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# ENVIRONMENTAL LAW IN NEW YORK

ARNOLD & PORTER



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## The Impossible Search for Perfect Land: Siting Renewable Generation Projects in New York State

Gene Kelly and Michelle Piasecki

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### Introduction

There is near universal acceptance in the United States that the Earth is warming,<sup>1</sup> and that it has been doing so for at least several decades. Recognizing this fact, so-called “climate deniers” have largely shifted in recent years from a position of outright denial to a position of questioning the link between the warming of the planet and anthropogenic causes. Those who maintain that humans are not responsible for climate change, however, find themselves in a distinct minority—particularly in the world’s scientific community, as 97% of published scientists around the world say human activity is responsible for global warming.<sup>2</sup>

Greater awareness of the impacts of fossil fuel use on global climate has, in relatively short order, transformed energy markets in the U.S. and Europe, where the growth of renewable energy has been aggressive and sustained. In fact, within the last decade, coal-fired generation has decreased from 45% of the national energy mix to just 25%,<sup>3</sup>

<sup>1</sup> For the sake of brevity, the terms “climate change” and “global warming” will be used interchangeably. The science supporting these concepts typically points out that, while the Earth is surely warming, the effects of this phenomenon are not limited to a warming of the planet. Such effects can be seen in a wide array of impacts arising from significant changes now underway that are adversely affecting climates around the globe.

<sup>2</sup> See, e.g., U.S. GLOBAL CHANGE RESEARCH PROGRAM, FOURTH NATIONAL CLIMATE ASSESSMENT: VOLUME II—IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES (2018), [https://nca2018.globalchange.gov/downloads/NCA4\\_2018\\_FullReport.pdf](https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf); John Cook et al., *Consensus on Consensus: A Synthesis of Consensus Estimates on Human-Caused Global Warming*, ENVTL. RES. LTRS. vol. 11, no. 4, 048002 (Apr. 2016); David Herring, *Global Warming Frequently Asked Questions*, CLIMATE.GOV (Jan. 23, 2014), <https://www.climate.gov/news-features/understanding-climate/global-warming-frequently-asked-questions>; *The Causes of Climate Change*, GLOBAL CLIMATE CHANGE: VITAL SIGNS OF THE PLANET, <https://climate.nasa.gov/causes/> (last updated July 22, 2019).

<sup>3</sup> N.Y. INDEP. SYS. OPERATOR, 2018 POWER TRENDS 17 (2018) [hereinafter 2018 POWER TRENDS REPORT], <https://www.nyiso.com/documents/20142/2223020/2018-Power-Trends.pdf/4cd3a2a6-838a-bb54-f631-8982a7bdfa7a> (stating that 19% of the eastern region’s coal capacity retired in the past decade); Joe Ryan, *First U.S. Coal Plant in Years Opens Where No Options Exist*, BLOOMBERG (Feb. 11, 2019, 11:29 AM EST), <https://www.bloomberg.com/news/articles/2019-02-11/coal-s-final-flicker-1st-new-u-s-plant-since-2015-set-to-open>.

with every year bringing more announcements of major coal-fired plant retirements.<sup>4</sup>

Such plant retirements have not been limited to the coal sector. In early 2019, Los Angeles Mayor Eric Garcetti announced that three aging natural gas power plants that had previously been slated for refurbishment and modernization would instead be retired in favor of investments in renewable energy. Saying that “[t]he climate crisis demands that we move more quickly to end dependence on fossil fuel,” the mayor stated that Los Angeles would seek to be carbon-neutral by 2050.<sup>5</sup>

### A New York State of Mind

The devastating effects of Superstorm Sandy reinforced what most had long recognized—that climate change was with us and should not be viewed as merely a topic of continuing debate. In 2014, New York Governor Andrew M. Cuomo announced the launch of his Reforming the Energy Vision (REV) initiative, a comprehensive energy strategy for New York.<sup>6</sup> REV seeks to rebuild, strengthen, and modernize New York’s energy system while bringing economic growth to the state. It includes more than 40 initiatives to build a “clean, resilient, and more affordable energy system.”<sup>7</sup>

As a means of strengthening fuel diversity and achieving the State’s clean energy goals consistent with REV, the New York State Public Service Commission (PSC) in 2016 approved the state’s Clean Energy Standard (CES), which Governor Cuomo touted at the time as “the most comprehensive and ambitious clean energy mandate in the state’s history.”<sup>8</sup>

The CES, in its most basic form, requires 50% of New York’s electricity to come from renewable energy sources such as wind

and solar by 2030. The overall goal is to reduce greenhouse gas emissions by 40% from 1990 levels by 2030, and by 80% by 2050.<sup>9</sup>

In his announcement of the CES, Governor Cuomo said the PSC would work with the New York Independent System Operator (NYISO), the operator of the state’s electric power grid, and other stakeholders to ensure that necessary investments are made in storage, transmission, and other technologies to secure a reliable electric system. In addition, the PSC must conduct triennial reviews of the CES to ensure that economic and clean energy goals are being achieved.<sup>10</sup>

By all accounts, despite the appearance of climate leadership, New York is seriously lagging in attaining its overall targets. By the end of 2017, only 28% of the state’s power generation was from renewable sources.<sup>11</sup> To achieve the CES targets, the state needs an additional 29,200 gigawatt hours of renewable energy by 2030, but very little new renewable generation has been added since adoption of the CES.<sup>12</sup> For the reasons noted below, renewable energy developers are finding it difficult to site new renewable generation at a quick enough pace.

