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BROWNFIELDS POLICY IN TRANSITION: NEW OPPORTUNITIES FOR NEW YORK'S URBAN, DOWNTOWN AND UNDERSERVED NEIGHBORHOODS

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presence of hazardous substances, pollutants or contamination—have long blocked redevelopment of many older neighborhoods, downtowns and former industrial sites. They short-circuit community redevelopment and threaten public health. Although no formal lists of brownfields are maintained, a 2004 report from the United States General Accounting Office estimated that there are between 450,000 and one million sites nationally.² No part of New York State is immune, and the weaker the local economy, the longer brownfields linger, sometimes for decades.

New York's 2003 brownfields law had two main parts: it reorganized and statutorily authorized the state's voluntary brownfield cleanup program into a new initiative called the Brownfield Cleanup Program (BCP), with generous, as-of-right tax credits for developers who build on reclaimed land. And it created the landmark Brownfield Opportunity Areas (BOA) program, a visionary planning tool that aids communities plagued by multiple brownfield sites that has since become a national model of community empowerment.

For years, most smart growth strategies have focused on preserving green areas, with less attention paid to rebuilding aging but already developed neighborhood and urban centers. However, urban brownfields should be a starting point for smart growth and sustainability because of the concentration of

I. Introduction

After years of planning, advocacy, discussion and often-contentious debate, New York State passed its brownfields law in 2003. Most everyone involved was optimistic that enactment would signal a new era of community renewal and revitalization. Brownfields—properties contaminated by the actual or potential

¹ This article is derived from the report, *Smart Growth Outlook 2011: Challenges and Opportunities in Brownfields, Area-wide Planning & Implementation*, published by New Partners for Community Revitalization and authored by Jody Kass, Laura Truettner, John Fleming and Jeff Jones. Copies of the report are available at: <http://www.npcr.net>.

² U.S. General Accounting Office, *Brownfield Redevelopment: Stakeholders Cite Additional Measures that Could Complement EPA's Efforts to Clean Up and Redevelop Properties* (2004), available at <http://www.gao.gov/new.items/d05450t.pdf>.

distressed and contaminated sites in older, already developed downtowns. Redeveloping brownfields reduces the pressure on greenfield development and sprawl. National studies have concluded that every redeveloped acre of brownfield property saves 4.5 acres of greenfields.³ And because urban redevelopment is an alternative to sprawl, there is the added benefit of reducing vehicle miles traveled (VMT's). Compared with development on the outer edges of suburbia, marked by isolated homes, workplaces, and strip malls, urban redevelopment can reduce the need to drive between 20 and 40 percent.⁴ Studies of brownfield projects indicate similar VMT savings.⁵ This translates directly to emissions reductions and greenhouse gas savings of a similar or greater magnitude, due in part to proximity to mass transit. And, because brownfields are disproportionately concentrated in low-income urban and downtown communities, these properties also offer a significant opportunity to meet critical community needs for jobs, affordable housing, and open space.

Now, more than seven years after passage, New Partners for Community Revitalization (NPCR) believes it is time for a critical evaluation of the state's brownfields program. In a changed political and economic landscape, it is possible to identify the program's successes and failures, and articulate the lessons learned to help inform future strategies.⁶ The BCP is a troubled program, and has cost the state hundreds of millions, if not several billion, dollars in tax credits for some of the state's most successful developers. A modest reform passed in 2008 capped the as-of-right tax credits in an effort to control spiraling costs.⁷ And in 2010, responding to the state's deepening revenue crisis, former Governor David Paterson convinced the Legislature to defer a significant portion of the tax credits to 2013 and beyond. This has left open the likelihood of large state fiscal obligations coming due in two years. Meanwhile, critics complain that the developments incentivized by the BCP have been primarily in top market areas like Manhattan and White Plains, and would likely have been built anyway. And they note that the number of actual brownfield sites being remediated has declined since passage of the 2003 law.

Meanwhile, the BOA program, although functioning at just a fraction of the cost of the BCP, has begun to emerge as the innovative tool its creators envisioned. More than 100 communities across New York have become part of the program, with more expected soon. The municipal governments and community based organizations leading these BOA initiatives

are giving hope to residents of some of New York's most distressed neighborhoods.⁸ The program has provided them a voice in determining the post-cleanup future of their communities, and the area-wide approach to community revitalization is becoming a national model for using smart growth strategies for urban revitalization.

II. BOA: New York's Brownfields Policy Success Story

It is the BOA program that positions New York as an innovator in the nation's sustainability/smart growth movement. The BOA place-based approach offers real hope for reversing the economic and environmental forces that continue to slow economic redevelopment in New York's outer boroughs, upstate cities, and Rust Belt industrial zones, and feed the seemingly inexorable creep of sprawling development. At the same time, BOA offers New York City a ready-made tool to achieve Mayor Michael Bloomberg's long-term sustainability and growth goals, and to address the dwindling land supply while accomplishing environmental justice in low-income communities. On Long Island, and in Westchester and other wealthy suburban communities, the BOA program provides a tool that can both counter resistance to local development through public involvement in planning, and address the growing need for affordable housing by reclaiming impacted sites. More recently, the area-wide approach is starting to play an important role in helping localities address the foreclosure crisis, shrinking populations, and the need for updated infrastructure as cities across the nation are reeling from the economic recession.

New York's 100 BOA communities are estimated to contain more than 4,700 brownfields covering some 50,000 acres of contaminated land. The BOA area-wide approach was conceived as a tool to fight sprawl and achieve environmental justice by addressing entire neighborhoods and the clusters of brownfields within those neighborhoods, including the conditions fueling abandonment and decay. BOA was crafted as a tool to enable low-income communities burdened with multiple brownfield sites, high incidence of disease and unemployment, to identify and implement alternatives to noxious uses as the primary future for reclaimed land.

Central to the BOA area-wide approach is the recognition that a program based on addressing one parcel at a time will not result in the revitalization of distressed areas. This approach invites dirty or stigmatizing uses such as garbage transfer stations, sewage

³ See, e.g., Northeast-Midwest Institute, *The Environmental and Economic Impacts of Brownfields Redevelopment* (2008), available at <http://www.nemw.org/index.php/policy-areas/brownfields/environmental-and-economic-impacts-of-brownfields-redevelopment>.

⁴ See Urban Land Institute, Smart Growth America, the Center for Clean Air Policy, and the National Center for Smart Growth, *Growing Cooler: Evidence on Urban Development and Climate Change*, available at <http://www.smartgrowth.umd.edu/pdf/GrowingCooler-Ch1Overview.pdf>.

⁵ See U.S. Conference of Mayors, *Clean Air/Brownfields Report* (Dec. 2001).

⁶ See New Partners for Community Revitalization, *Smart Growth Outlook 2011: Challenges and Opportunities in Brownfields, Area-wide Planning & Implementation* (Jan. 2011), available at http://www.npcr.net/reports/NPCRJournal_OnLineV2.pdf.

⁷ Starting with projects accepted into the BCP after 2008, tangible tax credits are capped at \$35 million, except for manufacturing sites which are capped at \$45 million.

