386.
15. *Id.*
16. *Id.* at 1387.
17. *Id.*
18. *Id.* at 1388.

***Standing Rock Sioux Tribe v. United States Army Corps of Engr's*, 2016 U.S. Dist. LEXIS 121997 (D.D.C. 2016).**

Facts

The facts of this case date back to the summer of 2014, when the route for the Dakota Access Pipeline (DAPL), a domestic oil pipeline designed to move more than a half million gallons of crude oil across four states daily, was first crafted.¹ Although most of the proposed route encompassed private land and did not intersect with the Standing Rock Sioux Tribe Reservation (the "Reservation") directly, it came within a half-mile of the Reservation resulting in the Tribe taking action against the United States Army Corps of Engineers (the "Corps").² The Standing Rock Sioux Tribe sued the Corps for violations of the Clean Water Act (CWA), the Rivers and Harbors Act (RHA), the National Environmental Policy Act (NEPA), and the National Historic Preservation Act (NHPA).³

Here, the court focused on the violations under the NHPA.⁴ Standing Rock filed a motion for preliminary injunction since construction on DAPL had already begun. Standing Rock asserted that the Corps had not engaged in required tribal consultations before obtaining the necessary pre-construction notice and authorizations (hereinafter PCN Authorizations).⁵ Standing Rock further asserted that a completed DAPL would cause cultural and historical harm before judicial relief could take place,⁶ especially on the waters of the Missouri River and Lake

Oahe, which play a crucial role in Standing Rock's spiritual beliefs. The banks of those waters cross paths with the DAPL's proposed route, encompassing the irreparable injury claimed by the Standing Rock Tribe.⁷

Procedural History

Standing Rock initially filed suit on July 27, 2016, in Washington D.C. Federal District Court.⁸ This Motion for Preliminary Injunction was filed on August 4, 2016.⁹ On August 8, 2016, Dakota Access intervened in support of the Corps and the hearing for the Motion was subsequently scheduled for August 24, 2016.¹⁰ In response to the facts revealed by Dakota Access at the August 24, 2016 hearing, Standing Rock submitted a supplemental declaration by their former Tribal Historic Preservation Officer and former member of Standing Rock, Tim Mentz, which showed that the area in question was entirely outside of the Corps jurisdiction.¹¹ On September 4, Standing Rock filed a Temporary Restraining Order against Dakota Access to stay any additional construction work on the pipeline.¹² On September 6, at the Temporary Restraining Order Hearing, the court denied the order; however, Dakota Access agreed to cease construction activities.¹³

Issue

1. Whether the Corps engaged in sufficient consultation with Standing Rock to satisfy requirements under the NHPA
2. Whether the alleged injury is probable to occur in the absence of preliminary injunction.

Rationale

In order for injunctive relief to be granted, Standing Rock must show a likelihood to succeed on the merits and a likelihood of probable irreparable harm in the absence of preliminary relief.¹⁴ On the first issue, the Court was unable to find Standing Rock's four arguments persuasive in establishing a likelihood of success on the merits of the case.¹⁵ The most significant fact from the findings was the documentation the Corps had that showed their many attempts between the fall of 2014, and the spring of 2016, to consult with Standing Rock on the DAPL construction.¹⁶ In fact, the court found that the Corps likely exceeded its obligations under the NHPA based on its efforts.¹⁷

Although the court only needed to find that one prong of injunctive relief was not satisfied to deny the motion, the court still analyzed Standing Rock's alleged irreparable injury.¹⁸ The court found that injunctive relief would not prevent the injury because Dakota Access had no intention to pull back on the work that had been done. And, the majority of the work that they had done on DAPL was on permitted private land.¹⁹ Further, the evidence showed that in order for Dakota Access to meet its contractual obligations, it would have to continue with the construction.²⁰ Therefore, the Court asserted that the harms to cultural sites were "destined" to occur even if the Court were to grant temporary relief.²¹

Conclusion

Standing Rock was unable to establish either the likelihood of success on the merits or the irreparable injury necessary to grant a Motion for Injunctive Relief. The court denied the motion.

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Endnotes

1. *Standing Rock Sioux Tribe v. United States Army Corps of Engr's*, 2016 U.S. Dist. LEXIS 121997 (D.D.C. 2016).
2. *Id.* at 2.
3. *Id.* at 3.
4. *Id.* at 4.
5. *Id.* at 13.
6. *Id.* at 4.
7. *Id.* at 19.
8. *Id.* at 53.
9. *Id.* at 53-4.
10. *Id.* at 54.
11. *Id.* at 55 - 56.
12. *Id.* at 57.
13. *Id.* at 59.
14. *Id.* (citing *Winter v Nat. Res. Def. Advisory Council, Inc.*, 555 U.S. 7, 22, 129 S.Ct. 365, 172 L. Ed. 2d 249 (2008)).
15. *Id.* at 61 - 62.
16. *Id.* at 53.
17. *Id.* at 76.
18. *Id.* at 59, 79.
19. *Id.* at 82.
20. *Id.*
21. *Id.* at 83.

Legislation

Climate Change Adapt America Bond Act of 2016, 114 S. 2860

This bill, S. 2860 (hereinafter, "the bill"), was introduced by Senator Barbara Boxer into the Senate on April 27, 2016, to establish a framework under the Climate Advisory Commission for projects that will respond to the impacts of climate change and to issue Federal bonds that will be used to fund projects that help with adaptation to climate change.¹

The bill establishes a Climate Change Advisory Commission composed of 11 members who will establish recommendations and guidelines for a Federal investment program which will help to adapt and improve energy, water, transportation, and infrastructure impacted by climate change; integrate the best available data and science into the framework; and identify the most cost-effective projects that have multiple benefits to the ecosystem, commerce, and human health.²

The Adapt America Fund established within the Department of Commerce is implemented by the Sec-

retary to help implement Funds for the guidelines and frameworks implemented by the Advisory Commission.³ Agencies at both the federal and state level, as well as any other entities deemed prudent by the Secretary, can request funds to implement projects that will adapt and improve energy, infrastructure, and other commerce related areas.⁴

Climate Change Bonds will be issued by the Secretary to be deposited into the Adopt America Fund and will be backed by the full faith and credit of the United States.⁵ The Climate Change Bonds will only be used for the purpose of this Act.⁶

The intent of this bill is to ensure that there are funds available for projects related to climate change. Currently, this bill has not been passed by either the House or Sen-

ate, but was referred to the Committee on Finance after it had been read and introduced into the Senate.⁷

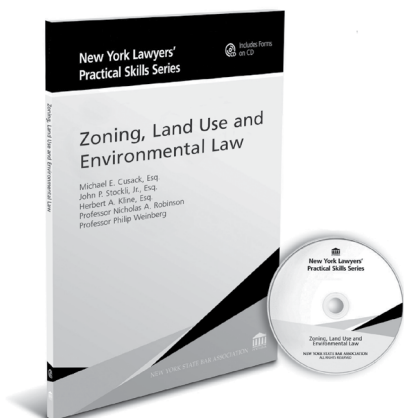
Linnea E. Riegel
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Endnotes

1. Climate Change Adapt America Bond Act of 2016, S. 2860, 114th Cong. (2015-2016), available at <https://www.congress.gov/bill/114th-congress/senate-bill/2860>.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. Climate Change Adapt America Bond Act of 2015, S. 2860, 114th Cong. (2015-2016), available at <https://www.congress.gov/bill/114th-congress/senate-bill/2860/actions>.

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