Despite (or perhaps because of) the lack of defined progress in moving toward CES goals, as the 2018–19 session of the State Legislature was winding down in late June, both houses passed the landmark Climate Leadership and Community Protection Act (CLCPA). Governor Cuomo signed the bill on July 18, 2019.<sup>13</sup> This legislation, which puts New York squarely at the forefront of climate change action planning, led Governor Cuomo to proclaim, “We are now taking another historic step forward to stop the imminent threat of climate change by establishing the most aggressive greenhouse gas reduction mandate in the nation and, we believe, in the entire world.”<sup>14</sup>

<sup>4</sup> Mark Hand, *Coal on Its Last Legs in New York After State Proposes Tough Emissions Rule*, THINKPROGRESS (May 17, 2018, 11:53 AM), <https://thinkprogress.org/new-york-rule-could-lead-to-closure-of-coal-plants-ae94276d60c1/> (noting that coal currently represented only two percent of the state’s overall generating capacity and that nearly 3,000 megawatts (MW) of coal-fired generation had been retired since 2000); Laurel Morales, *Looming Shutdown of the Navajo Generating Station Means New Jobs Far from Home*, NPR (Nov. 11, 2018, 7:45 AM ET), <https://www.npr.org/2018/11/11/660627883/looming-shutdown-of-the-navajo-generating-station-means-new-jobs-far-from-home>; *U.S. Coal Plant Retirements Near All-Time High*, BLOOMBERGNEF (Nov. 9, 2018), <https://about.bnef.com/blog/u-s-coal-plant-retirements-near-all-time-high/>.

<sup>5</sup> Nichola Groom, *Los Angeles Abandons New Natural Gas Plants in Favor of Renewables*, REUTERS (Feb. 12, 2019, 1:42 PM), <https://www.reuters.com/article/us-usa-california-natgas/los-angeles-abandons-new-natural-gas-plants-in-favor-of-renewables-idUSKCN1Q12C9>.

<sup>6</sup> See *About REV*, REV, <https://rev.ny.gov/about/> (last visited July 23, 2019).

<sup>7</sup> *REV Initiatives*, REV, <https://rev.ny.gov/rev-initiatives> (last visited July 23, 2019).

<sup>8</sup> See Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces Establishment of Clean Energy Standard That Mandates 50 Percent Renewables by 2030 (Aug. 1, 2016), <https://www.governor.ny.gov/news/governor-cuomo-announces-establishment-clean-energy-standard-mandates-50-percent-renewables>; see also Order Adopting a Clean Energy Standard, Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard, Case 15-E-0302 (Aug. 1, 2016), <https://on.ny.gov/2aKtpgA>.

<sup>9</sup> Press Release, Governor Andrew M. Cuomo, *supra* note 8.

<sup>10</sup> See Press Release, Governor Andrew M. Cuomo, *supra* note 8.

<sup>11</sup> Kay Dervishi, *How to Get to ‘50 by 30,’* CITY & STATE N.Y. (Aug. 22, 2018), <https://cityandstateny.com/articles/policy/energy-environment/how-to-get-to-50-30.html>.

<sup>12</sup> 2018 POWER TRENDS REPORT, *supra* note 3, at 30.

<sup>13</sup> 2019 N.Y. Laws ch. 106.

<sup>14</sup> Press Release, Governor Andrew M. Cuomo, Statement from Governor Andrew M. Cuomo on the Passage of the Climate Leadership and Community Protection Act (June 20, 2019), <https://www.governor.ny.gov/news/statement-governor-andrew-m-cuomo-passage-climate-leadership-and-community-protection-act>.

New York's leaders have thus positioned the State to claim the mantle of climate leadership on the global stage, but will these efforts on the legislative front translate to actual climate progress sufficient to enable New York to earn the Global Leader title it now claims?

### Article 10: Cumbersome, Protracted, and Unnecessarily Challenging

When Governor Cuomo took office in 2011, only 19% of the state's power came from renewable sources.<sup>15</sup> It was in that year that the Power NY Act of 2011<sup>16</sup> was enacted (replacing a previously expired version of the law), establishing a process for the siting of large-scale electric generating facilities and re-powering projects. As part of that process, known as "Article 10," a multi-agency Siting Board was charged with streamlining the permitting process for power plants of 25 megawatts (MW) or greater.<sup>17</sup> Regulations implementing the law were promulgated in 2012.<sup>18</sup>

When the enactment of the new Article 10 was first announced, developers had great expectations for the seamless and efficient siting of renewable resources in the state, particularly in light of claims that the new law "encourages investments," "provides a clear framework to site and re-power facilities," and "reinvigorates the energy industry."<sup>19</sup> Unfortunately, companies seeking to develop renewable energy projects in New York have experienced a different reality as they struggle to navigate a system beset with often-competing agendas and limited agency resources available to process applications for the necessary State approvals.

Indeed, in the seven-plus years since the new Article 10 was adopted, only one renewable energy project has emerged from the process with the Certificate of Environmental Compatibility and Public Need necessary to complete construction of a large-scale energy project. This prolonged process has served to dampen enthusiasm among renewable energy developers and

has led to questions about the State's ability to reach the energy targets outlined in REV, CES, and CLCPA.<sup>20</sup> Instead of a seamless path towards development, applicants seeking to construct solar and wind projects have experienced what the Alliance for Clean Energy New York (ACE NY) has described as an "unnecessarily complicated and time-consuming" process that is slowing construction of renewable projects "at a time it desperately needs to accelerate."<sup>21</sup>

The calls for improvements to the Article 10 process are not limited to those of developers. In an April 2019 letter sent to PSC Chair John Rhodes, a coalition of major environmental organizations likewise called for changes to the Article 10 siting process, urging adoption of a set of measures focused on speeding up the lagging project review process.<sup>22</sup>

### Five Issues That Slow Down Article 10 Reviews

A host of issues give rise to developers' and environmental organizations' frustration with the Article 10 process. While no responsible developer would dispute the need for proposed projects to undergo a reasonable degree of regulatory review, there is broad consensus that these reviews have been onerous and unnecessarily protracted, particularly in light of the governor's aggressive renewable energy targets. The issues giving rise to these delays include: (1) wetlands; (2) rare, threatened, or endangered (R/T/E) species; (3) farmland conversion; (4) grid interconnection; and (5) visual impacts and local community concerns.

#### Wetlands

Developers of solar projects typically seek to site their projects on land that is as flat and clear of trees as possible, with good southern exposure. For ease of development, they, as well as wind developers, prefer to deal with landowners who own large, contiguous tracts of land.

<sup>15</sup> Marie J. French, *Challenges Loom for Cuomo's Environmental Promises*, POLITICO (Dec. 2, 2017, 5:01 AM EST), <https://www.politico.com/states/new-york/albany/story/2017/12/07/challenges-loom-for-cuomos-environmental-promises-135419>.