⁸ For example, three New York communities accepted into the BOA Spotlight Communities Initiative are Wyandanch on Long Island, the South Bronx, and South Buffalo.

treatment plants, bus depots and fossil fuel power plants. Instead, the BOA area-wide approach can position a community to become part of the emerging green economy. It can reverse the cycle of disinvestment and decay by creating a plan for an entire community, including housing, shops, small manufacturers, green jobs, public amenities, and infrastructure improvements such as street lights, trees, parks, sidewalks and roadways. Together, these define functional communities and attract new residents.

At the same time, the BOA approach provides a counter to sprawl and unplanned development. Increasingly, municipal and state governments cannot afford the new transportation, sewage, water, and other infrastructure required for the continued development of greenfields—both farmland and open space. Scarce public resources must be focused to revitalize already existing but aging infrastructure in urban areas and downtowns. The BOA program's area-wide approach provides a vehicle to advance neighborhood-based, smart growth development.

Through the BOA program, municipalities and community-based organizations receive flexible grants for the investigation, planning, and market infrastructure studies needed to carry out a constructive and inclusive visioning process. BOA is based not on what is there now, or what the real estate market might otherwise attract or resist, but on what the community wants and needs. By looking at the area as a whole, the most productive, innovative and appropriately scaled end uses will be planned, creating new opportunities and helping put properties back on the tax rolls, while mitigating historic, current, and future environmental injustices.

Communities burdened by multiple brownfield sites are often trapped in a downward spiral of disinvestment and decay and require a far more comprehensive approach to revitalization than the traditional site-by-site approach. The area-wide approach provides communities with funding and the tools to assess the economic and environmental conditions associated with brownfield impacted areas, to identify and prioritize community supported redevelopment opportunities, to garner the collective support of local, state and federal agencies and to advance and implement priority projects. At its heart, the area-wide approach to brownfields reclamation is about creating value and providing environmental, social and economic benefits to communities disproportionately impacted by brownfields and other environmental burdens.

III. Brownfields, BOA and Economic Development

New York now has its fourth governor since passage of the state Brownfields Law in 2003. Although brownfields are a state-wide impediment to economic growth, and their remediation and redevelopment fit nicely with Governor Andrew Cuomo's

region-based economic strategies, they were largely ignored in his inaugural budget. The issue of what to do about out-of-control as-of-right tax credits was left to another day. And no new funding was included for the BOA program. Fortunately, there appears to be enough reappropriated funds from previous budgets to keep the BOA program moving forward, at least for the next year or two. But as more communities seek to enter the program, and projects already admitted continue to mature, the disparity between the hundreds of millions of dollars of poorly targeted tax credits going to large scale developments and the modest, but pressing needs of poor, underserved communities will heighten.

Site revitalization efforts in low- and moderate-income communities create favorable "linchpin" effects in which brownfield revitalization is the catalyst that leads to the transformation of whole neighborhoods and districts. The transformation of abandoned or underused properties creates a chain-reaction of positive events, and when several properties within a defined area are redeveloped, the reaction is that much more powerful.

Job development is one of the top priorities uniting lawmakers, municipal and community leaders, labor unions and environmental justice and community revitalization organizations. Brownfield site remediation efforts create pre-development jobs associated with redevelopment and planning; site investigation, remediation and construction jobs during redevelopment; and post-development commercial, industrial, manufacturing, and recreational jobs associated with new land uses.

The BOA program is relatively new and revitalization efforts take time, but preliminary analyses of national data suggest that it will be a powerful force for job generation. For example, the \$25 million of BOA investments to date by the New York State Department of State, which administers the BOA program, are projected to create and/or maintain 833 pre-development jobs. These include jobs for local community based-organizations, urban designers and planners, environmental scientists, economic consultants, and other personnel involved in BOA planning and site investigation.⁹ Additional jobs may include architects, landscape architects, transportation and infrastructure engineers, marketing and real estate consultants, and archaeologists. Post-development job creation is projected at between 275 and 455 jobs for each of the BOA study areas.¹⁰ Given that there are currently over 100 BOA study areas, this translates to between 27,500 and 45,500 jobs across the state. And these numbers do not account for the linchpin or synergistic effects that redevelopment of strategic sites will have on the larger BOA study area.

Other economic impacts of the BOA program include:

Preservation of open space/greenfields: The BOA program is preserving valuable open space by preventing new development

⁹ New York City commissioned an analysis of job creation associated with PlaNYC entitled "Analysis of Job Creation in PlaNYC Final Report" by The Louis Berger Group, Inc. This report is available at http://www.nyc.gov/html/om/pdf/2008/pr110_planyc_job_creation_analysis.pdf.

¹⁰ Marie Howland, "Employment Effects of Brownfields Redevelopment, What Do WE Know from the Literature?" *Journal of Planning Literature*, vol. 22, p. 91 (2007), available at <http://jpl.sagepub.com/cgi/reprint/22/2/91>.

on an estimated 11,250 acres of greenfields.¹¹ Preserving greenfields provides a host of benefits including improvements to air quality.

Public investment that leverages new investment: The BOA program is leveraging between \$4 million and \$10 million in private and public investment in each study area.¹² With 100 such areas already in the program, this could lead to an estimated \$400 million in investments across the state.

Property values: Studies show that brownfield redevelopment leads to a 5 to 15 percent increase in property values within $\frac{3}{4}$ mile of the remediated sites.¹³ This can increase property values and tax revenue. However, it can also have the unintended consequence of raising rents and causing displacement, which underscores the need for authentic community engagement in the BOA planning process.

Generation of local tax revenue: Local tax revenues within a typical BOA study area are estimated to increase by about \$3 million annually.¹⁴

Savings in transportation related externalities: Redevelopment on denser urban brownfields where public transit options are available means less vehicle usage and fewer vehicle miles traveled relative to new development on greenfields. Therefore, the indirect costs—externalities—related to transportation, such as parking, accidents, and pollution related health costs, are lower on brownfield redevelopment projects.

Savings in infrastructure investment: Brownfields typically have some infrastructure, such as sewers and water lines, in place, unlike greenfields, which have none.

Environmental and social benefits: Building a park on the waterfront can provide access and additional green/open space. This can improve a community's health and quality of life.

IV. Authentic Community Engagement

Authentic community engagement means the ongoing, meaningful participation by neighborhood residents in the decision-making that impacts their neighborhood. It is rooted in the seven years of policy debate that preceded the 2003 Brownfields Law during which community-based organizations from New York City's marginalized low-income communities of color fought for a more comprehensive and transparent approach, one that would give them a seat at the decision-making table. Many of these communities already bore more than their fair share of the waste management and other heavy industrial activities—incinerators, waste transfer stations, and power plants—that were the cause of widening health disparities. They believed only

meaningful participation in revitalization planning would alleviate these burdens. With BOA, community-based organizations were determined to build in mechanisms that would provide substantial and meaningful resources for planning and project implementation.

