

ENVIRONMENTAL LAW IN NEW YORK

ARNOLD & PORTER LLP



Volume 25, No. 10

October 2014

NEW YORK ENVIRONMENTAL IMPACT STATEMENTS BEGINNING TO ADDRESS CLIMATE RESILIENCY

Ethan I. Strell

IN THIS ISSUE

New York Environmental Impact Statements Beginning to Address Climate Resiliency	205
LEGAL DEVELOPMENTS	210
◆ AGRICULTURE & FOOD	210
◆ AIR QUALITY	211
◆ ASBESTOS	211
◆ ENERGY	212
◆ HAZARDOUS SUBSTANCES	213
◆ INSURANCE	215
◆ LAND USE	216
◆ SEQRA/NEPA	217
◆ TOXIC TORTS	217
◆ WETLANDS	218
NEW YORK NEWSNOTES	218
WORTH READING	218
UPCOMING EVENTS	219

In a subtle but meaningful shift, the environmental impact review process in New York is beginning to more systematically consider the potential effects of a changing climate on proposed projects, not just the effects that a project might have on the environment. In other words, rather than just considering the greenhouse gas emissions from individual projects, environmental impact statements (EISs) are now considering how a proposed project will be affected by anticipated sea level rise, increased storm surges, and the like. In the past year, most New York City environmental impact reviews for projects located in floodplains have explicitly addressed adaptation to climate

change, and several EISs in other parts of the state have also discussed how a changing climate may affect the proposed project.

Background

In 1970, the federal government enacted the National Environmental Policy Act (NEPA), which required federal agencies to evaluate the environmental effects of a wide variety of federal actions, including direct federal undertakings, funding and permitting. Many states followed suit with so-called “mini-NEPA” laws, requiring evaluation of the environmental impacts of state and often local actions. New York State enacted its mini-NEPA law, the State Environmental Quality Review Act (SEQRA), in 1975. New York City in turn implements SEQRA via its own environmental review procedures, the City Environmental Quality Review (CEQR).¹

The purpose of these laws is to ensure that government agencies are aware of and disclose to the public the potential impacts of their actions on the “environment.”² Although climate change has emerged as among the most important environmental issues, the environmental impact review process has been slow to meaningfully include climate change considerations, and methodologies for analyzing environmental impacts—including climate change—vary across jurisdictions.

The principal challenge in assessing a project in terms of climate change under the traditional methodology of environmental impact assessment is that greenhouse gas (GHG) emissions are a global

¹ NEPA, 42 U.S.C. §§ 4321–4370h; SEQRA, N.Y. ENVTL. CONSERV. LAW (ECL) art. 8; CEQR, Exec. Order 91 of 1977 (43 R.C.N.Y. ch. 6).

² The “environment” generally is broadly defined under the statutes. *See, e.g.*, *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 414, 494 N.E.2d 429, 434 (1986).

problem, and the emissions from one project—even a very large one—are not likely to be considered “significant.”

However, given the projected and observed changes to the climate, a more practical consideration for many projects is how that project will fare given what today’s best science can tell us about future climatic conditions. For instance, if a development is approved now, will rising seas and more frequent floods render that project uninhabitable within its anticipated lifetime? Or will more frequent and intense heat waves and changing rainfall patterns affect a water supply project, a gas drilling proposal or a forestry plan?

In a March 2012 *New York Law Journal* article,³ Professor Michael Gerrard noted that consideration of the impacts of climate change and adaptation to those impacts was “spotty at best” in NEPA EISs, and that only a “small handful” of SEQRA EISs addressed those issues. Slowly, the practice is changing.

Guidance on Climate Change Analysis

In recent years, various federal, state and local government agencies have proposed or issued guidance on how to conduct a climate change analysis.⁴

Back in 2010, the Council on Environmental Quality, the federal entity charged with overseeing the implementation of NEPA and adopting the government-wide NEPA regulations, issued draft guidance for public comment on consideration of the effects of climate change and greenhouse gas emissions

(Draft NEPA Guidance).⁵ Despite the passage of over four years, that 2010 draft has still not been finalized.⁶

The Draft NEPA Guidance is notable in that it not only addresses the direct greenhouse gas emissions of projects, but also explicitly includes adaptation and the effects of a changing climate on a proposed project as relevant considerations.⁷ Demonstrating the flexibility of NEPA to address emerging environmental issues, the Draft NEPA Guidance considers this assessment as part of the existing NEPA framework, not as a new legal requirement.⁸ Emphasizing NEPA’s “rule of reason,” the Draft NEPA Guidance reasonably indicates that the appropriateness of conducting such an analysis should be determined through the EIS scoping process, based on “the sensitivity, location, and timeframe of a proposed action.”⁹

New York State also issued a draft climate change policy document for SEQRA in 2008, which was finalized in 2009.¹⁰ However, that document is expressly limited in scope and does not address climate change adaptation.¹¹

In contrast to impact analysis under the federal NEPA and statewide under SEQRA, New York City has produced several versions of a comprehensive environmental impact review guidance document, the City’s *CEQR Technical Manual*.¹² The *Manual* covers most technical areas relevant to conducting an environmental assessment in New York City. Notably, it includes a chapter instructing City agencies regarding how and when to conduct a greenhouse gas analysis. In its latest revision, released in March 2014, the *Manual* includes the following

³ Michael B. Gerrard, *Reverse Environmental Impact Analysis: Effect of Climate Change on Projects*, N.Y.L.J., Mar. 8, 2012, at 3, available at http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=61833.

⁴ See, e.g., COUNCIL ON ENVTL. QUALITY (CEQ), DRAFT NEPA GUIDANCE ON CONSIDERATION OF THE EFFECTS OF CLIMATE CHANGE AND GREENHOUSE GAS EMISSIONS (Feb. 18, 2010) [hereinafter DRAFT NEPA GUIDANCE], available at <http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/ghg-guidance>; N.Y. STATE DEPT. OF ENVTL. CONSERV. (DEC), ASSESSING ENERGY USE AND GREENHOUSE GAS EMISSIONS IN ENVIRONMENTAL IMPACT STATEMENTS (July 15, 2009) [hereinafter DEC SEQRA GUIDANCE], available at <http://www.dec.ny.gov/regulations/56552.html>; DEC, COMM’R’S POLICY CP-49, CLIMATE CHANGE AND DEC ACTION (Oct. 22, 2010), http://www.dec.ny.gov/docs/administration_pdf/commissclimchpolicy.pdf; N.Y.C. MAYOR’S OFFICE OF ENVTL. COORDINATION, *Greenhouse Gas Emissions and Climate Change* (ch.18), in CEQR TECHNICAL MANUAL (Mar. 2014) [hereinafter CEQR TECHNICAL MANUAL], available at http://www.nyc.gov/html/oece/html/ceqr/technical_manual_2014.shtml; see also Katrina Fischer Kuh, *Impact Review, Disclosure, and Planning*, in THE LAW OF ADAPTATION TO CLIMATE CHANGE 543, 550–51 (Michael B. Gerrard & Katrina Fischer Kuh eds. 2012).

⁵ See DRAFT NEPA GUIDANCE, *supra* note 4.

⁶ In February 2008, two years before CEQ issued the Draft NEPA Guidance, the International Center for Technology Assessment (ICTA) and other organizations petitioned CEQ to amend its NEPA regulations and clarify that NEPA requires an assessment of climate change. Because the Draft NEPA Guidance was never finalized and CEQ did not amend its regulations, ICTA and its sister organization, the Center for Food Safety, filed a federal lawsuit last spring against CEQ seeking declarative and injunctive relief, asking the court to declare that CEQ violated the Administrative Procedures Act by failing to respond to the 2008 petition and to order CEQ to respond to the 2008 petition. Complaint for Declaratory and Injunctive Relief, Int’l Ctr. for Tech. Assessment v. CEQ, No 1:14-cv-549 (D.D.C. Apr. 2, 2014). On August 7, 2014, CEQ denied the 2008 rulemaking petition, but did so on the grounds that NEPA regulations already require assessment of climate impacts. CEQ also indicated that it was considering how to proceed as to the Draft NEPA Guidance in light of comments it has received. Letter from Michael J. Boots, CEQ, to Joseph Mendelson, III., et al., regarding CEQ’s Response to a Petition for Rulemaking and Issuance of Guidance to Require Inclusion of Climate Change Issues in NEPA Documents (Aug. 7, 2014). On August 20, ICTA and the Center for Food Safety filed a notice of voluntary dismissal without prejudice; the notice indicated that they were preserving their right to challenge the denial on its merits.

⁷ DRAFT NEPA GUIDANCE, *supra* note 4, at 6–8.

⁸ DRAFT NEPA GUIDANCE, *supra* note 4, at 11.

⁹ DRAFT NEPA GUIDANCE, *supra* note 4, at 6.

¹⁰ See DEC SEQRA GUIDANCE, *supra* note 4.

¹¹ See DEC SEQRA GUIDANCE, *supra* note 4, at 4 (“This policy focuses on how energy use and GHG emissions should be discussed in an EIS, but does not dictate whether or how climate change impacts, such as projected sea level rise, may be relevant to a proposed project. While impacts of climate change on a project may be important in some cases, this Policy is specifically focused on assessing and mitigating energy use and GHG emissions.”).