<sup>16</sup> 2011 N.Y. Laws ch. 388. For brevity, the Power NY Act of 2011 will be referred to as "Article 10," since it was later codified at Public Service Law, Article X.

<sup>17</sup> N.Y. PUB. SERV. LAW § 162.

<sup>18</sup> 16 N.Y.C.R.R. §§ 1000.1–1002.4.

<sup>19</sup> Press Release, Governor Andrew M. Cuomo, Governor Cuomo Signs Power NY Legislation (Aug. 4, 2011), <https://www.governor.ny.gov/news/governor-cuomo-signs-power-ny-legislation>.

<sup>20</sup> French, *supra* note 15 (stating that some of the State's environmental goals are in danger of not being realized); Marie J. French, *Group Outlines Renewable Siting Challenges, Solutions Facing State*, POLITICO (Feb. 28, 2019), <https://www.politico.com/states/new-york/albany/story/2019/02/28/group-outlines-renewable-siting-challenges-solutions-facing-state-877871> (noting that "while the Article 10 process is meant to take an estimated two years, pending projects are well behind that schedule"); Marie J. French, *Slow Pace of Energy Efficiency May Imperil Cuomo's Green Goals*, POLITICO (Dec. 14, 2017, 5:01 AM EST), <https://www.politico.com/states/new-york/albany/story/2017/12/14/slow-pace-of-energy-efficiency-may-imperil-cuomos-green-goals-144994> (noting same); Marie J. French, *Solar Market Worries*, POLITICO (Jan. 23, 2019), <https://www.politico.com/states/new-york/newsletters/politico-new-york-energy/2019/01/23/solar-market-worries-165846> (explaining that in order to meet New York's aggressive clean energy goals, the State must install about 1 gigawatt of solar energy per year but that so far "the State has installed about a gigawatt of solar capacity in total" and was on pace to install only 300 additional MW of solar in 2018).

<sup>21</sup> Letter from Alliance for Clean Energy New York, Inc. to Governor Andrew M. Cuomo (Jan. 8, 2019) (on file with authors).

<sup>22</sup> Letter from Environmental Organizations to Chairman John B. Rhodes (Apr. 22, 2019) (on file with authors). Signatories to the letter were Audubon New York, Catskill Mountainkeeper, Citizens Campaign for the Environment, Clean Coalition, Catskill Mountainkeeper, Natural Resources Defense Council, New York League of Conservation Voters, NY-GEO, Pace Energy and Climate Center, Sierra Club, and The Nature Conservancy in New York.

If this land recipe sounds like a farm would be an ideal host for such a project, it is. Adding to the factors making farmland desirable for the siting of a large-scale project is the challenging economic reality of farming in the United States in the 21st century. It goes without saying that the financial pressures facing the family farm in recent years have seriously eroded the historical practice of successive generations keeping the family farm in business. Stated simply, dwindling income and soaring expenses are the primary culprits behind the disappearing family farm.<sup>23</sup>

The kind of land that is typically used for growing crops—flat, open fields—often contains wet areas that may, once no longer used for agricultural operations, fall into the regulatory jurisdiction of the New York State Department of Environmental Conservation (DEC) or the U.S. Army Corps of Engineers (Corps).

In the wet Northeast, a significant percentage of the land that is suitable for development of renewable power projects may contain areas that could be classified as wetlands. Although DEC has historically mapped these areas, those maps are generally not current. As a consequence, developers of renewable power who seek to site utility-scale projects on agricultural lands are frequently required to perform a full field delineation of the prospective project site. Since many of these projects involve a project study area that comprises several hundred acres (or more depending on the size of the project), the time invested in field wetland surveys can be quite substantial. Adding to the burden is the fact that wetland surveys generally cannot be performed between the months of November and March.

In addition to the timing concerns associated with the delineation of wetlands, developers are constrained by the need to design the project layout so as to avoid, to the maximum extent practicable, the presence of jurisdictional wetlands. The layout must take into account DEC or Corps concerns and potential local restrictions while still encompassing enough area to meet the project's sizing requirements and to allow for ease of interconnection to the electric grid.

#### *R/T/E Species*

Renewable energy developers can face demands by DEC for a dizzying array of wildlife studies. This is true regardless of whether the developer proposes to use undeveloped land or land that has long been used for crop production. Considering that crop land is typically managed fairly aggressively year-to-year through mechanized tilling, application of fertilizers and pesticides, and cultivation, DEC's demand for multi-season studies aimed at determining whether an agricultural site is being used as wildlife habitat might be considered overly burdensome.

Since renewable energy developers generally prefer open land, most potential project sites almost exclusively comprise land that has been under active crop cultivation or haying operations. There are relatively few species that will tolerate the intensity of human activity attendant to such agricultural activities. Yet it is commonplace for DEC wildlife biologists to demand that project applicants commit substantial time and money for consultants to perform studies to prove what DEC staff may already suspect—namely, that land under active crop production does not contain habitat for protected wildlife.

Renewable energy developers are frequently frustrated by the delays and higher costs that these studies create for projects, particularly because they often produce results that are predictable. However, because developers likely wish to avoid protracted disputes with regulatory agencies, they often feel captive to the process.

#### *Farmland*

Juxtaposed with the concerns of DEC, which seeks to minimize impacts to wetlands and areas that may support wildlife habitat, the New York State Department of Agriculture and Markets (DAM) consistently takes issue with the siting of renewable energy projects on farmland. According to DAM, farmland that is utilized for a renewable energy project is considered "permanently converted" to non-agricultural use. As a result, DAM seeks to push projects out of cropland areas and into areas that the farmer is not utilizing for agricultural production, such as forested areas and lands that are too wet to support crop production.

DEC and DAM thus approach the issue of project site selection from seemingly diametrically opposed, irreconcilable positions. Because land that has been cultivated for crop production will, generally speaking, not be a habitat-rich environment, DEC would raise fewer objections to the siting of a project on that land. However, contrary to DAM's preference for siting projects in forested areas, DEC can be expected to raise a host of concerns about siting in such areas due to the possibility that they serve as habitat for protected species (e.g., the Northern Long-Eared Bat) and would result in significantly more clear-cutting than necessary if the project was sited on already cleared cropland.