Authentic community engagement differs from community participation as understood in the traditional paradigm of environmental and land use decision-making. A community is authentically engaged when it is involved at the outset in setting the scope and process of decision-making, and not just invited in to comment after most of the key decisions have been made. An essential feature of authentic community engagement is that substantial, flexible resources are made available to communities and community-based organizations to support and sustain engagement over the long period of time required for the area-wide approach. This is a defining feature of the BOA program.

V. Preference and Priority

The New York State Brownfield Law provides that “projects in Brownfield Opportunity Areas designated pursuant to this section may receive a priority and preference when considered for financial assistance pursuant to any other state, federal or local law.”¹⁵ However, while the law provides broad authority, it offers little in the way of specific benefits. As the BOA program matures there is growing recognition of the need to establish mechanisms, resources and programs to implement the emerging community plans. When a community sets out to plan for its future, it should know that government programs and funding criteria are structured so that resources will be programmatic available on a priority basis for projects that are built consistent with an authentic community plan.

In its review of the New York State Brownfields Law, NPCR has concluded that a meaningful preference and priority policy cannot be achieved by making a single or simple adjustment. Instead, the goal must be achieved through an array of legislative, policy, program and administrative changes made to the specific programs that communities need in order to advance their area-wide plans. This might involve securing changes in the competitive ranking criteria of an over-subscribed affordable housing subsidy program so that a housing project being built consistent with an authentic community plan would be ranked higher and therefore more likely to be awarded available government resources. Increasingly, state environmental and affordable housing programs embrace preference and priority. A fresh look at the state Brownfields Law is necessary to guarantee

¹¹ See Northeast-Midwest Institute, *The Environmental and Economic Impacts of Brownfields Redevelopment*, *supra* n.3.

¹² See *id.*

¹³ See *id.*

¹⁴ See *id.*

¹⁵ Gen. Mun. L. Sec. 970(r)(5).

that meaningful preference and priority is awarded to authentic community developed and approved revitalization plans.¹⁶

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LEGAL DEVELOPMENTS

HAZARDOUS SUBSTANCES

Second Circuit Affirmed Decision Requiring Filmmaker to Produce Outtakes of Documentary Concerning Ecuadorian Litigation Involving Oil Company

In a multi-billion dollar Ecuadorian litigation against Chevron Corporation concerning oil activities by the company that allegedly polluted certain rainforests and rivers in the country, Chevron filed applications in federal court seeking to subpoena the outtakes of a documentary film entitled "Crude," the making of which was allegedly solicited by the plaintiffs' lawyers and depicts events relating to the litigation. The Ecuadorian plaintiffs and the documentary filmmaker opposed the applications on the grounds that the discovery of such materials would undermine the Ecuadorian proceedings and that the materials sought are protected by the journalists' privilege. In 2005, a lawyer for the plaintiffs solicited a documentary filmmaker to create a film depicting the Ecuadorian litigation from the perspective of the plaintiffs, which resulted in 600 hours of raw footage. The film was released in 2009. In its application, Chevron alleged that the outtakes would be highly relevant in both the Ecuadorian litigation and the criminal proceedings, as well as a related arbitration. In a May 2010 decision, the district court granted the application, holding that the material was relevant and was not protected by the journalists' privilege because none of the material sought was subject to a confidentiality agreement or was otherwise confidential. In a subsequent decision, the court ordered the filmmaker to preserve all relevant evidence and directed the court clerk to issue subpoenas to the filmmaker and his associates requiring them to turn over certain documents and that they testify at a deposition. In an October 2010 decision, the court denied motions to quash the subpoenas, holding that the information at issue (outtakes from the film) was highly relevant and thus the information and depositions were appropriate. On appeal, the Second Circuit affirmed the district court's decision, holding that the filmmaker could not invoke journalistic privilege given that the lead advisor to the Ecuadorian plaintiffs solicited the filmmaker to produce the film "to tell his clients'

story" and the filmmaker also removed a scene from the final version at the requests of the plaintiffs. Thus, he could not show that he collected information for purposes of independent reporting and commentary and it was thus within the district court's discretion to order the production. *In re Application of Chevron Corp.*, 629 F.3d 29 (2d Cir. 2011).

Bankruptcy Court Disallowed Private Party Claims Seeking Future Cleanup Costs

In a contested federal bankruptcy proceeding concerning a chemical company, the debtors objected to private party claims for future environmental remediation costs also sought by the federal government and several state governmental entities. In June 2009, EPA and various state agencies filed proofs of claim against the company, seeking unreimbursed past and estimated future response costs for environmental cleanup under CERCLA totaling \$5.5 billion. In April 2010, the court approved a settlement agreement that provided for an allowance of over \$1 billion to resolve the government entities' claims. Over 70 private parties sought approximately \$1.1 billion in past and future cleanup costs. The debtors objected to these claims under Section 502(e)(1)(B) of the Bankruptcy Code to the extent they sought payment of future cleanup costs. This section prohibits claims for contribution and indemnification by those parties who are liable, along with the debtor, to third parties for amounts to be determined in the future. The court held that, with one exception where the costs were already paid by the claimant, these claims were contingent and thus disallowed. *In re Lyondell Chemical Co.*, 2011 Bankr. LEXIS 10 (S.D.N.Y. Jan. 4, 2011).

Appellate Division Found that Buyer of "As Is" Property Not Entitled to Reimbursement Under State Compensation Fund

The Appellate Division, affirming a trial court decision, held that a property owner who had no knowledge of an underground storage tank (UST) on his property when he purchased it and did nothing to contribute to the contamination is nevertheless strictly liable as a discharger and not entitled to reimbursement from the New York Environmental Protection and Spill Compensation Fund. The court held that the property owner's liability as a discharger is not predicated on his status as a landowner but, rather, as the owner of the system from which the discharge occurred. Although the orphan tank was installed by an entity other than the property owner and he took steps in an attempt to remove all USTs from the property prior to purchasing it, it remains undisputed that the orphan tank remained in the ground when he purchased the property. Moreover, the property owner bought the property in "as is" condition and failed to submit any proof that the transfer of the land did not include fixtures, and the record was otherwise devoid of any evidence that, as the title owner of the real estate, the property owner is not the owner of the orphan tank. As such, even though the property owner was unaware of and did nothing to contribute to the

¹⁶ More information on New York State Brownfield Law reform is available at <http://www.npcr.net>.

contamination, he was strictly liable as a discharger and not entitled to reimbursement from the Fund. *Veltri v. New York State Office of the Comptroller*, 916 N.Y.S.2d 315 (3d Dept. 2011).