¹² See CEQR TECHNICAL MANUAL, *supra* note 4.

guidance on when to conduct an analysis of climate change's effect on a proposed project:

Although significant climate change impacts are unlikely to occur in the analysis year for most projects, depending on a project's sensitivity, location, and useful life, it may be appropriate to provide a qualitative discussion of the potential effects of climate change on a proposed project in environmental review. Such a discussion should focus on early integration of climate change considerations into the project and may include proposals to increase climate resilience and adaptive management strategies to allow for uncertainties in environmental conditions resulting from climate change.¹³

Consideration of Climate Adaptation and Resiliency Policies

Although specific climate change adaptation guidance is inconsistent among jurisdictions, adaptation has emerged as an important environmental policy, and is reflected in numerous official written government policies.¹⁴ Because an aspect of environmental impact review is considering official laws and policies,¹⁵ those adaptation policies are important elements in encouraging lead agencies to include an adaptation analysis.

In May 2014, the New York State Legislature passed a bill called the "Community Risk Reduction and Resiliency Act,"¹⁶ which would amend certain sections of the Environmental Conservation Law, Agriculture and Markets Law and Public Health Law to promote greater awareness of and preparedness for climate change-associated risks such as sea level rise and flooding. If signed into law, the bill would, among other

things, require the Department of Environmental Conservation (DEC) to adopt regulations establishing science-based state sea level rise projections.¹⁷ Although this bill would not specifically amend SEQRA, it would further evidence a strong environmental policy to consider how future climate risks affect discretionary state decisions.

Additionally, recently adopted revisions to the City's local waterfront revitalization program (LWRP) require consideration of climate change and sea level rise for projects located in the designated coastal zone.¹⁸

Consideration of Climate Resiliency in Recent CEQR and DEC Environmental Impact Statements

While there still is no definitive policy or guidance document setting forth how or when an EIS should consider adaptation to climate change, New York City has begun to routinely include an analysis of a project's resiliency to certain impacts of climate change in environmental impact statements over the last year or so, as have several DEC SEQRA EISs.

City CEQR environmental review documents for projects located in floodplains (or that will likely be located in future floodplains given projected sea level rise) now include discussions of adaptation and resilience, and also reference the City's LWRP. The following projects include such a discussion:

- **625 West 57th Street.** Rezoning of portion of a Manhattan block to permit 1.1 million gross square feet of residential, commercial, community facility and parking uses. Final Supplemental Environmental Impact Statement, December 7, 2012 (City Planning Commission).

¹³ CEQR TECHNICAL MANUAL, *supra* note 4, at 18-7.

¹⁴ See, e.g., Exec. Order 13653, Preparing the United States for the Impacts of Climate Change, 78 Fed. Reg. 66,819 (Nov. 6, 2013); EXEC. OFFICE OF THE PRESIDENT, THE PRESIDENT'S CLIMATE ACTION PLAN (June 2013), <http://www.whitehouse.gov/sites/default/files/image/president27climateactionplan.pdf>; U.S. ENVIRONMENTAL PROTECTION AGENCY POLICY STATEMENT ON CLIMATE CHANGE ADAPTATION (revised June 2014), <http://epa.gov/climatechange/Downloads/impacts-adaptation/adaptation-statement-2014.pdf>; U.S. ARMY CORPS OF ENG'RS, USACE CLIMATE CHANGE ADAPTATION POLICY STATEMENT (June 2011), <http://www.corpsclimate.us/docs/USACEAdaptationPolicy3June2011.pdf>. *Climate Change Adaptation Resources*, SABIN CTR. FOR CLIMATE CHANGE LAW, <http://web.law.columbia.edu/climate-change/resources/adaptation-resources> (last visited Sept. 3, 2014).

¹⁵ See, e.g., 40 C.F.R. § 1502.16(c) (An EIS "shall include discussions of . . . [p]ossible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned."); 40 C.F.R. § 1506.2(d) ("To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned)."); 6 N.Y.C.R.R. § 617.7(c)(1)(iv) ("These criteria are considered indicators of significant adverse impacts on the environment: . . . the creation of a material conflict with a community's current plans or goals as officially approved or adopted.").

¹⁶ A06558-B, 200th Leg., 2d Sess. (2014).

¹⁷ The bill also would amend the following specific statutory provisions or subject areas to require consideration of future climate change risk: State funding for agricultural land protection (Agric. & Markets § 325); Smart growth public infrastructure criteria (ECL art. 6); Petroleum bulk storage requirements (ECL art. 17, tit. 10); Water pollution revolving loan fund (ECL art. 17, tit. 19); Oil and gas well permits (ECL art. 23, tit. 3); Siting of hazardous waste facilities (ECL art. 27, tit. 11); Bulk storage of hazardous substances (ECL art. 40); Land acquisition for preservation of open space; recreation; and natural, cultural and historic resources (ECL art. 49, tit. 2 and art. 54, tit. 3); State assistance for closure of non-hazardous municipal landfills (ECL art. 54, tit. 5); State assistance for local waterfront revitalization programs and coastal rehabilitation projects (ECL art. 54, tit. 11); Uniform procedures for major permits (ECL art. 70); and Drinking water revolving fund (Pub. Health Law art. 11, tit. 4).

¹⁸ N.Y.C. DEPT. OF CITY PLANNING, THE NEW YORK CITY WATERFRONT REVITALIZATION PROGRAM 43 (Oct. 30, 2013) [hereinafter NEW YORK CITY LWRP], available at http://www.nyc.gov/html/dcp/html/wrp/wrp_revisions.shtml (Policy 6.2: "Integrate consideration of the latest New York City projections of climate change and sea level rise (as published by the NPCC, or any successor thereof) into the planning and design of projects in the city's Coastal Zone.").

- **Cornell USA Tech.** Various approvals to allow for the development of an applied science and engineering campus on Roosevelt Island. Final Environmental Impact Statement, March 8, 2013 (Mayor's Office of Environmental Coordination).
- **Governors Island.** Completion of Park Master Plan and the re-tenanting of approximately 1.2 million square feet of North Island historic structures by 2022, as well as expanded ferry service. Final Supplemental Generic Environmental Impact Statement, May 23, 2013 (Mayor's Office of Environmental Coordination).
- **Memorial Sloan-Kettering Cancer Center Ambulatory Care Center and CUNY/Hunter College Science and Health Professions Building.** Hospital and City university partnering to acquire an approximately 66,111-square-foot, City-owned site on the Upper East Side of Manhattan to build a new ambulatory care center and Science and Health Professions Building. Final Environmental Impact Statement, August 8, 2013 (Mayor's Office of Environmental Coordination).
- **Willetts Point Development Project.** Modifications to previously approved plan for 61-acre district in Queens. Overall project would comprise approximately 108.9 acres and up to 10.34 million square feet of development. Final Supplemental Environmental Impact Statement, August 9, 2013 (Mayor's Office of Environmental Coordination).
- **Halletts Point Rezoning.** Mixed-use development on eight parcels on the East River in Astoria, Queens, including publicly accessible waterfront open space, an esplanade and a supermarket. Final Environmental Impact Statement, August 9, 2013 (City Planning Commission).
- **Seaside Park and Community Arts Center.** Creation of a new recreational and entertainment destination on the Coney Island Boardwalk, including a 5,100-seat seasonal amphitheater for concerts and other events, the creation of approximately 2.41 acres of publicly accessible open space, and the reuse of the landmarked former Childs Restaurant Building as a restaurant and banquet facility. Draft Environmental Impact Statement, September 15, 2013 (Mayor's Office of Environmental Coordination).
- **Gun Hill Square.** Development of a pedestrian-oriented open-air urban shopping center and a single residential building containing senior housing, on an approximately 12.6-acre site in the Bronx. Draft Scope of Work, July 2, 2014 (Mayor's Office of Environmental Coordination).
- **Astoria Cove.** Various zoning and other approvals sought to facilitate mixed-use development on 8.7-acre site in

Astoria on the East River. Development will include approximately 1,689 dwelling units (295 affordable units), local retail space including a supermarket and a site for an elementary school. Draft Environmental Impact Statement, April 18, 2014 (City Planning Commission).¹⁹

Portions of each City project listed above are either located in the current 100-year floodplain, as designated by the Federal Emergency Management Agency (FEMA), or are projected to be located within a floodplain in the future based on projections of the New York City Panel on Climate Change (NPCC). Most of the documents reference the City's then-proposed revision to the LWRP, which was formally adopted by the City Council in October 2013. The Gun Hill Square and Astoria Cove documents were prepared after the City Council adopted the new waterfront program. Citing the NPCC's projections, which forecast a local sea level rise of 12 to 23 inches by the end of this century (up to 55 inches with rapid ice melt), the EISs generally consider whether the design of the proposed project would be able to withstand flooding if the 100-year flood level rose by two feet.