There is no middle ground. DEC's and DAM's objectives are at war, and it is the project developer who is caught in between.

Furthermore, irrespective of any financial pressures that the farmer may be facing due to an array of factors that make farming a risky and speculative venture (e.g., extreme weather, crop failures, declining commodity prices, rising costs, labor shortages, etc.), DAM takes the position that farmers should not permit their land to be used to produce energy. This position

<sup>23</sup> See Siena Chrisman, *American Farmers Are in Crisis*, EATER (Sept. 14, 2018), <https://www.eater.com/2018/9/14/17855080/american-farmers-crisis-trade-war>; Roberto A. Ferdman, *The Decline of the Small American Family Farm in One Chart*, WASH. POST (Sept. 16, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/09/16/the-decline-of-the-small-american-family-farm-in-one-chart/>; Lela Nargi, *What's Behind the Crippling Dairy Crisis? Family Farmers Speak Out*, CIVIL EATS (Nov. 5, 2018), <https://civileats.com/2018/11/05/whats-behind-the-crippling-dairy-crisis-family-farmers-speak-out/>.



frustrates farmers who feel they should have the ultimate say in how their land should be utilized.

Indeed, a growing number of farmers are looking to solar as a way of preserving their farms' financial viability and preventing the farms from succumbing to these economic pressures. Many farmers that have participated in renewable projects speak glowingly of the decision to do so.<sup>24</sup> For example, the economic plight of the farmer is well-described in remarks by a farmer in an article published in the *Buffalo News* in August 2018: "We got a choice: plant corn and lose \$300 an acre or do nothing and get \$1,500 an acre. . . ."<sup>25</sup>

The lease payments that rural landowners can expect to obtain from renewable energy projects are generally far greater, with far less risk, than the landowner can expect to derive from agricultural uses. Farmers are siding with the developers, pointing out the reality of present-day farming: it's not profitable. As farmers in the Hudson Valley explained when asked why they turned to solar energy to develop an additional source of income:

Most farmers that are working farmers can't just farm and they need to do something else and make money. . . . I have a perfect location . . . . We have 50 acres open field with no trees, and I'd really like to do it. I could probably supply enough power to generate enough power for the whole town [sic]. . . .

It's extra income. . . . I thought it would be a good opportunity for some clean tech and possibly make some money.<sup>26</sup>

Often the lease payments from renewable generation projects are the only thing keeping the farmer in business and the land from being sold and developed for less environmentally friendly uses. As one Orange County farmer said, "Twenty acres is being used for . . . solar. That keeps 220 open for agriculture, and not houses."<sup>27</sup>

DAM's position creates unnecessary obstacles and resistance to the Article 10 applicant. DAM's stance is particularly confounding, considering the State's avowed interest in spurring the growth of utility-scale renewable power projects. Moreover, considering that the state's agricultural sector has much to lose if climate change continues unabated, DAM's position would seem to be at odds with the State's interest in encouraging the development of these projects.

#### *Interconnection Issues*

Making matters worse for developers is the scarcity of interconnection lines across the state to allow renewable generation

projects to connect to the electric grid. As a result, a significant amount of land is completely foreclosed from development because it is simply too remote from the available points of interconnection.

In addition, while NYISO (at the behest of stakeholders) has made great efforts to streamline and improve the interconnection process to reduce the project queue, the process is still prolonged and cumbersome. In fact, the NYISO is currently engaging stakeholders in a comment process to further streamline the interconnection process and avoid a repeat of the issues faced in reviewing and approving the 2017 Class Year. The review for those projects is still ongoing and has taken an additional year beyond the anticipated timeline for completion.

#### *Visual Impacts and Local Community/NIMBY Concerns*

Nearly any survey conducted in the last few years will show broad public support for renewable energy. There seems to be no shortage of people who identify with and support environmental causes. Perhaps nowhere is this more evident than when asked whether we need to depend less on fossil fuels and more on renewable energy. Standing in stark contrast to the public's general support for renewable energy, however, is the fact that renewable energy projects, regardless of proposed location, seem never to fail to engender opposition from local residents. Everyone wants to support the development of renewable energy, as long as it is sited somewhere else, which frustrates and hampers renewable energy developers who are willing to put capital at risk in order to construct and operate these projects that are the keystone to the transition from fossil fuels.

Opponents of wind and solar projects often decry the fact that these projects, while delivering emissions-free, sustainable power, can present visual impacts that may defy even the best-designed mitigation efforts. There is little room for debate that a wind or solar project may be more visible to more people than would a traditional power plant of corresponding power capacity. Stated simply, it is an inescapable fact that to quickly address climate change it will be necessary to accept trade-offs and compromises. Without a more flexible approach, we are consigned to a future filled with uncertainty, or worse. The stakes are extremely high.

Much has been written about the dire consequences of failing to successfully tackle climate change. While some may dismiss these predictions as exaggerated or hyperbolic, there is universal acceptance that the impacts will be severe, that they will be felt planet-wide, and that certain populated portions of Earth will be rendered uninhabitable. This point is made quite convincingly by

<sup>24</sup> Mark Flach, *My View: Solar Saves Farms*, HUDSONVALLEY360 (July 31, 2018, 11:55 AM), <https://www.hudsonvalley360.com/article/my-view-solar-saves-farms>; *Upstate Farms Contributing to Gov. Cuomo's Ambitious Plan For Renewable Energy Sources*, CBS NEW YORK (Mar. 19, 2019), <https://newyork.cbslocal.com/2019/03/19/solar-dairy-farms-orange-county-westtown-solar-energy/>.

<sup>25</sup> Thomas J. Prohaska, *Wanted: Niagara County Farmland, Space for Solar Panels*, BUFF. NEWS (Aug. 18, 2018), <https://buffalonews.com/2018/08/18/solar-power-promoters-looking-for-niagara-county-farmland/>.