LAND USE

Company's Summary Judgment Motion Concerning Denial of Permit to Construct Cell Phone Towers Granted

In October 2008, a telecommunications company filed an action in federal court against the Village of East Hills pursuant to the federal Telecommunications Act seeking a declaratory judgment that the Village's denial of its application for a special exemption permit and two variances to construct several cell phone antennas on a commercial building in the Town violated the Act. Previously, the company had filed an application with the Village Board of Zoning Appeals for an exemption permit. After a hearing, the Board denied the application on the grounds that it would have a negative aesthetic impact on the surrounding area, that it would have a negative impact on the marketability and prices of nearby homes, and that the company had not demonstrated a need for the antennas. After filing the action in federal court, the company moved for summary judgment. The district court found that the Board's conclusions were not supported by substantial evidence and granted the company's motion. The court therefore directed the Village to grant the company the requested permit and variances. *MetroPCS New York LLC v. Village of East Hills*, 2011 U.S. Dist. LEXIS 6479 (E.D.N.Y. Jan. 20, 2011).

Due Process Challenge Concerning Prohibition Against Second Dwelling on Property Dismissed for Second Time on Ripeness Grounds

A resident of the Town of Middleton commenced an action in state court, alleging that the Town code enforcement officer deprived him of his due process rights under the 14th Amendment. The resident had erected a second single-family dwelling on his property after receiving a building permit to do so. However, after completing the second dwelling, the resident was informed by the code enforcement officer that Town zoning regulations only permitted one such building on his property and only agreed to issue a certificate of occupancy if the individual would sign an affidavit stating that he would use the older dwelling only for storage, which the individual agreed to do. The Town removed the action to federal court and then moved to dismiss on ripeness grounds, alleging that the individual failed to utilize the administrative mechanisms available to him to get such approval, such as seeking a variance. The court agreed and granted the motion. After dismissal, the resident filed another action in federal court which contained the identical allegations, plus an allegation that he was told by the code enforcement officer that appealing the denial of the certificate of occupancy or seeking a variance would be futile because there was no way that the Town would allow the use of both dwellings as single-family residences. The court again dismissed on

ripeness grounds, given that there was no final, definitive position from the Town regarding such use. The court further held that the action was barred by the applicable statute of limitations given that the resident became aware in April 2006 that the code enforcement officer would not issue him a certificate of occupancy. *Hennelly v. Town of Middleton*, 2011 U.S. Dist. LEXIS 2854 (N.D.N.Y. Jan. 12, 2011).

Fourteenth Amendment Claim Concerning Expansion of Non-Conforming Use Dismissed

Residents of the Village of Hancock commenced an action in federal court alleging that the Village violated their constitutional rights under the 14th amendment by failing to enforce Village zoning regulations against a neighbor. The neighbor had operated a tool and dye business on his property since the 1970s. When the Village adopted zoning ordinances, the business was designated as a legal non-conforming use. In 2001, to accommodate the growth of his business, the neighbor built an additional structure on his property. Plaintiffs, two individuals who purchased property on the east and west of the property at issue, alleged that the tool and dye business was substantially expanded in 2006 and 2007, as measured by increased hours of operation, machinery, revenues and employees. The neighbors spoke at a Village Board meeting urging the Village to enforce its zoning ordinance but nothing was done. The Town moved to dismiss the complaint. The district court granted the motion, holding that the plaintiffs failed to allege a due process violation given that they failed to allege a federally protected property right. In this case, they could not show a zoning ordinance violation. In addition, there is no due process right in enforcing a law against another person. Further, assuming that a property right existed, an Article 78 proceeding was available. With respect to equal protection, the plaintiffs failed to show that they were treated differently from other similarly situated individuals. In this case, they failed to allege that they were treated differently with respect to the Village's non-conforming use expansion regulations. *Nemeth v. Village of Hancock*, 2011 U.S. Dist. LEXIS 1563 (N.D.N.Y. Jan. 7, 2011).

City May Not Require that School District Pay to Repair Existing Sewer Line as Precondition for Granting Application to Connect to Sewer System

A school district in the City of Middletown commenced an Article 78 proceeding challenging the requirement by the City that, as a precondition for the City to consider an application for a new elementary school to connect to the City sewer system, the district bear the cost of the reconstruction or replacement of certain portions of the Town's sewer line. The district alleged that the requirement was arbitrary and capricious, and an abuse of discretion given that the portions of the sewer system that the City demanded be repaired were not connected to the school. The trial court agreed and held that the City may not require that the district pay for the repair or replacement of existing sewer line as a precondition for considering its application. *Enlarged School District of Middletown v. City of Middletown*, Index No. 7804/10 (Sup. Ct. Orange Co. Jan. 26, 2011).

Injunction Denied Concerning Issuance of Building Permits for Renovations to Building Housing Homeless Advocacy Group

A business coalition in the Chelsea section of Manhattan commenced an Article 78 proceeding seeking an injunction of certain building permits issued by the New York City Department of Buildings (DOB) concerning the renovation of a building that is used to provide accommodations and other services to the homeless by an advocacy group. The business coalition alleged that DOB, in approving the permits, improperly designated the premises as a “transient hotel” when in reality it is a “community facility” and is not a permitted use under the New York City zoning code. The advocacy group filed a motion for a stay on the grounds that the business coalition did not exhaust its administrative remedies by appealing the issuance of the permits to the Board of Standards and Appeals. The trial court agreed and issued the stay. *Chelsea Business & Property Owners’ Association LLC v. City of New York*, Index No. 113194/10 (Sup. Ct. N.Y. Co. Jan. 10, 2011).

Trial Court Held that Town Board Had Rational Basis for Denying Permit to Fast Food Establishment

The Town of Hempstead board of zoning appeals denied an application for special permits and variances to construct a White Castle fast food establishment in the Town. The company thereafter filed an Article 78 proceeding seeking to annul the decision on the ground that it was arbitrary and capricious. The trial court denied the petition, holding that the findings of fact submitted by the zoning board, which included findings that a drive-thru to be constructed as part of the restaurant would be dangerous to the health, safety, and welfare of the surrounding residential community and would result in a negative impact on the adjacent home values, was not an abdication of the board’s obligation to make an independent decision. As such, the court held that the board’s decision had a rational basis and must be sustained. *White Castle System, Inc. v. Board of Zoning Appeals of the Town of Hempstead*, Index No. 23962/10 (Sup. Ct. Nassau Co. Jan. 5, 2011), NYLJ 1 (Jan. 14, 2011).

SEQRA/NEPA

Lawsuit Challenging Infrastructure Project Dismissed as Moot

Residents of the Peace Bridge neighborhood of the City of Buffalo commenced an Article 78 proceeding against the Buffalo and Fort Erie Public Bridge Authority seeking a declaration that the Authority is a state agency and public body subject to SEQRA and that the Authority violated SEQRA by segmenting an infrastructure improvement project and by failing to conduct an inadequate environmental review. The Authority removed the case to federal court. The case arose when the Authority contemplated a number of transportation projects, including the construction of a second international bridge between the U.S. and Canada. DEC assumed the lead agency role and determined

that construction of the bridge would have no significant adverse impact on the environment and issued a permit for construction of the bridge. In a previous action, the City and several related groups commenced an Article 78 proceeding challenging the issuance of the permit on the grounds that it violated SEQRA by improperly segmenting the environmental review. In a 2000 decision, the trial court agreed and granted the petition. In accordance with the decision, an EIS was prepared with respect to the project. In the meantime, the Authority began work on a related infrastructure project, which included the relocation of toll booths and several stores. In their petition, the residents alleged that the Authority violated SEQRA by failing to conduct an adequate environmental review of the infrastructure project and by segmenting its review of it. The Authority moved for summary judgment. The district court granted the motion, holding that the Authority was created to enter into a compact with Canada with respect to the bridge crossing between the United States and Canada, and thus SEQRA did not apply to the project. On appeal, the Second Circuit held that petitioners’ SEQRA challenge was moot because the infrastructure project had been completed in 2008 and petitioners never sought to safeguard their challenge by requesting injunctive relief. *Mitskovski v. Buffalo and Fort Erie Public Bridge Authority*, Index No. 10-0589-CV (2d Cir. Jan. 31, 2011).