In the Gun Hill Square project, which is undergoing scoping, an early stage in the environmental review process, the Draft Scope of Work indicates that, because the project site is located within existing and future projected flood zones, the DEIS will include discussion of (1) projected future sea level rise and likely future flood zones for different years within the expected life of the development; (2) government initiatives to improve coastal resilience; and (3) an analysis of consistency with policy 6.2 of the City's revised waterfront revitalization plan, which provides for the integration of consideration of projections of climate change and sea level rise into the planning and design of projects in the City's coastal areas.²⁰

The Astoria Cove DEIS indicates that a small portion of one proposed building is located in a current floodplain, and that additional buildings would be located in the 100-year and 500-year floodplains based on NPCC projections for the 2020s and 2050s.²¹ For one building projected to fall within the 100-year floodplain by 2050, the DEIS states:

Should the base flood elevation rise to these projected elevations in the future, the Applicant anticipates retrofitting the perimeter of the building with flood prevention systems (either temporary or permanently installed flood gates/shutters), potentially in conjunction with an emergency flood protection plan. In addition, as a small portion of [that building] falls within the [current] 100-year flood zone, provisions to address potential flood risks have been developed in the building design.²²

¹⁹ New York City Planning Commission EISs can be found at http://www.nyc.gov/html/dcp/html/env_review/eis.shtml. EISs prepared by the New York City Mayor's Office of Environmental Coordination can be found at http://www.nyc.gov/html/oc/html/ceqr/dme_environmental_reviews.shtml.

²⁰ See NEW YORK CITY LWRP, *supra* note 18, at 43.

²¹ Astoria Cove DEIS fig. 2-9.

²² Astoria Cove DEIS at 2-24; *see also id.* at 15-10.

For buildings proposed in later phases of that project, the DEIS indicates that future building codes and other design requirements will address flood concerns.²³

The Hallets Point Rezoning FEIS considers another proposed mixed-use development along the East River in Astoria, Queens. The Hallets Point FEIS states that “[s]ince the proposed site is on the waterfront, the potential effects of global climate change on the proposed project are considered and measures that could be implemented as part of the project to improve its resilience to climate change are discussed.”²⁴

After discussing various federal, state and local resilience policies, the FEIS states that “the only issue for which the project can prepare, within its context and location, is potential future flooding, *i.e.*, designing the project to withstand and recover from flooding and to ensure that hazardous materials and other potentially dangerous items would not end up in floodwaters.”²⁵ The FEIS then analyzes the project-area flood elevations using the latest FEMA information, plus sea level rise as projected by the NPCC. The FEIS concludes that while the proposed project would be above the current 100-year flood level and projected mid-century flood levels, it “may be within the range of end-of-century 100-year flood levels.”²⁶ Although not formally called environmental “mitigation,” the FEIS states that proposed buildings “would be flood-proofed and would utilize flood barriers on an as needed basis (*i.e.*, before predicted severe storm events).”²⁷

In the Seaside Park project in Coney Island, the DEIS discloses that the basement areas of a renovated restaurant would be lower than current flood levels and future flood levels could reach the ground floor. However, the DEIS states that in addition to meeting all building code requirements, all mechanical equipment will be at roof level, and electrical switchgear will be on the first level, elevated two feet above the floodplain elevation.²⁸

The FEIS for the 625 West 57th Street project in Manhattan, which includes residential, commercial, community facility and parking uses, indicates that the western portion of the project would be subject to flood levels two feet higher than current levels. The FEIS states, however, that the portion of the

project site subject to future flooding would only include non-critical retail frontage, and that no residential areas, critical infrastructure or openings leading to lower-lying project areas would be in the areas subject to increased flooding.²⁹

The other EISs contain similar discussions of potential future flooding, and all discuss measures to make each project more energy efficient and sustainable. The adaptation analyses are limited to flooding and do not include discussion of other potential climate impacts, such as more intense heat waves.

Outside of New York City, several EISs where DEC is the lead agency also discuss the changing climate’s effect on the proposed project. For instance, the DEIS for the Haverstraw Water Supply Project, a proposal to build a desalinization plant for Hudson River water, includes a chapter on global climate change, which discusses projected increased precipitation, droughts and sea level rise, and how those changes would affect water quality (salinity, turbidity, water temperature, etc.) and water levels. The DEIS indicates that the design of the plant takes projected flood levels into account, and is being built to one foot above the current 500-year flood zone, and is designed so that if floods are higher, doors can be elevated to provide additional flood protection.³⁰

Another EIS considering future climate conditions is the Cumulative Impacts Analysis for the Belleayre Mountain Ski Center located in the Catskills.³¹ The Cumulative Impacts Analysis addresses rising temperatures and how they would affect a northeast ski area, water availability, increased runoff from more intense storms and changes in vegetation and pests due to rising temperatures.³²

Consideration of Climate Resiliency in California

In marked contrast to New York, it is up to the courts to decide whether California may affirmatively foreclose any discussion of the effects of climate change on a proposed project under the California Environmental Quality Act (CEQA). In a series of cases, a small number of California courts have held that the purpose of CEQA “is to identify the significant effects of a project on the environment, not the

²³ See Astoria Cove DEIS at 2-24, 15-10.

²⁴ Hallets Point FEIS at 17-9.

²⁵ Hallets Point FEIS at 17-13.

²⁶ Hallets Point FEIS at 17-14.

²⁷ Hallets Point FEIS at 17-14. Because the Hallets Point project would involve a property disposition by the New York City Housing Authority, federal approval is required, and, in accordance with Executive Order 19988, a federal floodplain analysis was also completed in accordance with the floodplain regulations of the U.S. Department of Housing and Urban Development, 24 C.F.R. part 55. See Hallets Point FEIS app. D.

²⁸ Seaside Park DEIS at 11-10.

²⁹ 625 West 57th Street FEIS at 12-13.

³⁰ Haverstraw Water Supply Project Draft Environmental Impact Statement, United Water New York Inc. (Jan. 13, 2012), available at <http://haverstrawwatersupplyproject.com/draft-environmental-impact-statement-deis.html>.

³¹ The Belleayre project involves two EISs, one prepared by a private developer for a resort development, and a separate one prepared by the State for its “Unit Management Plan” for the state-owned ski area. The Cumulative Impacts Analysis addresses the combined impacts of the two related projects. Environmental review documents for both actions are available at <http://www.dec.ny.gov/permits/54704.html>.

³² Cumulative Impact Analysis for: Belleayre Mountain Ski Center UMP-DEIS and Modified Belleayre Resort at Catskill Park Supplemental DEIS § 1.12, at 5.

significant effects of the environment on the project.”³³ In *Ballona Wetlands*, a California appellate court held that the environmental impact report for a proposed mixed-use residential development did not need to consider whether the project would be threatened by rising sea levels due to climate change.

Although the California Supreme Court declined to hear an appeal of *Ballona Wetlands*, it subsequently took the appeal in a case with a similar CEQA issue—*California Building Industry Association v. Bay Area Air Quality Management District*, which involves the promulgation of air quality standards in the San Francisco area. At issue are air quality standards affecting so-called “new receptors”—in other words, new people, such as those working or residing in a new residential or commercial development in an area with existing air pollution. A trade group representing the building industry challenged the threshold standards, arguing that the “purpose of CEQA is to protect the environment from proposed projects, not to protect proposed projects from the existing environment.”³⁴ The California appeals court rejected that argument, which it characterized as based on just a “quartet of cases concluding an EIR is not required for a proposed project based solely on the effect of the environment on people who will live and work at the site of the project.”³⁵ In November 2013, the California Supreme Court agreed to hear the trade group’s appeal, limiting its review to the following issue: “Under what circumstances, if any, does the California Environmental Quality Act . . . require an analysis of how existing environmental conditions will impact future residents or users (receptors) of a proposed project?”³⁶

The case was briefed in the spring of this year and has generated enormous interest in the environmental and building communities. Nineteen organizations, including building, business, housing, planning, environmental and municipal groups, have been granted *amicus* status. The California Supreme Court’s decision will have significant implications for whether CEQA (and possibly other environmental review statutes) can be used to prepare for and adapt to the effects of climate change.

Concluding Thoughts

Notwithstanding the California litigation, it seems clear that environmental impact review statutes such as NEPA, SEQRA and, yes, even California’s CEQA, are not only flexible enough to accommodate disclosure of the effects of climate on a proposed project, but likely to require it. There is no principled reason for excluding disclosure of environmental impacts on the proposed project site, as opposed to the wider environment at large. The definition of “environment” under each statute is broad, and neither the statutes, regulations nor caselaw

distinguish between the “environment” of the project site and the wider world. Moreover, it is well-established practice to analyze other environmental effects on the project site itself, such as hazardous contamination, flora and fauna, the presence of archaeological and historic resources, and the like. Omitting such areas from an environmental impact statement would be improper. Likewise, as is becoming accepted practice, discussing the impacts of the future environment due to a changing climate on a proposed project fulfills the purpose of the environmental review laws.

Ethan Strell is Counsel to Shamberg Marwell Hollis Andreyck & Laidlaw, P.C., where he practices land use, zoning and environmental law (estrell@smhal.com/914-666-5600). This article was written while Mr. Strell was a 2013–14 Fellow and Associate Director at the Sabin Center for Climate Change Law at Columbia Law School. Akiko Inertia Shimizu, an undergraduate at the Columbia University School of Engineering and Applied Science, assisted with research.