<sup>26</sup> Amy Wu, *Solar Projects Surge: Landowners Reaching for the Sun, Savings*, POUGHKEEPSIE J. (May 5, 2018, 2:04 PM), <https://www.poughkeepsiejournal.com/story/tech/science/environment/2018/05/02/solar-energy-renewables/438026002/>.

<sup>27</sup> *Upstate Farms Contributing to Gov. Cuomo's Ambitious Plan For Renewable Energy Sources*, *supra* note 24.

350.org founder, Middlebury College professor and author Bill McKibben in a 2018 article in the *New Yorker*, “How Extreme Weather is Shrinking the Planet.”<sup>28</sup>

Without question, it is reasonable to expect renewable energy developers to mitigate visual impacts, but the expectations of what can be considered “reasonable mitigation” must be viewed through the lens of the alternative to constructing these projects. In other words, if we refuse to accept that these projects entail a degree of unavoidable visual impacts, the Article 10 process becomes overly focused on issues that cannot be avoided.

Opposition to solar energy projects, while perhaps less virulent than the kind of opposition that wind projects may generate, is nonetheless a serious concern of project developers and investors. According to a 2011 report issued by the U.S. Chamber of Commerce, “Project No Project,” roughly 45% of challenged renewable energy projects across the nation in the period covered by the study were delayed or stopped due to “not in my back yard” (NIMBY) activism.<sup>29</sup> In fact, in many instances developers conduct extensive due diligence to select potential project locations in municipalities that support renewable energy development (through the adoption of comprehensive plans and ordinances), only to later have those same municipalities impose moratoriums and adopt unfavorable modifications to their laws that severely hamper, limit, or outright prohibit development.

### DPS Acknowledgement of Problems

New York regulators themselves recognize that criticism of the Article 10 process is valid. Last October, Sarah Osgood, the Director of Policy Implementation at the New York State Department of Public Service (DPS), acknowledged the need to improve the process for utility-scale energy projects, saying it needs to become “frictionless.”<sup>30</sup> Acknowledging that the process is not serving the governor’s clean energy agenda well, Ms. Osgood said:

We need to have a rigorous and comprehensive application and Review process but—and this is I think a very big but—the process must work. Hard stop. It must work. It needs to

be as frictionless and smooth as possible, and we’re moving in that direction but we clearly have work to do.<sup>31</sup>

Ms. Osgood further stated:

We need to improve communication generally among the development community and the local communities that may not be aware of potential benefits or negative impacts from the project... Really we’re looking to provide clarity to the process, establish more general standards ... (and) make it easier for all the parties to understand what’s in the application.<sup>32</sup>

Finally, in apparent recognition of the conflicting DAM and DEC positions, Ms. Osgood said: “Given where we are with our current resources, we see a need to better coordinate with our sister agencies ... and make sure we appropriately capture the position the state is taking.”<sup>33</sup>

### Renewable Energy Projects Under SEQRA

Article 10 is the exception to the rule that development projects are subject to environmental review under the State Environmental Quality Review Act (SEQRA).<sup>34</sup> Thus, SEQRA will govern the review of all but the very largest renewable energy projects (those over Article 10’s 25 MW threshold). Most renewable energy projects being reviewed under SEQRA are solar projects since very few, if any, wind energy projects fail to meet the Article 10 threshold of 25 MW. Conversely, most solar projects fail to reach the Article 10 threshold and are reviewed pursuant to SEQRA.

Under SEQRA, the local land use board (generally speaking, the local planning board) is responsible for conducting an environmental analysis of a project before it can be approved. This local board will assume the role of lead agency,<sup>35</sup> meaning it is principally responsible for undertaking, funding, or approving the proposed project and is responsible for determining the scope of review that is required before a final determination of approvability can be rendered.

The planning board will typically determine whether the project requires site plan approval, a special use permit, a

<sup>28</sup> Bill McKibben, *How Extreme Weather Is Shrinking the Planet*, NEW YORKER (Nov. 16, 2018), <https://www.newyorker.com/magazine/2018/11/26/how-extreme-weather-is-shrinking-the-planet>.

<sup>29</sup> STEVE POCIASK & JOSEPH P. FUHR, JR., PROJECT NO PROJECT—PROGRESS DENIED: A STUDY ON THE POTENTIAL ECONOMIC IMPACT OF PERMITTING CHALLENGES FACING PROPOSED ENERGY PROJECTS (Mar. 10, 2011), [https://www.uschamber.com/sites/default/files/pnp\\_economicstudy.pdf](https://www.uschamber.com/sites/default/files/pnp_economicstudy.pdf).

<sup>30</sup> Marie J. French, *Agency Changes Tone on Large-Scale Renewable Siting*, POLITICO (Oct. 10, 2018), <https://www.politico.com/states/new-york/newsletters/politico-new-york-energy/2018/10/11/state-shifts-on-article-10-121067>.

<sup>31</sup> French, *supra* note 30.

<sup>32</sup> Marie J. French, *Developers, State Policymakers Seek Improvements to Renewable Siting Process*, POLITICO (Nov. 15, 2018), <https://subscriber.politicopro.com/states/new-york/albany/story/2018/11/15/developers-state-policymakers-seek-improvements-to-renewable-siting-process-697983>.

<sup>33</sup> French, *supra* note 32.

<sup>34</sup> See N.Y. ENVTL. CONSERV. LAW art. 8; 6 N.Y.C.R.R. part 617.

<sup>35</sup> 6 N.Y.C.R.R. § 617.2(v).

variance, or other special authorization. To commence this process, the project proponent must complete either the long or short Environmental Assessment Form (EAF), depending on the type of action the project involves. Once a completed EAF is submitted, the lead agency will then make a determination of significance, determining whether the project will likely result in a significant adverse environmental impact. If that determination is negative, no further environmental review is required, and the lead agency can approve the project, generally with a formal resolution supported by a reasoned negative declaration.