Resident Had Standing to Maintain Action Concerning Sewage Treatment Plant

A resident of the Town of Oswego filed an Article 78 proceeding alleging that he would suffer environmental harm as a result of the Town planning board’s decision to permit a developer to construct a sewage treatment plant on a parcel of land that was located across the street from the resident’s property. The trial court denied the petition and dismissed the proceeding, holding that the resident lacked standing to challenge the board’s determination. On appeal, the Appellate Division reversed, holding that the resident’s property was approximately 700 feet from the property line where the sewage treatment plant was to be built and thus was within the zone of interest to be protected. *Ontario Heights Homeowners Association v. Town of Oswego Planning Board*, 77 A.D.3d 1465, 908 N.Y.S.2d 514 (4th Dept. 2010).

Trial Court Found that Final EIS Concerning Proposed Landfill Did Not Comply With SEQRA

A municipal industrial development agency and a recycling company proposed to construct a construction and demolition landfill in the City of Amsterdam on property which bordered the Town of Amsterdam. In June 2003, the Town notified the City and the company that it opposed the project and that it was willing to take action to oppose the project. It thereafter commenced an Article 78 proceeding challenging the February 2007 final EIS and findings statement. The City and the company opposed the petition on various grounds, including standing. The trial court held that the Town had a sufficiently specific municipal interest in the potential environmental impacts of the

project to establish standing under SEQRA. However, the court found that the final EIS failed to respond to substantive comments regarding alternatives, zoning, community character, air pollution, surface water, drinking water and wetlands as required under SEQRA. The court also found that the final EIS did not take the requisite “hard look” at the residential community character that would be affected by the landfill, as well as the no action alternative. Therefore, the court found that the final EIS was null and void and ordered a full environmental review of the project in compliance with SEQRA. *Town of Amsterdam v. Amsterdam Industrial Development Agency*, Index No. 015/07 (Sup. Ct. Montgomery Co. Jan. 14, 2011).

Motion to Amend and Supplement Petition Challenging Re-Zoning Resolution on SEQRA Grounds Partially Granted

In May 2009, several environmental groups and related individuals commenced an Article 78 petition seeking to annul an April 2009 resolution by the Town of Brookhaven Town Board which allowed the rezoning of a 39 acre parcel of land in the Town from single-family residential to multi-family residential for the purpose of building a mixed-use development. The petition alleged, among other things, that the resolution violated SEQRA. After filing, the petitioners filed a motion to serve an “amended/supplemental” petition to add new claims. The respondents opposed the motion on several grounds. With regard to the supplemental claims that related to a “clarifying” resolution passed by the Town Board after the petition was originally filed, the court allowed these claims given that they did not prejudice respondents. However, with respect to the amended claims that related back to the original action by the Board and mainly sought to add new factual allegations, the court found that these were known or should have been known by petitioners at the time the petition was filed and the portion of the motion which sought leave to amend the petition was denied. The court also consolidated this action with a separate action filed by the same petitioners challenging the “clarifying” resolution. *Long Island Pine Barrens Society, Inc. v. Town of Brookhaven Town Board*, Index No. 18932/09 (Sup. Ct. Suffolk Co. Jan. 13, 2011).

Hospital Expansion Project Found Not to Require Preparation of EIS

Residents of the Bayside section of Queens and a citizens’ advocacy group filed a combined Article 78 proceeding and declaratory judgment action against several municipal and state agencies seeking to enjoin the construction of a 90,000 square foot addition to the St. Mary’s Hospital for Children, alleging among other things that the Dormitory Authority failed to comply with SEQRA. The New York State Department of Health (DOH) and the New York City Department of Buildings (DOB) moved to dismiss the petition. With respect to DOH, petitioners alleged that it failed to conduct an environmental review when it approved the construction project and failed to provide notice and opportunity for a public hearing in connection with its review and approval. DOH countered that the claims

were time-barred because it gave its approval in February 2008 and thus the claims fell outside the 4-month statute of limitations. The trial court agreed and dismissed the claims against DOH. With respect to DOB, petitioners alleged that it failed to comply with applicable zoning restrictions. DOB moved to dismiss on the grounds that petitioners failed to exhaust their administrative remedies given that they did not appeal to the Board of Standards and Appeals from the building permit issued by DOB in July 2010. The court denied this portion of the motion, holding that exhaustion was not necessary when petitioners were seeking injunctive relief. However, the court denied a portion of the petitioners’ preliminary injunction motion, holding that they were unlikely to succeed on their claim that a grandfathering provision in the New York City building code did not apply to the proposed enlargement of the hospital. With respect to the claim that the Dormitory Authority failed to comply with SEQRA in concluding that the project did not require the completion of an environmental impact statement (EIS), the court found that the agency took the requisite “hard look” at the relevant issues of environmental concern before concluding that the project did not require an EIS. *Weeks Woodlands Association v. Dormitory Authority of the State of New York*, Index No. 110502/10 (Sup. Ct. N.Y. Co. Jan. 5, 2011).

WATERS

Appeal of Decision Concerning Alleged Violations of the Clean Water Act Regarding Stormwater Discharges Dismissed

The City of Newburgh commenced a lawsuit pursuant to the Clean Water Act against the owners of a residential development and other related parties, alleging that the defendants violated the CWA and State Pollutant Discharge Elimination System (SPDES) permits issued by DEC by discharging unfiltered stormwater into a reservoir adjacent to the development known as Brown’s Pond. The City also brought a claim for trespass, claiming that the development installed two drainage basins on City-owned land as well as a sediment barrier and filter next to Brown’s Pond. In September 2009, the City moved for a preliminary injunction seeking to require the development to achieve compliance with the applicable SPDES permit, to implement weekly testing to evaluate the adequacy of the development’s stormwater management system, and prohibiting expansion of the development. Defendants cross-moved to dismiss on various grounds. In a February 2010 decision, the district court denied the cross-motion with respect to the development, but held that because DEC had commenced an administrative enforcement proceeding against the development, civil penalties were not allowed under the CWA. However, the court held that this did not preclude the City’s claims for injunctive relief. Nonetheless, the court denied the motion for a preliminary injunction, holding that the City failed to establish the threat of irreparable harm given that it had alleged that the development had failed to effectively control its stormwater discharges since 1999 but had delayed in bringing suit for almost 10 years. The defendants appealed the denial of their motion to dismiss. The City

cross-moved to dismiss the appeal on the grounds that it was an improper interlocutory appeal. The Second Circuit agreed, holding that that defendants did not seek certification from the district court permitting them to pursue an appeal. The court further held that even if it had jurisdiction to hear the appeal, it would affirm the district court's decision on the same grounds. *City of Newburgh v. Sarna*, 2011 U.S. App. LEXIS 1232 (2d Cir. Jan. 21, 2011).