LEGAL DEVELOPMENTS

AGRICULTURE & FOOD

Appellate Division Found That Occasional Foie Gras Consumer and Animal Legal Defense Fund Did Not Have Standing to Seek State Foie Gras Ban

The Appellate Division, Third Department, ruled that the Animal Legal Defense Fund (ALDF) and an individual petitioner lacked standing to seek a ban on force-fed foie gras in an action against New York’s Commissioner of Agriculture and Markets, the Department of Agriculture and Markets and New York producers of foie gras. Petitioners alleged that the force-feeding of geese or ducks to enlarge their livers caused the animals to be diseased and the food products created from them to be adulterated, and that such products should therefore be prohibited from entering the food supply. The Third Department ruled that the individual petitioner, who alleged that he occasionally consumed foie gras and was therefore at an increased risk of the medical condition secondary amyloidosis, could not benefit from “enhanced risk” standing because his “risk of exposure” was minimal (given his “occasional” consumption) and the “indication of harm” was uncertain (given that petitioners had identified no case of secondary amyloidosis being linked to foie gras). The individual’s alleged injury was therefore speculative and conjectural. The Third Department also declined to find that ALDF had standing

³³ *Ballona Wetlands Land Trust v. City of Los Angeles*, 201 Cal. App. 4th 455, 473, 134 Cal. Rptr. 3d 194, 206–07 (Cal. Ct. App. 2011).

³⁴ *Cal. Bldg. Indus. Ass’n v. Bay Area Air Quality Mgmt. Dist.*, 218 Cal. App. 4th 1171, 1192, 161 Cal. Rptr. 3d 128, 145 (Cal. Ct. App. 2013), *review granted & opinion superseded*, 312 P.3d 1070, 164 Cal. Rptr. 3d 552 (Cal. 2013).

³⁵ *Cal. Bldg. Indus. Ass’n v. Bay Area Air Quality Mgmt. Dist.*, 218 Cal. App. 4th 1171, 1193, 161 Cal. Rptr. 3d 128, 146 (Cal. Ct. App. 2013), *review granted & opinion superseded*, 312 P.3d 1070, 164 Cal. Rptr. 3d 552 (Cal. 2013).

³⁶ *Cal. Bldg. Indus. Ass’n v. Bay Area Air Quality Mgmt. Dist.*, 312 P.3d 1070, 164 Cal. Rptr. 3d 552 (Cal. 2013).

merely because it had used its resources to investigate and litigate to advance its policy interests related to animal cruelty. The court also ruled that the individual petitioner did not have citizen taxpayer standing under State Finance Law § 123-b because petitioners had not alleged a sufficient nexus to the fiscal activities of the State. *Animal Legal Defense Fund, Inc. v. Aubertine*, 2014 N.Y. App. Div. LEXIS 5318 (3d Dept. July 17, 2014).

AIR QUALITY

Federal Court Rejected Steel Mill Sellers' Claim That Purchaser Breached Covenant Not to Sue; Dispute Centered on Clean Air Act Violations

In 2010, plaintiff purchased from defendants all shares in TAMCO, a company that operated a steel mill in Rancho Cucamonga, California. In 2013, plaintiff commenced a suit in the federal district court for the Southern District of New York for breach of contract and declaratory judgment in which plaintiff alleged that defendants had falsely represented that the facility was in compliance with environmental laws and had all necessary permits, and that defendants had breached their agreement to indemnify plaintiff for losses from defendants' misrepresentations. Plaintiffs alleged the existence of a number of Clean Air Act violations and failures to obtain required air permits. Defendants in turn brought a counterclaim alleging that plaintiff had violated its covenant not to sue in the Stock Purchase Agreement (SPA) by bringing a suit alleging claims it had released. Because the release covered only pre-closing claims and plaintiff's claims arose at closing, the court dismissed the counterclaim. The court found that the breach of contract claim arose at closing because it was based on alleged breaches of representations and the indemnity provision in the SPA, which provided that defendants made the representations at closing and for 18 months following closing. The court rejected defendants' argument that at closing they had merely attested to the truthfulness of representations previously made, finding that this characterization was inconsistent with the provisions of the SPA. The court also described as "nonsensical" defendants' argument that the release should cover all pre-closing conduct concerning TAMCO while the indemnification would apply only to pre-closing conduct not concerning TAMCO. *Gerdau Ameristeel US Inc. v. Ameron International Corp.*, 2014 U.S. Dist. LEXIS 100515 (S.D.N.Y. July 22, 2014).

ASBESTOS

Second Circuit Ruled That Conditions for Travelers's Payment of \$500-Million Asbestos Settlement Had Been Satisfied

In July 2014, the Second Circuit Court of Appeals reinstated a bankruptcy court order requiring Travelers Indemnity Co. and

Travelers Casualty and Surety Co. (Travelers) to pay more than \$500 million to asbestos plaintiffs under settlement agreements initially approved by the bankruptcy court in 2004. The underlying asbestos injury claims arose in connection with products supplied by Johns-Manville Corp. (Manville), which filed for bankruptcy protection in 1982 due to asbestos-related litigation. The bankruptcy court order approving the 2004 settlements clarified the scope of 1986 orders pursuant to which Travelers, Manville's primary insurer for many years, paid approximately \$80 million to a trust in exchange for a release from all Manville-related liabilities. After asbestos plaintiffs continued to prosecute claims against Travelers based on its own alleged wrongdoing, Travelers agreed to the 2004 settlements after mediation conducted by former governor Mario M. Cuomo. In its July 2014 opinion, the Second Circuit rejected Travelers' contentions (and the district court's holding) that two conditions precedent to payment under the 2004 settlements had not been met. First, the Second Circuit ruled that the breadth of the 2004 bankruptcy court order conformed to the requirement of the settlements that the order bar all claims against Travelers arising out of or relating to its handling of asbestos-related claims, despite the fact that the Second Circuit had concluded in 2010 that another insurer—Chubb Indemnity Insurance Co. (Chubb)—was not bound by the 1986 or 2004 orders because it had not received constitutionally sufficient notice of the 1986 orders. The court said that "whatever Travelers' private hopes and dreams," the 2004 order could not reasonably have been intended to bar all claims regardless of whether notice was constitutionally sufficient. Moreover, because the 2004 order was rooted in the 1986 order and did not expand but only clarified its scope, the 2004 order could bar only the claims of parties that received constitutionally sufficient notice of the 1986 order. Second, the Second Circuit said that the 2004 order met the settlement agreements' condition that it be a final order. The Second Circuit concluded that the order became final in 2009 when the U.S. Supreme Court ruled that the bankruptcy court had jurisdiction to issue it, notwithstanding that the Supreme Court also remanded the case to the Second Circuit for consideration of Chubb's claims regarding constitutionally insufficient notice. The Second Circuit also ruled in its July 2014 opinion that Travelers had waived arguments regarding the satisfaction of a third condition of the settlements and that the bankruptcy court had properly awarded more than \$65 million in prejudgment interest even though the settlement agreements did not expressly provide for it. *Common Law Settlement Counsel v. Travelers Indemnity Co. (In re Johns-Manville Corp.)*, 2014 U.S. App. LEXIS 13891 (2d Cir. July 22, 2014). [*Editor's Note:* This case was previously covered in the August 2010 and June 2012 issues of *Environmental Law in New York*.]

Appellate Division Upheld Consolidation of Asbestos Trials and Affirmed Judgments for Plaintiffs

After a consolidated trial, the Supreme Court, New York County, entered judgments awarding two plaintiffs damages of

\$8 million and \$4.4 million in compensation for pain and suffering caused by asbestos exposure. One plaintiff had worked as a carpenter at Manhattan construction sites where defendant Tishman Liquidating Corporation (TLC) was the general contractor; the other plaintiff had served as a boiler technician on U.S. Navy vessels that used valves manufactured by defendant Crane Co. The Appellate Division, First Department, affirmed the judgments. As a preliminary matter, it ruled that the trial court had properly consolidated the cases. The manner in which plaintiffs were exposed to asbestos was similar even though they were exposed in different physical environments (a ship's boiler room and a building under construction). The exposure periods also were sufficiently common, particularly because they ended in the same year. Nor did differences in the type of mesothelioma plaintiffs suffered compel separate trials. The First Department also determined that even though one plaintiff pursued claims under Labor Law § 200 and common law negligence and the other plaintiff brought a duty to warn claim, the common element requiring plaintiffs to show that defendants failed to act reasonably to prevent plaintiffs' exposure predominated over the disparate elements of their legal theories. The First Department found, moreover, that the trial court had taken steps to cure possible jury confusion and that the verdicts supported the conclusion that consolidation was proper because they reflected that the jury distinguished between the evidence presented for each case. The appellate court therefore found that TLC was not unduly prejudiced by the consolidation. Substantively, the First Department rejected the argument that the jury's apportionments of liability were against the weight of the evidence and said it was rational for the jury to find that defendants' conduct was reckless, given their awareness of the dangers of asbestos. The court also found that because Crane had a "substantial interest" in the use of asbestos as the standard insulation for components to be placed in its valves, it therefore had a duty to warn. Because there was no evidence that Crane ever attempted to warn the Navy that its products carried a risk of asbestos exposure, the First Department rejected Crane's arguments that there was no proximate cause. The court also affirmed the trial court's calculations of pain and suffering. Two justices dissented in part, indicating that they would not have considered the question of whether consolidation was proper and that they would have ordered a new trial on the issue of whether Crane's failure to warn was a substantial factor causing plaintiff's injury. *In re New York City Asbestos Litigation*, 2014 N.Y. App. Div. LEXIS 4964 (1st Dept. July 3, 2014). [Editor's Note: These cases were previously covered in the December 2012 and January 2013 issues of *Environmental Law in New York*.]