If the lead agency determines that the solar project may have a significant adverse impact on the environment, it will issue a positive declaration, triggering the requirement to prepare a full environmental impact statement (EIS). An EIS is a significant undertaking, necessitating a range of studies and analyses. Under DEC's recent revisions to the SEQRA regulations, scoping of the issues to be addressed by the EIS is mandatory.<sup>36</sup>

Generally speaking, very few solar projects that fall below the Article 10 size threshold result in lead agency issuance of a positive declaration. Unless there is something exceptional about the proposed project site, it would be rare for a lead agency to issue a positive declaration for the common small-scale solar project. Local municipalities that have failed to place restrictions on the siting of a solar project may resort to a positive declaration as a means of discouraging the project, or as a means of exerting greater control over the applicant. Either way, such an unusual occurrence generally sends a message to the applicant that they may be in for a rough time.

Unlike the Article 10 process, a SEQRA review can generally result in an expeditious outcome, with the entire process being measured in months, rather than years. Further, a SEQRA review can be much more streamlined than the Article 10 process, which requires a lengthy pre-application process typically lasting at least nine months and submission of a detailed application, followed by what may include a prolonged process of stipulations and an adversarial hearing (and possibly rehearing) before hearing examiners from both DEC and DPS. By contrast, the applicant in a SEQRA process deals directly with the lead agency in a less formal way, conforming the project to address the lead agency's issues, ideally leading to final approval.

SEQRA is not without its challenges, however. Critics have long complained that the process is subject to abuse by hostile lead agencies and can be lacking in transparency. DEC's 2018 revisions to its SEQRA regulations sought, among other purposes, to limit the ability of a lead agency to delay review of projects or to raise new issues with the apparent purpose of stringing applicants along. However, while DEC attempted to address widespread concern that SEQRA was frequently being used as a tool of delay and hindrance, the agency has no role in

overseeing local governments' implementation of SEQRA on the local level. DEC explicitly acknowledges this in its *SEQRA Handbook*.<sup>37</sup> As a result, a project developer stymied by a lead agency endeavoring to erect barriers to project approval is left to respond to bad-faith implementation of SEQRA through what most would consider the unattractive recourse of litigation, or even project abandonment.

Experienced attorneys who successfully guide projects through the array of legal hoops that may stand between a project proposal and its ultimate approval may be able to smooth the path to approval through what we refer to as "advance diligence." By advance diligence, we mean the process of engaging with officials before the formal commencement of project review. It can be immensely helpful to take the time to better understand the objectives of those who hold approval authority over a project and to develop conceptual attributes that may be able to address those concerns and facilitate a smoother process of project approval. Unfortunately, there is no guarantee that even the best-laid plans, buttressed by proactive engagement, will result in a favorable outcome.

## Recommendations and Conclusions

If New York is to reach the CES and CLCPA targets, significant improvements must be made to the Article 10 process. Since the new Article 10 process was finalized in 2012, only one utility-scale renewable energy project has been approved. With 2030 now just 11 years away, there is precious little time to implement changes that will ensure that many more of these renewable projects are sited, constructed, and placed in service.

In addition to the suggestions for improvement proposed by ACE NY in its January 2019 letter to the Governor, we suggest the following:

1. Dedicate sufficient resources to Article 10 statutory agencies with primary review responsibilities (DPS, DEC, and DAM) to enable project reviews to proceed more quickly.
2. Impose firm time deadlines, for all stages of the Article 10 process, on reviewing agencies to improve processing times.
3. Impose limits on the ability of reviewing agencies to raise issues not raised in response to the Preliminary Scoping Statement. This change would be similar to DEC's recent revision to the SEQRA regulations limiting lead agencies' ability to raise new issues beyond those originally scoped.
4. For projects proposed to be sited on lands currently in agricultural use, establish a presumption that the site will

<sup>36</sup> 6 N.Y.C.R.R. § 617.8(a).

<sup>37</sup> DEC, *The SEQRA Handbook*, Fourth Edition (Draft) 13 (Jan. 2, 2019), [https://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/dseqrhandbook.pdf](https://www.dec.ny.gov/docs/permits_ej_operations_pdf/dseqrhandbook.pdf) ("DEC has no authority to review the implementation of SEQRA by other agencies.").



return to agricultural use post-decommissioning, meaning that the project proponent shall not be required to conduct natural resources studies that would not be required of an active agricultural operation.

5. Direct DEC to rely exclusively on the inventory of freshwater wetlands mapped pursuant to Article 24 of the Environmental Conservation Law in determining requirements for development of specific renewable energy sites. National Wetlands Inventory (NWI) maps may be used to supplement State-mapped wetlands, but only insofar as NWI wetlands maps may implicate non-duplicative federal requirements.
6. Direct DEC to develop a general permit for freshwater wetlands that will establish standard practices for all renewable energy projects, regardless of size, on sites that contain mapped wetlands.
7. Direct the commissioners of Article 10 statutory agencies to identify and implement opportunities to expedite project reviews.
8. Identify and implement standards for all agreed-upon (or non-controversial) environmental issues in order to limit the adjudicatory proceeding to necessary issues.
9. When necessary, be prepared to overrule local laws to allow for siting and construction of renewable projects.

Legitimate debate over climate change is essentially over. It is real and it is with us. The only question remaining is how to limit its effects. The community of scientists have spoken with one voice: we must significantly limit our contribution of greenhouse gases without delay.

With the enactment of the Climate Leadership and Community Protection Act, New York has established itself as the national leader of climate change action. Maintaining this leadership position and ensuring that its objectives will actually be realized will require bold steps involving compromise and trade-offs.

Those opposed to accepting trade-offs should consider the fact that unless compromises are made, and made quickly, the continuing progression of climate change will impose a far more dire set of circumstances that will quickly dwarf the scope and magnitude of compromise necessary for the deployment of renewable energy projects.

It would not be melodramatic to suggest that without rapid action to address climate change, we face an uncertain future. With the necessary changes to address siting challenges faced by renewable energy developers, New York can site the projects needed to make the State's ambitious climate goals a reality.