WETLANDS

Second Circuit Held that State and Local Laws Regarding Wetlands Not Preempted by Federal Airport Laws

The Second Circuit held that the Connecticut Inland Wetlands and Watercourses Act (IWWA) and the Connecticut Environmental Protection Act (CEPA), as well as municipal regulations that impose permit requirements for cutting trees on protected wetlands, are not preempted by the Federal Aviation Act (FAA) or the Airline Deregulation Act (ADA). The case arose after an airport sought to cut some trees on its property, part of which is protected wetlands, because they obstruct air navigation. Under Connecticut law and municipal regulations, a person must apply for permission to undertake activities affecting wetlands. However, the airport argued that because the trees at issue here qualify as obstructions, they are hazards under the FAA regulations and the otherwise applicable state and local statutory and regulatory framework establishing the wetlands permit process is preempted. The Second Circuit previously stated in dicta that Congress has established its intent to occupy the entire field of air safety, thereby preempting state regulation of that field. However, the Second Circuit held that the state and local statutes, regulations, and actions at issue here are neither field-preempted by the language of the FAA, nor expressly preempted by the ADA. The airport is not federally licensed under the FAA; it is a small private airport with no federal funding. As such, there is no federal interest in the airport's proposed actions. Moreover, the IWWA and CEPA are environmental laws that do not refer to aviation or airports. Further, the impact on air carriers of the laws and regulations at issue here, if any, is too remote to be expressly preempted under the terms of the ADA. Accordingly, the court held that the airport must observe the appropriate state procedures before it can cut down the trees. *Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Comm'n*, 2011 U.S. App. LEXIS 2645 (2d Cir. Feb. 10, 2011).

WILDLIFE AND NATURAL RESOURCES

Second Circuit Found that South Africa is Entitled to Restitution Concerning Scheme to Illegally Overharvest Rock Lobsters in South African Waters

From 1987 to 2001, three individuals engaged in a scheme to illegally harvest large quantities of South Coast and West Coast

rock lobsters in South African waters for export to the United States in violation of both South African and U.S. law. Although South African authorities obtained arrest warrants for the defendants, it declined to charge and prosecute them after concluding that their presence outside of the country rendered them beyond the reach of South African authorities. Instead, South Africa focused its prosecution on the South African entities involved in the scheme, including several companies and fisheries inspectors who had taken bribes. After the three defendants were indicted by U.S. authorities, they pleaded guilty to conspiracy to violate the Lacey Act and to commit smuggling in violation of federal law. In 2004, the defendants were sentenced to various terms of imprisonment and together forfeited \$13.3 million to the U.S. Following the district court's decision to hold a restitution hearing, the U.S. submitted a report prepared by a group of experts commissioned by the South African Department of Marine and Coastal Management, setting out two different methods of calculating restitution. In previous decisions in 2007, the district court denied the U.S. government's request for restitution pursuant to the Mandatory Victims Restitution Act (MVRA) and the Victim and Witness Protection Act (VWPA), determining that South Africa did not meet the requirements of either. On appeal, the Second Circuit reversed, holding that South Africa had a property interest in the overharvested lobsters and that it was directly harmed as a result of the illegal scheme. The court therefore vacated the district court's judgment and remanded the case to calculate restitution. *United States v. Bengis*, 631 F.3d 33 (2d Cir. 2011).

Administrative Judge Found that Charges to Hunters on Game Preserve Were Taxable

An individual who owned a lodge and game preserve filed a petition for revision of a determination for sales and use taxes under the Tax Law for certain periods of time beginning in 2001 and ending in 2006. The issue for consideration was whether charges by the individual to hunters for game birds on the preserve constituted a sale of tangible personal property pursuant to Tax Law § 1105(a) or an admission charge for a participatory sporting activity that is specifically exempted from sales tax pursuant to Tax Law § 1105(f)(1). In addition, if the charges were deemed a sale of tangible personal property, a second issue for consideration was whether these sales are exempt from tax as food sold for human consumption under Tax Law § 1115(a)(1). The administrative law judge assigned to the case determined that, as to the first question, the record demonstrated that game bird hunters received the right to direct the release of game birds and the right to hunt the birds at the preserve, meaning that the individual sold tangible personal property that was taxable. As to the second question, the judge found that the sales were not exempt as food sold for human consumption given that they were released in the preserve and there was no guarantee that they would be shot and eaten. The judge further found that no penalties should be assessed on the amount that was due in taxes given that the individual reasonably relied on prior written advice from the State Division of Taxation to various

third parties operating similar businesses as his reason for not charging sales tax. *In re Gugliotta*, Index No. 023157 (Dec. 30, 2010), NYLJ 1202477450311 (Dept. of Taxation Jan. 7, 2011).

NATIONAL DEVELOPMENTS

Ninth Circuit Affirmed Dismissal of Case Alleging Discrimination by Bay Area Public Transit System

A class of plaintiffs alleged that the Bay Area Metropolitan Transportation Commission, California's largest bus-only transit system, engaged in funding decisions that disadvantage the transit system's largely minority riders in comparison to the white ridership of the region's light and heavy rail trains, primarily by failing to cover operational shortfalls regarding the system. The defendants moved for summary judgment, challenging the standing of the plaintiffs as well as claiming that plaintiffs had failed to raise a material issue of fact as to intentional discrimination. The district court found that the plaintiffs had standing to maintain the action, and that there were triable issues of fact regarding whether the Commission intentionally discriminated against plaintiffs in its funding decisions. After trial, the court held that plaintiffs had established a prima facie case of disparate impact discrimination only as to the Commission's conduct in disproportionately selecting and allocating funding to rail projects, as opposed to bus projects, in its Regional Transit Expansion Plan. However, the court found that the Commission had shown a substantial legitimate justification for its conduct and that the plaintiffs had not proven the existence of a less discriminatory and equally effective alternative, as they were required to do. Thus, the court dismissed the case. On appeal, the Ninth Circuit affirmed on different grounds, holding that plaintiffs did not establish a prima facie case given that their statistical evidence did not demonstrate that an expansion plan that emphasizes rail projects over bus projects would harm minorities given that minorities already benefit substantially from rail service. *Darensburg v. Metropolitan Transportation Commission*, 2011 U.S. App. LEXIS 3007 (9th Cir. Feb. 16, 2011).