ENERGY

Federal Court Ruled Against Whistleblower Consultant in Action Alleging Unlawful Disclosures Concerning Electric and Gas Utility

The federal district court for the Southern District of New York dismissed all claims brought by a whistleblower consulting firm in connection with public disclosures of reports and other documents that plaintiff produced when the electric power and natural gas utility for Manitoba, Canada, retained plaintiff to help it with risk management issues. The utility terminated its relationship with plaintiff the day after plaintiff presented to the utility its findings that there were risk management issues that could result in forced blackouts. The utility later retained a second consultant to review plaintiff's findings. In a subsequent proceeding before the Manitoba Public Utilities Board (PUB) to consider the utility's application to increase rates, plaintiff approached PUB regarding its findings and at first agreed to share, but later withdrew, its reports. PUB, however, required the utility to submit the reports and determined that redactions requested by plaintiff were not warranted. Plaintiff brought its action against the utility, PUB and the second consultant alleging a number of claims related to the allegedly unlawful disclosure and use of the documents. The court dismissed all claims. The court ruled first that it lacked jurisdiction over PUB because PUB was entitled to immunity under the Foreign Sovereign Immunities Act. The court then dismissed all claims against the utility because the agreements between the utility and plaintiff allowed the utility to disclose the consultant's proprietary information when compelled to do so by a government body and also allowed disclosure to the utility's agents, which included the second consultant. The court also dismissed the whistleblower's copyright infringement claim against the utility as well as claims of breach of good faith and fair dealings, misappropriation of trade secrets, misappropriation of confidential information and unfair competition and unjust enrichment that were duplicative of the breach of contract claims. Finally, the court dismissed claims against the second consultant for aiding and abetting breach of contract (a cause of action not recognized under New York law), tortious interference with contract, misappropriation of trade secrets and misappropriation of confidential information and unfair competition. *A Star Group, Inc. v. Manitoba Hydro*, 2014 U.S. Dist. LEXIS 88825 (S.D.N.Y. June 30, 2014).

State Supreme Court Ruled That Parties Did Not Have Standing to Compel DEC to Complete Its Review of Fracking Regulations

The Supreme Court, Albany County, dismissed two lawsuits in which plaintiffs-petitioners sought to compel the New York State Department of Environmental Conservation (DEC) to finalize its supplemental generic environmental impact statement (SGEIS) for high-volume hydraulic fracturing and horizontal drilling. Until the environmental review process is complete, a

statewide moratorium on fracking is in place. In the first proceeding, the court ruled that the bankruptcy trustee for Norse Energy Corp. USA (Norse)—a holder of mineral rights in New York—and an investor in Norse did not have standing to pursue claims under the State Environmental Quality Review Act (SEQRA) because they alleged only economic injury, which was not within SEQRA's zone of interests. Similarly, in the second proceeding, the court ruled that a landowner with an oil and gas lease, a holder of mineral rights and a coalition of 38 coalitions representing over 70,000 New York landowners alleged injuries that were solely economic in nature. The court rejected petitioners' argument in the second proceeding that they did not need to allege environmental harm because they raised procedural, not substantive, SEQRA challenges. In both proceedings, the court said that plaintiffs-petitioners did not qualify for the single recognized exception to the environmental harm requirement—property owners whose land is targeted for rezoning. The court said that it recognized “the possibility that respondents' alleged actions/inactions in the SGEIS process are potentially shielded from challenges,” but that it could not “discern any applicable exception in the SEQRA case law that would allow standing to be conferred upon the petitioners herein.” *Wallach v. New York State Department of Environmental Conservation*, No. 6773-2013 (Sup. Ct. Albany Co. July 11, 2014); *Joint Landowners Coalition of New York, Inc. v. Cuomo*, No. 843-2014 (Sup. Ct. Albany Co. July 11, 2014).

State Supreme Court Rejected Governmental Immunity Defense to Breezy Point Property Owners' Hurricane Sandy Claims Against Electric Utilities

Property owners in Breezy Point sued Long Island Power Authority (LIPA), Long Island Lighting Company (LILCO), National Grid Electric Services, LLC (National Grid) and National Grid PLC, alleging that defendants' negligent, grossly negligent, reckless and careless failure to de-energize Breezy Point during Hurricane Sandy caused fires that damaged plaintiffs' property. Defendants LIPA, LILCO and National Grid moved to dismiss on grounds of governmental immunity. Because the private sector traditionally provided electricity in New York and provision of electricity was therefore a proprietary function, the Supreme Court, Queens County, ruled that defendants could not use governmental immunity as a defense and denied their motions. The court also noted that LILCO, as a private entity, could not assert governmental immunity and further held that even if LIPA could benefit from governmental immunity, National Grid, which operated LIPA's electrical grid as a private contractor, could not “piggyback” on governmental immunity because New York law does not recognize a government contractor defense. *Baumann v. Long Island Power Authority*, 2014 N.Y. Misc. LEXIS 3119 (Sup. Ct. N.Y. Co. July 3, 2014).

HAZARDOUS SUBSTANCES

Second Circuit Declined to Answer Questions of New York Probate Law and Ruled That CERCLA Claims Were Time-Barred in Action Against Rockefeller Trust

The Second Circuit Court of Appeals ruled that the statute of limitations for contribution actions under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) barred Asarco LLC (Asarco) from recovering response costs for two sites in Washington from testamentary beneficiaries of John D. Rockefeller. In the late nineteenth and early twentieth centuries, Rockefeller controlled corporations that owned or operated the sites, which had been contaminated by smelting and mining operations. Asarco settled its liability for the cleanup of the sites in two settlements that were approved by the bankruptcy court in Asarco's Chapter 11 proceeding. The Second Circuit held that CERCLA's three-year limitations period for contribution actions ran from the date of the bankruptcy court's approvals of the settlements for the sites, not from the date of approval or the effective date of Asarco's bankruptcy reorganization plan. Moreover, although Asarco had commenced its contribution action before the statute of limitations expired for one of the sites, it did not assert claims related to that site until it filed an amended complaint after the limitations period expired, and the Second Circuit said the claims did not relate back to original complaint because they were based “on different conduct, in a different location, and attributable to different entities.” The Second Circuit also rejected Asarco's attempt to characterize its claims as a subrogation action for which the limitations period would run from the date of Asarco's post-bankruptcy payment of the settlement. The Second Circuit said Asarco could not bring subrogation claims because the “reorganized debtor” and the debtor-in-possession that entered into the settlements were not separate legal entities for purposes of pursuing such claims. Because the statute of limitations determined the outcome of the case, the Second Circuit declined to answer the question of whether New York courts would permit imposition of CERCLA liability on testamentary beneficiaries and also declined to certify the question to the New York Court of Appeals. Before proceeding to its statute of limitations analysis, however, the Second Circuit did refuse to create a federal common law rule applying trust fund doctrine to impose liability on the trustees. *Asarco LLC v. Goodwin*, 2014 U.S. App. LEXIS 12091 (2d Cir. June 25, 2014).

Federal Court Approved IBM Settlement with Federal Government for East Fishkill Site

The federal district court for the Southern District of New York approved a consent decree entered into by IBM Corp. and the United States government to resolve the U.S.'s CERCLA claims associated with the Shenandoah Road Groundwater Contamination Superfund site in the Town of East Fishkill in Dutchess County. The site was used for industrial cleaning

operations in the 1960s and 1970s, including the cleaning of computer chip racks supplied to the facility under a contract with IBM. Under the consent decree, IBM agreed to pay \$225,000 for past response costs and to reimburse EPA for future response costs. IBM also agreed to implement a remedial program. The court concluded that the settlement satisfied the four factors for fairness and reasonableness as set forth in the Second Circuit's 2014 opinion, *U.S. Securities and Exchange Commission v. Citigroup Global Markets, Inc.*: "(1) the basic legality of the decree; (2) whether the terms of the decree, including its enforcement mechanism, are clear; (3) whether the consent decree reflects a resolution of the actual claims in the complaint; and (4) whether the consent decree is tainted by improper collusion or corruption of some kind." Among other things, the district court concluded that CERCLA did not require IBM to admit liability and echoed the Second Circuit's ruling that there was no other basis for a district court to require an admission of liability as a settlement condition. Because the consent decree required injunctive relief, the court also considered the public interest and determined that none of the settlement's terms "disserv[e]d the public interest." The court again noted the fact that IBM was not required to admit liability or to acknowledge "an imminent and substantial endangerment to the public health or welfare or the environment," but said that nothing prevented private litigants from pursuing claims against IBM based on such a theory. *United States v. International Business Machines Corp.*, 2014 U.S. Dist. LEXIS 91750 (S.D.N.Y. July 2, 2014).