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## LEGAL DEVELOPMENTS

### ASBESTOS

#### Federal Court Granted Emergency Remand Motion in Talcum Powder Personal Injury Case

The federal district court for the Northern District of New York granted a plaintiff's emergency motion to remand a personal injury action alleging that the defendants' cosmetic talcum powder products were contaminated with asbestos. The defendants removed the action to federal court after a talc supplier that previously was a defendant filed for bankruptcy. The talc supplier had been dismissed from the action on the ground that it only began supplying talc to the other defendants in 1989, years after the plaintiff's alleged period of exposure. The federal court concluded that equitable remand under 28 U.S.C. § 1452(b) was appropriate, as was permissible abstention under 28 U.S.C. § 1334(c), both of which pertain to cases arising under the Bankruptcy Code or arising in or related to a case under the Bankruptcy Code. The federal court noted that the defendants had removed the case within the applicable timeline and was also persuaded that the personal injury case was "related to" the bankruptcy proceeding despite the talc supplier's dismissal from the state action. The court also said the plaintiff cited no cases in support of her argument for mandatory abstention. The court found, however, that a balancing of factors weighed in favor of remand, particularly a factor that considered prejudice to the party involuntarily removed from state court. The court dismissed the defendants' motion for a stay as moot. *Lalima v. Johnson & Johnson*, 2019 U.S. Dist. LEXIS 96899 (N.D.N.Y. May 24, 2019).

#### DEP Asbestos Inspector Pleaded Guilty to Taking Bribes

On June 4, 2019, New York Attorney General Letitia James and New York City Department of Investigation Commissioner Margaret Garnett announced the guilty plea of an inspector with the New York City Department of Environmental Protection (DEP). The inspector admitted that he had accepted bribes from an asbestos abatement contractor in exchange for using his position for the benefit of the contractor. The defendant, who had been a DEP inspector since 1990, gave the contractor advance notice of DEP inspections at the contractor's jobsites, ignored asbestos removal violations at the jobsites, and referred business to the contractor. He pleaded guilty to charges of Bribe Receiving in the Second Degree, a Class C felony; Bribe

Receiving in the Third Degree, a Class D felony; Offering a False Instrument for Filing in the First Degree, a Class E felony; and two counts of Official Misconduct, an A misdemeanor. He was sentenced to conditional discharge and must pay \$15,000. *People v. Nebedum*, Indictment No. 673/2019 (Sup. Ct. Queens County June 4, 2019).

## CLIMATE CHANGE

### Appellate Term Rejected Necessity Defense for Power Plant Protesters

The Appellate Term, Second Department affirmed a defendant's convictions for disorderly conduct in connection with his obstructing vehicles from entering a power plant construction site. The appellate court agreed with the trial court that the defendant failed to meet the requirements to establish the justification by necessity defense. In particular, the appellate court agreed that the defendant's actions, "planned in advance with the stated intention of drawing attention to the issue of global warming, cannot be considered to have been reasonably calculated to actually prevent any harm presented merely by the construction of the power plant." The Appellate Term also rejected the defendant's definition of "imminent" as extending beyond immediacy to refer to harms that are certain to occur. The court said caselaw did not support such a definition. The Appellate Term noted that it was not reaching the issue of whether "the threat of global warming was of such gravity that the desirability and urgency of avoiding this threat outweighed the injury sought to be prevented by the disorderly conduct statute." The court also affirmed the disorderly conduct convictions of five other defendants. *People v. Cromwell*, 2019 N.Y. Misc. LEXIS 3186 (N.Y. App. Term June 13, 2019).

### State Supreme Court Dismissed Exxon's Defenses Accusing Attorney General's Office of Misconduct in Climate Change Fraud Action

At a hearing on June 12, 2019, the Supreme Court, New York County dismissed affirmative defenses related to alleged conflicts of interest and official misconduct in the New York Attorney General's climate change fraud action against Exxon Mobil Corporation (Exxon). The court reserved its decision on Exxon's defense of selective enforcement pending submission of additional documents. The court directed the parties to submit three-page letters on potential depositions of Office of Attorney General (OAG) staff. In addition, the court granted OAG's motion to seal certain emails between OAG attorneys and a third-party attorney. The court also addressed a dispute over access to former Attorney General Eric Schneiderman's personal email account, which Exxon alleges was used to conduct official business relevant to Exxon's defenses. The court directed OAG to provide "a less carefully worded statement" to provide confidence "that anything that was official business or related to this investigation was made available"

to Exxon "via communications sent by Mr. Schneiderman to his official account." *People v. Exxon Mobil Corp.*, Index No. 452044/2018 (N.Y. Sup. Ct. June 12, 2019).

## ENERGY

### Federal Court Dismissed Two of Three Claims in Solar Development Dispute, Included Anti-SLAPP Claim

The federal district court for the Northern District of New York dismissed a plaintiff solar energy developer's anti-SLAPP (Strategic Lawsuit Against Public Participation) claim for damages against competing solar developers. The court also dismissed a Town of Dryden landowner's fraud counterclaim against the plaintiff. The plaintiff's breach of contract claim against the landowner remained pending. The plaintiff claimed that the landowner breached an agreement that gave the plaintiff an exclusive option to lease a 15-acre parcel that was part of a bigger 157-acre parcel that the landowner subsequently leased to one of the defendant solar developers. After the plaintiff contacted the Town of Dryden in connection with the competing developers' application to obtain approvals for a solar farm, the competing solar developers filed a state lawsuit against the plaintiff asserting claims that included tortious interference with a contract (although this claim was voluntarily dismissed). The federal court concluded that the plaintiff failed to state an anti-SLAPP claim for several reasons. First, the plaintiff—which alleged that it had contacted the Town Supervisor asking that action on the competing developers' permit application be delayed until the parties' business dispute was resolved—did not allege that it made a "direct" challenge to the defendants' application. Second, the court said the plaintiff was "hardly the sort of public-interest group that the New York legislature intended to protect with the Anti-SLAPP statute." Third, the court noted that the plaintiff's filing of its anti-SLAPP claim in federal court rather than as a counterclaim in the state action was "less in line with a public-interest entity trying to oppose a project the group deems harmful to the community and more in line with savvy business litigation seeking to protect business interest and cause complications and increase cost to a competitor." The court said the anti-SLAPP statute, which is to be construed narrowly, "was not designed to serve that purpose." The court also concluded that the landowner's allegations that a representative of the plaintiff misrepresented the lease option agreement as nonbinding did not state a claim for fraud because the landowner failed to allege damages. *Dynamic Energy Solutions, LLC v. Pinney*, 2019 U.S. Dist. LEXIS 77579 (N.D.N.Y. May 8, 2019).