EPA Inspector General Released Report Finding Flaws in Agency's "All Appropriate Inquiries" Investigations

On February 15, 2011 the EPA's Office of Inspector General released a report finding that the agency's oversight of investigations of brownfields sites for potential environmental contamination is flawed because the agency does not review site assessments to ensure they meet federal requirements. The report concluded that if the "all appropriate inquiries" investigations are not conducted properly, there is a risk that the environmental conditions of a property have not been adequately assessed, which would lead to improper decisions about how appropriate uses of brownfields properties. The report found

that EPA does not review the "all appropriate inquiries" reports submitted by persons receiving assessment grants under the agency's brownfields program to assure the assessments comply with federal requirements. Instead, the agency has relied on the environmental professionals conducting the investigations to self-certify that requirements are met. In its review, the Inspector General said it looked at 35 all appropriate inquiry reports, which were randomly chosen, and none contained all the required elements to document the inquiry was done in compliance with federal requirements. The report stated that this happened because EPA does not have management controls to document that the investigation was done in compliance with federal requirements. The report further stated that if EPA is aware of noncompliance, it is authorized to take back funds from grantees, refuse reimbursement, and deny future grants. The report recommended that EPA develop accountability for all appropriate inquiry reports, develop a plan to review the reports to determine their compliance with documentation requirements, and establish criteria to determine whether noncompliance grantees should return grant money. The report, entitled "EPA Must Implement Controls to Ensure Proper Investigations Are Conducted at Brownfields Sites," is available at <http://www.epa.gov/oig/reports/2011/20110214-11-P-0107.pdf>.

D.C. Circuit Held that New York Company Did Not Have Standing to Challenge FERC Regulations Concerning Transmission Lines

On February 11, 2011, the Circuit Court for the District of Columbia affirmed the dismissal of a challenge by a New York company to a series of Federal Energy Regulatory Commission (FERC) orders on standing grounds. The court held that the company, which is developing a high voltage transmission line in New York, lacked standing because it did not have any active proposals for new transmission projects that the orders would affect. New York's bulk transmission system is managed by the New York Independent System Operator (NYISO), which is charged with developing an Open Access Transmission Tariff (OATT). An OATT is a region-wide transmission rate system. In 2007, new FERC regulations required public utilities to develop cost-allocation principles to recover costs associated with new transmission projects under the OATT. Accordingly, NYISO developed a method under which transmission customers that would benefit from a new project would have to pay for it though higher rates. NYISO's method included certain requirements, including that a new project had to be approved by 80 percent of those that would benefit from the project. The company opposed NYISO's method as well as the underlying FERC regulations. The D.C. Circuit held that the company could not oppose NYISO's method and FERC's regulations because it had withdrawn its application for the construction of the high-voltage line. *New York Regional Interconnect, Inc. v. Federal Energy Regulatory Commission*, 2011 U.S. App. LEXIS 3170 (D.C. Cir. Feb. 11, 2011).

Federal Court in West Virginia Bars Company from Producing Pesticide Ingredient

On February 10, 2011, a federal judge in West Virginia issued a 14-day restraining order barring a Bayer CropScience plant in the state from restarting its production of methyl isocyanate, a deadly pesticide ingredient. Citizens and workers in the county where the plant is located had filed a lawsuit in federal court seeking to stop the company from producing the chemical until a report by the National Academies of Sciences (NAS) is completed and recommendations from the U.S. Chemical Safety and Hazard Investigation Board (CSB) are implemented. The judge assigned to the case signed the restraining order on February 10, finding that the plaintiffs were likely to succeed on the merits of their argument. The order barred the company from participating or engaging in any part of manufacture of the chemical. The company immediately challenged the restraining order in an emergency motion, which was denied by the judge on February 13. The NAS report and the CSB recommendations follow a fatal explosion at the plant in 2008 that the CSB said was caused by multiple deficiencies in the startup of a pesticide manufacturing unit. In its report, the CSB recommended that the company revise its hazard analysis procedures, establish a hazardous chemical release prevention program in the county, and allow the Occupational Safety and Health Administration and EPA to inspect the facility. *Nye v. Bayer CropScience*, Index No. 11-CV-0087 (S.D. W. Va. Feb. 10, 2011).

EPA Issued Proposed Rule for Carbon Monoxide that Keeps Existing Standard

On January 31, 2011, EPA proposed increased monitoring for carbon monoxide near busy roadways but otherwise offered no revisions to the air quality standards for the pollutant. The proposed rule, which is part of EPA's periodic review of the national ambient air quality standards for carbon monoxide, finds that the existing standards "provide the requisite protection of public health with an adequate margin of safety and should be retained." The primary, health-based air standards for carbon monoxide are 9 parts per million averaged over eight hours and 35 parts per million averaged hourly. There are no secondary air quality standards for the pollutant. The primary standards are set to protect public health, while the secondary standards protect public welfare and the environment. Although EPA proposed no revisions to the air quality standards, it did propose expanding its monitoring network for carbon monoxide along busy roadways in urban areas with populations of 1 million or more. EPA estimates the rule would add 77 monitors near roadways in 53 cities. The monitors would be located with other equipment monitoring near-road emissions of nitrogen dioxide. EPA is also proposing that regional agency administrators would be able to require additional monitoring on a case-by-case basis in areas affected by large stationary sources of carbon monoxide or meteorological or topographical factors that increase concentrations of the pollutant. The proposed rule is available at <http://www.epa.gov/airquality/carbonmonoxide/actions.html#jan11>.

NEW YORK NEWSNOTES

New Commissioner for the Department of Environmental Conservation Confirmed

On March 8, 2011, the New York State Senate unanimously confirmed Joseph Martens as the new DEC Commissioner. Mr. Martens has served as president of the Open Space Institute since 1998 and was deputy secretary for energy and the environment from 1992-94 under former New York Governor Mario Cuomo. Mr. Martens had been the acting DEC Commissioner since late January 2011.

RGGI Report Found that RGGI States Are Using 78 Percent of Proceeds on Energy Programs

On February 28, 2011, the Regional Greenhouse Gas Initiative (RGGI) released a report finding that the 10 northeastern states that comprise RGGI are spending 78 percent of the proceeds from carbon dioxide allowance auctions on energy efficiency, renewable energy, and programs to benefit energy consumers. The report found that RGGI states have raised \$789 million over the past two years from carbon dioxide allowance auctions, with \$631 million going to various energy programs. According to the report, each RGGI state has its own plan for spending the auction proceeds, but 52 percent of overall proceeds are being used for energy efficiency programs. The report found that 11 percent of proceeds are being used for renewable energy programs, 14 percent are being used to provide direct assistance to consumers for paying their energy bills, and 1 percent are being used for a variety of greenhouse gas reduction programs such as carbon sequestration and carbon emission abatement technologies. According to the report, 17 percent of RGGI proceeds were used for budget deficit reduction in New York, New Jersey, and New Hampshire. The remaining 5 percent is being used for administrative expenses to run the program. The report is available at http://www.rggi.org/docs/Investment_of_RGGI_Allowance_Proceeds.pdf.