Federal Court Said Notice of Breach of Environmental Representations and Warranties in Securitization Agreement Was Untimely

In a case involving commercial mortgage-backed securities, the federal district court for the Southern District of New York considered the timeliness of the notice of breach of an environmental representation made in a mortgage loan purchase agreement (MLPA). The terms of the MLPA required that such notice be submitted no more than three days after discovery of the breach. One of the loans included in the securitization was for the purchase of a retail shopping center in Ohio that was built on top of two landfills. Prior to the date of the securitization, the Ohio Environmental Protection Agency (Ohio EPA) had issued several notices of violation, and Wal-Mart, the anchor tenant, had to close its store temporarily due to high methane levels. After the securitization, Ohio EPA initiated a lawsuit, and the Wal-Mart store terminated its lease and closed permanently. An employee of the "special servicer" for the securitized loans later wrote in a February 16, 2009 memorandum that the special servicer "believe[d]" defendant had breached the environmental representation in the MLPA because it was aware of the notices of violation, which were not disclosed in the environmental assessment for the property. More than a month later, the special servicer finally issued its "First Notice of Material Breach." After the court in 2013 allowed discovery as to what additional investigation took

place between the February 16 memorandum and issuance of the notice, the court found that the notice was untimely and granted summary judgment to defendant. The court noted that the special servicer's in-house counsel had written on February 19 that the breach notice should be sent, that the employee who had written the February 16 memorandum did not produce a draft of the breach notice until 12 days later, and that the in-house counsel did not review the draft for another 10 days. The court further found that the lawyer's edits to the draft and her cover e-mail did not indicate that any issues needed to be resolved to confirm the existence of the material breach. Nor did senior management do any more than give a "rubber-stamp" approval to the notice. The court also noted the extremely limited involvement of outside counsel during the month-long period between the February 16 memorandum and issuance of the notice. Finally, the court characterized as "errant nonsense" and "a desperate effort to rewrite the historical record" the assertions by the special servicer's employees that they had needed a formal appraisal to be able to determine whether there had been a material and adverse effect on the property's value. In any event, the court noted that the draft appraisal—which showed a drop in value from \$103.4 million to \$22.3 million—was sent to the special servicer more than two weeks before the notice of breach was issued. *Bank of New York Mellon Trust Co. v. Morgan Stanley Mortgage Capital, Inc.*, 2014 U.S. Dist. LEXIS 83536 (S.D.N.Y. June 16, 2014); 2013 U.S. Dist. LEXIS 87863 (S.D.N.Y. June 19, 2013). [Editor's Note: This case was previously covered in the October 2011 issue of *Environmental Law in New York*.]

State Supreme Court Held Residential Property Owner Liable for Operation of Unpermitted Landfill

In an enforcement action commenced by the State of New York, the Supreme Court, Putnam County, found that Gary Prato, the owner of 27 acres on a hilltop above New York City's Croton Falls Reservoir in the Town of Carmel, was using his property as a landfill without a permit and was liable for discharges onto the property of the New York City Department of Environmental Protection (DEP) and into the reservoir. The court enjoined Prato from continuing to operate the landfill and ordered him to investigate and clean up the property. The enforcement action arose from Prato's decision to build a pool house and garage on the property, which also included a single-family residence, a swimming pool, a barn, a horse ring and a small putting green and driving range, and his engagement of codefendant Anthony Adinolfi to fill and grade a portion of the property. Adinolfi obtained the fill at no cost to Prato from contractors who needed to dispose of construction and demolition (C&D) debris from construction sites and was paid a fee for each truckload of debris that was dumped at the property. The volume of debris dumped at the site exceeded 40,000 cubic yards and included brick, concrete and asphalt pavement, plastic, tiles, electrical conduit and wiring, scrap metal, coal, coal ash and slag and dimensional lumber. DEC and DEP officers observed the C&D debris migrating down the slope and into the reservoir.

In holding Prato liable, the Supreme Court rejected Prato's arguments both that he could not be held liable simply because he was the owner and also that he had no active role in the project. The court noted that there was no requirement that the owner of a solid waste management facility be in corporate form, and that the owner of land on which a solid waste management facility was operating for the owner's benefit could be an "owner" under DEC's regulations. The court also found that Prato had been active in the operation and supervision of the facility. Prato was therefore held liable as both an owner and an operator of a facility. The court also rejected Prato's assertions that he intended to use only clean fill and was not aware of the contents of the fill that was deposited on his property. The court said these claims strained credulity since Prato had received more than \$300,000 of fill without paying for it. *New York v. Prato*, No. 3177/2010 (Sup. Ct. Putnam Co. July 18, 2014).

State Supreme Court Ruled That Letter from Consultants' Attorney Satisfied Notice of Claim Requirement in Dispute over Payment for PCB Cleanup

The Yorktown Central School District retained DTM Development, Ltd. (DTM) to oversee removal of soil contaminated with polychlorinated biphenyls (PCBs) at an elementary school. DTM later submitted a "change order" requesting payment for additional costs incurred to remove "extra tonnage." A firm providing architectural and engineering services that was designated "Initial Decision Maker" in DTM's contract with the school district disapproved the change order in a November 27, 2012 letter, and on December 7, 2012, DTM's attorney sent a letter to the school district requesting payment "to preclude the commencement of legal action." DTM contended that the weight of contaminated soil specified in the bid documents did not correlate with the volume specified, and that this inconsistency resulted in costlier remediation. Settlement negotiations ensued, but on October 2, 2013, DTM served a notice of claim and commenced this action. Despite finding that the October 2, 2013 notice of claim was untimely, the Supreme Court, Westchester County, denied the school district's motion to dismiss. The court concluded that DTM's claim accrued on November 27, 2012, when the Initial Decision Maker rejected DTM's demand for payment, and that the notice of claim therefore was served well after the three-month statutory period for such notice had expired. The court found, however, that DTM attorney's letter of November 27, 2012 substantially complied with the notice of claim requirements, and that DTM had therefore satisfied the condition precedent to its suit. The court declined to rule on the school district's request that it compel DTM and a subcontractor to provide "close out" documents for submission to the U.S. Environmental Protection Agency (EPA). The court ruled that this request was premature because the school district had not filed a cause of action or counterclaim for breach of contract.

DTM Development, Ltd. v. Yorktown Central School District, 2014 N.Y. Misc. LEXIS 3138 (Sup. Ct. Westchester Co. June 24, 2014).

INSURANCE

Federal Court Ruled That Sandy Storm Surge Damage Was Subject to Flood Sublimit in Nursing Homes' Insurance Policies

Hurricane Sandy caused damage at nursing homes in Brooklyn owned by plaintiffs. Much of the damage was caused by "storm surge." Plaintiffs' insurer deemed the storm surge damage to be flood damage and therefore limited coverage for such damage at one of the nursing homes to \$1 million, citing the policy's flood sublimit, and denied coverage entirely for the second nursing home, which was located in a Special Flood Hazard Area designated by the Federal Emergency Management Agency (FEMA) where the policy did not cover flood damage. Because the policies unambiguously included storm surge in their definition of "flood" and also unambiguously made all loss or damage caused by a flood subject to the flood sublimit even where the "named storm" sublimit also applied, the federal district court for the Eastern District of New York ruled that the insurer had not breached its contractual obligations by denying coverage. The court noted that the policies made clear on their first pages that bold terms, including "flood," had technical definitions. The court therefore rejected plaintiffs' argument that because the named storm sublimit listed flood and storm surge separately, storm surge did not fall within the flood sublimit. The court also ruled for insurers on plaintiffs' claims of breach of good faith and fair dealing and negligent misrepresentation. The court found that the fact that the insurer's outside independent adjuster had told plaintiffs that the damage would be covered to the policies' full limits did not provide a basis for either of these claims. *New Sea Crest Healthcare Center, LLC v. Lexington Insurance Co.*, 2014 U.S. Dist. LEXIS 86585 (E.D.N.Y. June 24, 2014).

Federal Court Dismissed Insurers' Action for Chemical Exposure Under Wilton/Brillhart Abstention Doctrine

Insurers brought a declaratory judgment action in the federal district court for the Southern District of New York against their insured, a company facing personal injury lawsuits by employees of aluminum smelting facilities who alleged exposure to hazardous substances in products supplied by the insured. Because all of the coverage issues at stake in the federal declaratory judgment action could be raised in a pending Ohio state court action commenced by the insured, the federal court decided that abstention was warranted and dismissed the action. The other factors considered by the court were avoidance of duplicative proceedings, avoidance of forum shopping, the convenience of the fora, order of filing and choice of law, all

of which are factors that courts may consider under the *Wilton/Brillhart* abstention doctrine, pursuant to which federal courts have discretion to abstain from resolving declaratory judgment actions where a controversy can be better settled in a pending state court proceeding. In this case, the court was swayed by concerns that any judgment in the federal court would not have preclusive effect against the issuer of an excess policy, who was a party to the state court action but not to the federal action. The absence of issues of federal law also weighed in favor of abstention, while the other abstention factors did not strongly weigh in favor of one forum or the other. *ACE American Insurance Co. f/k/a Cigna Insurance Co. v. GrafTech International Ltd. f/k/a UCAR International Inc.*, 2014 U.S. Dist. LEXIS 86682 (S.D.N.Y. June 24, 2014).

LAND USE

Second Circuit Said Physical Takings Claim Concerning Telecommunications Equipment Did Not Satisfy Ripeness Requirements

In a case involving placement of telecommunications equipment on private property, the Second Circuit Court of Appeals ruled that the two-part ripeness test in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), applied to physical takings and to procedural due process claims based on the same circumstances as physical takings claims. The court said that while the “physical taking in itself” satisfied the finality requirement of *Williamson County*, it did not satisfy the exhaustion requirement. The court thus rejected the property owners’ argument that it would be unconstitutional to require them to bring a lawsuit seeking compensation after the physical taking has occurred. The court said that only the unavailability of an adequate procedure for obtaining post-taking compensation would satisfy the exhaustion requirement and therefore concluded that the property owners “flunk the exhaustion requirement by their failure to seek compensation at the state level” since New York law provided an adequate method. The court further held that, though it was a closer question, a procedural due process claim that arose from the same circumstances as a takings claim was also subject to *Williamson County*’s ripeness test. *Kurtz v. Verizon New York, Inc.*, 2014 U.S. App. LEXIS 13595 (2d Cir. July 16, 2014).

Second Circuit Affirmed Dismissal of “Class of One” Equal Protection Claim Over Recycling Operation

A 2003 stipulation between the Town of Wawayanda and plaintiffs permitted plaintiffs to continue their nonconforming recycling operation with significant limitations that included a prohibition on vehicle dismantling. In 2013, plaintiffs sued the Town because the Town had denied a request to rescind the stipulation after plaintiffs argued that another company had been permitted to conduct recycling operations without

limitations in a district with similar—but not identical—permitted uses. Because plaintiffs had not plausibly alleged that properties sufficiently similar to theirs received more favorable treatment from the Town, the Second Circuit Court of Appeals affirmed the dismissal of plaintiffs’ “class-of-one” equal protection claim. In its summary order, the Second Circuit noted that the most significant distinction providing a rational basis for a difference in treatment between plaintiffs’ property and the other company’s property was that the other company’s facility was located in a district that permitted all “Industrial Uses,” while plaintiffs were located in a district that permitted “Light Manufacturing Uses,” which allowed only some industrial uses. *Zito v. Town of Wawayanda*, 2014 U.S. App. LEXIS 12485 (2d Cir. July 2, 2014).

Appellate Division Upheld Approvals for Adirondack Club and Resort

In 2012, after an adjudicatory hearing, the Adirondack Park Agency (APA) approved an application for the Adirondack Club and Resort in the Town of Tupper Lake. The project—to be built in four phases over 15 years—included 659 residential units, a 60-bedroom inn, a downhill ski area, a marina and valet boat launching service, over 15 miles of public and private roads, wastewater treatment systems and various recreational amenities and maintenance facilities. The Appellate Division, Third Department, held that the APA’s determinations approving the project were supported by substantial evidence with respect to each of the issues raised by petitioners. The court found that substantial evidence in the 80-volume record supported the decision to allow the temporary use of Cranberry Pond (a 26-acre body of water with surrounding wetlands) for snowmaking for the ski area, subject to the continuing oversight of the APA. The court also found substantial evidence supported the conclusion that the project would not have undue adverse impacts on wildlife and their habitats, and sanctioned the decision of the APA not to require a comprehensive wildlife survey, given the absence of evidence of the presence of protected species on the site. Other conclusions for which the court found adequate support in the record included the consistency of the project’s residential development with the APA Act’s land use and development plan, the lack of adverse impacts on a DEC-operated boat launch of the project’s boat valet service, and the absence of undue adverse fiscal impacts to local governments. The court also rejected various procedural challenges, including that there had been improper ex parte communications between APA members and the project’s developers, and affirmed the denial by the Supreme Court, Albany County, of a request for discovery. *Matter of Protect the Adirondacks! Inc. v. Adirondack Park Agency*, 2014 N.Y. App. Div. LEXIS 4912 (3d Dept. July 3, 2014). [*Editor’s Note:* This proceeding was previously covered in the June 2013 issue of *Environmental Law in New York*.]

SEQRA/NEPA

Federal Court Upheld Wetlands Permit for Upper East Side Marine Transfer Station

The federal district court for the Southern District of New York upheld the issuance by the United States Army Corps of Engineers of a Clean Water Act Section 404 permit for a solid waste marine transfer station (MTS) on the East River on the Upper East Side of Manhattan that, as the court noted, had been the subject of litigation for more than seven years. The court ruled that the Corps did not violate either the National Environmental Policy Act or the Clean Water Act. Among other things, the court upheld the Corps' determination that it did not have sufficient control and responsibility over post-construction operations to warrant extending the scope of its environmental review beyond the specific activity requiring the permit. The court also rejected plaintiffs' claim that the Corps had improperly segmented its review and failed to account for its action's cumulative impacts. The court found that the Corps had properly deferred to DEC regarding the impacts of the post-construction operation of the MTS. The court also upheld the Corps' alternatives analysis—which considered four on-site alternatives, no-action alternatives and four off-site alternatives—over plaintiffs' "host of arguments regarding supposedly better alternatives" the Corps did not consider. Also among the arguments rejected by the court was that New York City should have prepared a supplemental environmental impact statement to address both flooding after Superstorm Sandy and also the issuance of new advisory flood maps by FEMA. The court said the City's actions, which included preparation of a technical memorandum after issuance of the FEMA maps and incorporation of additional floodproofing measures, satisfied "hard look" requirements under SEQRA. The court also rejected the claim that the Corps should have supplemented its own environmental review after Sandy. The court also ruled against plaintiffs in constitutional, breach of contract, private nuisance and trespass claims against the City. *Residents for Sane Trash Solutions, Inc. v. United States Army Corps of Engineers*, 2014 U.S. Dist. LEXIS 94356 (S.D.N.Y. July 10, 2014). [Editor's Note: This case was previously covered in the June 2014 issue of *Environmental Law in New York*.]

Appellate Division Said Petitioners Had No Standing to Challenge Agricultural Fair

Petitioners challenged Monroe County's approval of the operation of a four-day agricultural festival and sought to vacate the negative declaration issued under SEQRA. The Appellate Division, Third Department, agreed with the Supreme Court, Monroe County, that petitioners lacked standing to bring a SEQRA challenge both because their alleged environmental injuries were not different in kind or degree from injury suffered by the general public and also because the injuries were too speculative and conjectural. *Kindred v. Monroe County*, 2014 N.Y. App. Div. LEXIS 4965 (4th Dept. July 3, 2014).

Appellate Division Affirmed New York City's Siting of Bike Share Station

The Appellate Division, First Department, affirmed the dismissal of an Article 78 proceeding that challenged the siting of a bike share station in front of petitioner's residential building in Manhattan. In a brief opinion, the First Department indicated that the New York City Department of Transportation had conducted a sufficient environmental review of the bike share program prior to its siting decision, and that the siting determination was consistent with the program's siting guidelines, had a rational basis and was not arbitrary and capricious. *Cambridge Owners Corp. v. New York City Department of Transportation*, 118 A.D.3d 634, 989 N.Y.S.2d 30 (1st Dept. June 26, 2014). [Editor's Note: This proceeding was previously covered in the March 2014 issue of *Environmental Law in New York*.]

TOXIC TORTS

Second Circuit Revived Cleaning Workers' World Trade Center Lawsuits

The Second Circuit Court of Appeals reversed the judgment of the federal district court for the Southern District of New York dismissing personal injury claims brought by 211 employees of cleaning companies hired after the September 11th terrorist attacks by owners of buildings on the periphery of the World Trade Center site. Each of the 211 workers—who alleged that the building owners failed to adequately monitor their working conditions and provide safety equipment to protect them from harmful airborne contaminants—had answered "none" to an interrogatory that asked them to identify "diagnosed" conditions, injuries and diseases for which they sought recovery. The Second Circuit ruled, however, that the district court had erred in granting summary judgment solely based on this response. Instead, the Second Circuit said, the district court was required to consider the response in the context of any other evidence of injury. The Second Circuit noted the ambiguity of the term "diagnosed" in the interrogatory, which could have led plaintiffs to answer "none" despite manifestation of symptoms of a condition, injury or disease not yet diagnosed. The Second Circuit agreed with the district court, however, that under New York law plaintiffs could not pursue causes of action for medical monitoring or for fear of cancer without some physical manifestation of contamination. The Second Circuit also concluded that the district court had not abused its discretion in dismissing claims of 31 plaintiffs for failure to prosecute because they had not certified their interrogatory responses by a court-ordered deadline. The Second Circuit rejected plaintiffs' argument that the dismissal should have been *nunc pro tunc* to December 8, 2011, in order to allow plaintiffs to submit claims to the Victim Compensation Fund. *In re World Trade Center Lower Manhattan Disaster Site Litigation*, 2014 U.S. App. LEXIS 13145 (2d Cir. July 10, 2014).

Appellate Division Issued Mixed Ruling in Suffolk County Water Authority's Case Against PCE Manufacturers

In an action by the Suffolk County Water Authority (SCWA) against manufacturers of perchloroethylene (PCE) seeking damages for contamination of public water supplies, the Appellate Division, Second Department, ruled that claims related to 151 wells where PCE contamination had been detected prior to July 12, 2007 were time-barred. The Second Department also ruled, however, that SCWA had standing to maintain its claims in connection with 115 wells where the contamination did not reach or exceed maximum contaminant levels (MCLs) established under State and federal law. With respect to the time-barred claims, the Second Department ruled that the applicable statute of limitations was CPLR 214-c, which applies to actions alleging latent injuries, such as the migration of PCE into wells over time. Because CPLR 214-c was the applicable statute of limitations, SCWA could not rely on the common law exception for continuous wrongs, which CPLR 214-c displaced. Nor could SCWA rely on the “two-injury rule,” which “permits the splitting of one cause of action . . . or recognizes the accrual of a new cause of action . . . where a single exposure has resulted in separate and distinct injuries.” The damages alleged by SCWA did not qualify as separate and distinct since they were “of the same nature in wells where contamination was previously discovered, prior to July 12, 2007.” Nor were there issues of fact indicating that there might have been multiple distinct acts of tortious conduct such as specific releases of PCE by a dry cleaner. With respect to SCWA’s standing for claims related to the 115 wells where contamination was below the MCLs, the court said that while regulatory standards such as MCLs may be helpful in determining whether an injury occurred, they did not “set a bar below which an injury cannot have occurred.” *Suffolk County Water Authority v. Dow Chemical Co.*, 2014 N.Y. App. Div. LEXIS 5350 (2d Dept. July 23, 2014).