DEC Reached Settlement with Smelting and Recycling Facility in Middletown

On February 23, 2011, DEC announced that it had entered into a settlement with Revere Smelting and Refining Corporation and Eco-Bat New York LLC, companies which own and operate a lead smelting and battery recycling facility in the Town of Middletown. The battery recycling operation by Revere has been in existence since 1972, and the facility is one of the largest recyclers of automobile and other vehicle batteries in the Northeast United States. The Order resolves an enforcement proceeding initiated by DEC after several investigations of the facility in 2009 and 2010 revealed violations of spills reporting and response requirements. The enforcement proceeding also involved continuing treatment and containment of hazardous waste at the facility and an ongoing remedial program to

address contamination. The Consent Order requires upgrades to the containment building at the facility to prevent future harm to the environment, and remediation of certain properties impacted by the smelting and recycling operations. The settlement specifically requires Revere and Eco-Bat to perform the following actions: (1) construct a new liner floor system for the containment building where battery recycling occurs, which will prevent future releases of hazardous waste to the environment; (2) undertake a study of the contamination in the areas where battery recycling is conducted, to identify the steps which will need to be taken to ensure that the contamination from operations will be properly addressed when the facility is closed; (3) post a financial guarantee once DEC approves a closure plan for the facility; (4) remediate the remainder of the inactive hazardous waste disposal site in accordance with a remedy which DEC issues for this property; (5) construct a parking area for the storage of trailers containing lead acid batteries prior to processing, which will contain any spills from these trailers; (6) pay a \$150,000 penalty; and (7) complete a DEC-approved project to benefit the environment with a value of \$300,000. (DEC Press Release Feb. 23, 2011).

Company Agreed to Pay \$4 Million to Settle CWA Case Concerning Gasoline Spill Near Staten Island

On February 8, 2011, a shipping company, Brouhard Transportation Co., agreed in a settlement to pay \$4 million to settle a Clean Water Act lawsuit brought by the U.S. Coast Guard concerning 50,000 barrels of gasoline it allegedly spilled near Staten Island when a barge carrying the fuel caught fire in the Arthur Kill waterway. The gasoline was discharged into the river in February 2003 after the company's barge exploded and caught fire while delivering a shipment of gasoline to an Exxon Mobil Corp. facility in Staten Island. The fire killed two Bouchard employees and severely burned an Exxon Mobil worker. The penalty, which will go to the Oil Spill Liability Trust Fund, is the largest civil penalty ever collected by the Coast Guard in a Clean Water Act case. The settlement must still be approved by the U.S. District Court for the Eastern District of New York. *United States v. Borchard Transportation Co.*, Index No. 08-CV-04490 (E.D.N.Y., settlement dated Feb. 8, 2011).

EPA Investigation of Gowanus Canal Found Widespread Presence of Pollutants

On February 2, 2011, EPA Region 2 announced that its investigation of the Gowanus Canal superfund site in New York City has confirmed the widespread presence of more than a dozen pollutants. Contaminants found at high levels in sediment include polychlorinated biphenyls (PCBs), polycyclic aromatic hydrocarbons (PAHs), mercury, lead, copper, and other metals. PAHs and metals were also found in canal water. In its report, EPA stated that its investigation began before the Brooklyn waterway was declared a superfund site in 2010. The site, which housed industrial operations for many years, was added to superfund's National

Priorities List in March 2010. A companion human and ecological risk assessment found that exposure to the contaminants in the canal poses threats to people's health and the environment. The ecological risk assessment by the agency showed that organisms living in canal sediment could be at risk, primarily from PAHs but also from PCBs and metals. Ducks may be threatened by exposure to PAHs in sediment, and heron could be at risk from eating contaminated fish. The investigation also confirmed that the contamination has a combination of historical and continuing sources. EPA stated that it will use the investigation's findings in a feasibility study outlining cleanup options, to be completed as a draft assessment by the end of 2011. The probe included more than 500 sediment samples, 80 water samples, and collection of more than 200 fish, including striped bass, eel, white perch, and blue crab. Ground water and soil monitoring consisted of 88 wells installed along the canal. According to EPA, it has sent 11 letters to potential responsible parties about their possible liability. These parties include New York City, Consolidated Edison, Honeywell International, Inc., and the U.S. Navy. The draft remedial investigation and risk assessment documents are available at <http://www.epa.gov/region02/superfund/npl/gowanus>. (EPA Region 2 Press Release Feb. 2, 2011).

New York State Tax Department Released Brownfield Credit Report

On January 31, 2011, the New York State Tax Department released its 2010 "Brownfield Credit Report." A law enacted in 2008 (L. 2008 ch. 390) requires that the Department release a report by January 31st of each year. The law requires that the report include the name of each taxpayer claiming the brownfield redevelopment tax credit, the remediated brownfield credit for real property taxes, or the environmental remediation credit, the amount of credit earned, and information identifying the brownfield project generating the credit. The Tax Department is also authorized to include any other information that it deems useful in analyzing the effects of the program. A copy of the 2010 report is available at http://www.tax.ny.gov/research/stats/statistics/special_interest_reports/brownfield_credit/brownfield_credit_reports.htm.

UPCOMING EVENTS

April 26, 2011 6–9 p.m.

New York City Bar Association, Energy Committee, "New York City's Efforts to Green Its Building Energy Code." Location: Association of the Bar of the City of New York, 42 West 44th Street, New York, New York. Information: <http://www.abcnyc.org/nycbar>.

May 5, 2011

Pace Law School Land Use Law Center, "New York Practically Grounded—Best Practices for Skill Building in Teaching

Land Use, Environmental, and Sustainable Development.” Location: Pace Law School, White Plains, New York. Information: jnolon@law.pace.edu or psalk@albanylaw.edu.

May 16–27, 2011

International Research Institute for Climate and Society, “2011 Summer Institute on Climate Information for Public Health.” Location: Earth Institute, Columbia University, Lamont Campus, Palisades, New York. Information: <http://iri.columbia.edu/education/ciph11>.

May 23–25, 2011

Columbia Law School Center for Climate Change Law, “Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate.” Location: Columbia Law School, 435 W. 116th Street, New York, New York. Information: <http://www.law.columbia.edu/centers/climatechange/resources/threatened-island-nations>.

June 29, 2011 6–9 p.m.

New York City Bar Association, Energy Committee, “State & Federal Regulation of Renewable Resources and Distributed Generation.” Location: Association of the Bar of the City of New York, 42 West 44th Street, New York, New York. Information: <http://www.abcnyc.org/nycbar>.

WORTH READING

Kenneth M. Block & John-Patrick Curran, “New City Green Laws May Spur Retrofitting,” NYLJ 5 (Mar. 9, 2011).

Christine A. Fazio & Ethan I. Strell, “Environmental Impacts of Road Salt and Deicers,” NYLJ 3 (Feb. 24, 2011).

Michael B. Gerrard, “Increasing Use of Renewable Energy: Legal Techniques and Impediments,” NYLJ 3 (Mar. 10, 2011).

M. Robert Goldstein & Michael Rikon, “EDPL Exemptions From Requirement of a Public Hearing,” NYLJ 3 (Feb. 28, 2011).

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