WETLANDS

Federal Court Denied Property Owner's Request for Interlocutory Appeal on Wetlands Issues

In an action involving questions of federal jurisdiction over wetlands on property in Amherst, the federal district court for the Western District of New York ruled against the property owner on two issues in May 2013. First, the court said that permits under Section 402 of the Clean Water Act, which regulates storm water discharges, among other pollutants, did not shield the property owner from enforcement under other provisions of the Clean Water Act, including Section 404, which regulates discharge of dredged or fill material. Second, the court said that “prior-converted cropland,” which is excluded from “waters of the United States,” could lose that designation through abandonment. In June 2014, the court denied the

property owner’s request for interlocutory appeal on these two issues. Noting its “unfettered discretion” to deny such requests, the court said that certification of an interlocutory appeal was not called for simply because the property owner had advanced a “novel” (the federal government called it “extraordinarily weak”) argument on which there was a dearth of caselaw. The court further found that it was unlikely that the property owner would succeed on appeal, and that an immediate appeal therefore would not materially advance termination of the lawsuit. *United States v. Acquest Transit, LLC*, 2014 U.S. Dist. LEXIS 88907 (W.D.N.Y. June 27, 2014). [*Editor’s Note:* This case and related cases were previously covered in the October 2008, July 2009, November 2009, August 2010, January 2011, July 2013 and August 2013 issues of *Environmental Law in New York*.]

NEW YORK NEWSNOTES

DEC Proposed Amendments to Ginseng Regulations

In the July 2, 2014 issue of the *NYS Register*, DEC proposed amendments to its regulations for American ginseng. The proposed revisions would specify that collection of wild ginseng is only allowed where plants are at least five years old and would specify the method for determining the plant’s age (counting the number of stem scars on the rhizome or root neck). DEC indicated that this revision would ensure that harvested ginseng meets the requirements for export under federal regulations. The proposed regulations would also clarify that landowner permission is required for collection of ginseng and would bar collection of ginseng on DEC-administered lands without a permit, which would only be issued for academic or scientific research. The regulations would also reduce reporting frequency for ginseng dealers from four times every year to one annual report.

New York City Expanded Green Roof Tax Abatement to Include Rooftop Farms

In June 2014, the New York City Department of Buildings adopted amendments to the regulations for the green roof property tax abatement that expanded the tax abatement’s scope to include roofs composed of “native plant species” and “agricultural plant species.” DOB indicated that the amendment will allow rooftop farms, which provide similar stormwater management benefits as other green roofs, to benefit from the tax abatement. DOB noted that rooftop farms also bring the added benefit of providing local produce.

WORTH READING

John C. Armentano, *Water, Water, Every Where: The Public Trust Doctrine, Colonial Patents and Riparian Rights*, N.Y. Zoning Law & Practice Report, at 1 (Jan./Feb. 2014).

Charlotte A. Biblow, *Laws, Regulations and Incentives Power Solar Energy's Growth*, N.Y.L.J., at 3 (July 24, 2014).

Michael B. Gerrard, *Obama's New Emission Rules: Will They Survive Challenges?*, Yale Env't 360 (June 16, 2014), http://e360.yale.edu/feature/obamas_new_emission_rules_will_they_survive_challenges/2776/.

Anthony S. Guardino, *Decision May Signal End of Fracking Before It Digs In*, N.Y.L.J., at 5 (July 23, 2014).

Michael J. Lesser, Environmental Law Section, New York State Bar Association, *The New York Environmental Enforcement Update 2013 Annual Report* (Samuel J. Capasso III ed. 2014), http://www.nysba.org/Sections/Environmental/NY_Environmental_Enforcement_Update_2013_Annual_Report.html.

NYU Furman Center, *The Price of Resilience: Can Multifamily Housing Afford to Adapt?* (July 2014), http://furmancenter.org/files/NYUFurmanCenter_ThePriceofResilience_July2014.pdf.

Jennie R. Romer & Leslie Mintz Tamminen, *Plastic Bag Reduction Ordinances: New York City's Proposed Charge on All Carryout Plastic Bags as a Model for U.S. Cities*, 27 Tul. Envtl. L.J. 237 (2014).

Meg Byerly Williams, *Using the U.S. Green Building Council's Technical Guidance Manual for Sustainable Neighborhoods to Evaluate a Mixed-Use Zoning Ordinance*, N.Y. Zoning Law & Practice Report, at 1 (May/June 2014).

UPCOMING EVENTS

September 19–21, 2014

Section Fall Meeting, New York State Bar Association, Environmental Law Section, The Otesaga Resort, Cooperstown. For information, see <http://www.nysba.org/Environmental/>.

October 15, 2014

Brownfields Roundtable, New Partners for Community Revitalization, New York City. For information, see <http://npcr.net/pages/events.html>.

October 22, 2014

Origins of Environmental Law: Process, Issues, and Solutions, The Earth Institute, Columbia University, School of

International and Public Affairs, Kellogg Center, Room 1501, New York City. Speakers: Thomas Jorling and Leon Billings. For information, see <http://www.earth.columbia.edu/events/view/72316>.

October 23–24, 2014

MAS Summit for New York City: Equity, Place & Opportunity, The Municipal Art Society of New York, New York City. For information, see <http://www.mas.org/programs/mas-summit-for-new-york-city/>.

November 5, 2014

Grid Edge Analytics: Advances in Big Data, Intelligent Software and Analytics Behind the Meter, co-sponsored by Clean Energy Connections and Greentech Media. For information, see <http://www.cleanecnyc.org/the-grid-edge/>.

November 12–13, 2014

Raising the Bar: Home Country Efforts to Regulate Foreign Investment for Sustainable Development, Ninth Annual Columbia International Investment Conference, Columbia Center on Sustainable Investment, Faculty House, Columbia University, New York. For information, see <http://ccsi.columbia.edu/2014/01/01/raising-the-bar-home-country-efforts-to-regulate-foreign-investment-for-sustainable-development/>.

December 5, 2014

2014 Land Use and Sustainable Development Law Conference: Transitioning Communities, Land Use Law Center, Pace Law School. For information, see <http://law.pace.edu/annual-conference-2014>.

January 29–30, 2015

Annual Meeting, New York State Bar Association, Environmental Law Section, New York Hilton Midtown, 1335 Avenue of the Americas, New York City. For information, see <http://www.nysba.org/Environmental/>.

Mathew Bender & Co., Inc.

Patrick E. Cannon Director, Research Information
Linda J. Folkman Legal Editor

For editorial questions contact Linda Folkman:
by phone at (908) 673-1548, or
by e-mail to Linda.Folkman@lexisnexis.com.
For all other questions call 1-800-833-9844.

ENVIRONMENTAL LAW IN NEW YORK (USPS 008-162, ISSN 1048-0420, EBOOK ISBN 978-1-5791-1260-8) is published monthly for \$528 per year by Matthew Bender & Co., Inc., 1275 Broadway, Albany, NY 12204-2694. Periodical Postage is paid at Albany, New York and at additional mailing offices.

POSTMASTER: Send address changes to:
Environmental Law in New York
136 Carlin Road, Conklin, N.Y. 13748-1531.

LexisNexis, the knowledge burst logo, and Michie are trademarks of Reed Elsevier Properties, Inc, used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.

Copyright © 2014 Matthew Bender & Company, Inc., a member of the LexisNexis Group.

Produced on recycled paper

Note Regarding Reuse Rights: The subscriber to this publication in .pdf form may create a single printout from the delivered .pdf. For additional permissions, please see www.lexisnexis.com/terms/copyright-permission-info.aspx. If you would like to purchase additional copies within your subscription, please contact Customer Support.

Arnold & Porter LLP**Environmental Practice Group****Washington**

555 Twelfth Street, N.W.
Washington, D.C.
20004-1202
(202) 942-5000
Contact:
Lester Sotsky

Denver

370 Seventeenth St., Suite 4500
Denver, CO
80202
(303) 863-1000
Contact:
Thomas Stoever

Los Angeles

777 South Figueroa St.
Los Angeles, CA
90017-2513
(213) 243-4000
Contact:
Matthew T. Heartney

New York

399 Park Avenue
New York, NY
10022-4690
(212) 715-1000
Facsimile: (212) 715-1399
Contact:
Nelson Johnson

San Francisco

275 Battery St., Suite 2700
San Francisco, CA
(415) 356-3000
Contact:
Karen J. Nardi

Partners and Counsel

Daniel A. Cantor
Lawrence Culleen
Michael Daneker
Kerry Dziubek
Michael B. Gerrard
Joel Gross
Matthew T. Heartney
Brian D. Israel
Nelson Johnson
Jonathan Martel
Thomas H. Milch
Karen J. Nardi
Peggy Otum
Allison B. Rumsey
Thomas Stoever
Lester Sotsky

Editor: Michael B. Gerrard

Managing Editor: L. Margaret Barry

This monthly newsletter provides general information concerning recent decisions and other developments, and should not be used as a substitute for legal advice in specific situations. Send new, unreported decisions and other information for possible inclusion to the editor. Articles represent the views of their authors and not necessarily those of the publisher or Arnold & Porter LLP.