### Court of Appeals Upheld Public Service Commission's Imposition of ESCO Price Cap

The New York Court of Appeals unanimously held that the Public Service Law authorizes the New York State Public Service Commission (PSC) to condition energy service

companies' (ESCOs') access to public utility infrastructure on the capping of prices charged by ESCOs for electricity. After finding that ESCOs were generally charging residential and small-scale customers higher prices than the prices charged by utilities, the PSC issued an order requiring that ESCOs' prices be no more than the prices charged by public utilities unless 30% of the energy was derived from renewable sources. Although the Court of Appeals rejected the argument that ESCOs were "gas corporations" or "electric corporations" subject to the PSC's direct rate-making authority, the court concluded that the PSC could require compliance with the price cap using its authority to regulate utilities' transportation of ESCOs' gas and electricity. The court called the authority to determine the terms and conditions of ESCOs' eligibility to purchase delivery services a "necessary corollary" of the PSC's authority to regulate utilities' delivery of ESCOs' energy. The court also observed that the legislature had "expressly recognized the PSC's authority to regulate ESCOs' eligibility to access public utilities' infrastructure" in a provision of the General Business Law that preserved the PSC's existing authorities to suspend ESCOs' eligibility. The court said the provision would be "meaningless" if the PSC lacked such authority in the first place. *Matter of National Energy Marketers Association v. New York State Public Service Commission*, 2019 N.Y. LEXIS 1356 (N.Y. May 9, 2019). [Editor's Note: This case and a related proceeding have previously been covered in the October 2016, November 2017, and February 2019 issues of *Environmental Law in New York*.]

## HAZARDOUS SUBSTANCES

### Federal Court Said North Tonawanda Residents Failed to Allege Causation in Landfill Lawsuit but Found Sufficient Allegations of Town's "Deliberative Indifference"

The federal district court for the Western District of New York granted motions to dismiss a lawsuit brought by current and previous owners and renters of residential properties in North Tonawanda to recover damages for alleged exposure to toxic and hazardous substances released from a Town of Wheatfield landfill. The court agreed with the defendants that allegations in the plaintiffs' amended complaint "remain vague and conclusory" and failed to allege a plausible connection between contaminants and a condition suffered by a plaintiff. Although the court said a "high degree of specificity is not required," it found that the plaintiffs' causation theory "remains wholly speculative." The court also found that the plaintiffs failed to allege that each named plaintiff incurred response costs. The plaintiffs therefore failed to state a cost recovery claim under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). In addition, the court found that the plaintiffs' contribution and declaratory judgment claims under CERCLA failed. Because the plaintiffs' allegations in support of their trespass claim were conclusory, the court dismissed that claim as well. Although the plaintiffs' claims against the Town of Wheatfield

under 42 U.S.C. § 1983 failed due to the plaintiffs' failure to allege causation, the court did find that the plaintiffs' allegations were sufficient to assert a claim of "deliberative indifference" under *Monell*. The court found the complaint adequately alleged both that the Town arranged for the deposit of hazardous industrial waste at the landfill and that the Town was aware of the risks the site posed, deliberately ignored the risk, took steps to conceal it, was aware that the site could contaminate neighboring properties and that the site was used for recreational purposes, and nonetheless failed to notify neighbors of the site's risks. *Andres v. Town of Wheatfield*, 2019 U.S. Dist. LEXIS 103699 (W.D.N.Y. June 13, 2019). [Editor's Note: This case was previously covered in the February 2018 issue of *Environmental Law in New York*.]

### Federal Court Denied Corning Property Owners' Motions to Amend Complaint and for Immediate Appeal of Dismissal of State Law Claims

The federal district court for the Western District of New York denied a motion by property owners in the City of Corning to amend their complaint to re-assert a negligence claim against Corning Incorporated (Corning) and other defendants for allegedly causing contamination of the plaintiffs' properties. The court dismissed the negligence claim and other state law claims in December 2018. The court found that the plaintiffs' proposed amended complaint "does little but add a few conclusory allegations" that the defendants knew or should have known that materials deposited in the area at issue contained hazardous substances. The court said the negligence claim could not proceed "on the basis of conjecture, based on a few scraps of information, or broad, conclusory allegations about what was 'generally known' in the past." The court noted that there was no dispute that Corning "eventually became aware that materials it deposited many years earlier . . . contained hazardous substances" but that no facts were alleged to support an inference that Corning knew of the contamination but failed to disclose it. The court also found that the plaintiffs did not allege facts in support of their allegation that Corning had an "enhanced duty" to them. The court also denied the plaintiffs' motion for entry of final judgment on the dismissed claims. The court concluded the dismissed claims were "closely related" to the remaining CERCLA claim, which the court had stayed pursuant to the doctrine of primary jurisdiction. The court concluded that "[n]o good purpose would be served by allowing an immediate appeal" from dismissal of the state law claims. *Read v. Corning Inc.*, 371 F. Supp. 3d 87 (W.D.N.Y. 2019). [Editor's Note: This case was previously covered in the March 2019 issue of *Environmental Law in New York*.]

### State and Chemical Manufacturer Reached Settlement for Cleanup of Pesticide Plant in Middleport

On June 7, 2019, Governor Andrew M. Cuomo announced that New York had reached a settlement with FMC Corporation (FMC) to clean up arsenic and other contamination associated



with the company's 103-acre pesticide formulation and packaging plant in the Village of Middleport. The settlement is embodied in a consent order that replaces a 1991 Administrative Order on Consent with the U.S. Environmental Protection Agency. The new consent order requires cleanup of on-site and off-site contaminated areas as well as FMC's reimbursement of \$31 million in costs incurred by the State for cleanup activities through the end of the 2018. In addition, FMC must reimburse the New York State Department of Environmental Conservation (DEC) for up to \$15 million per year in 2019 and 2020 for costs incurred to clean up surrounding residential properties and a nearby school. FMC must also fund a \$1 million environmental benefit project and pay \$2.4 million in penalties. A portion of the penalties will be used for habitat restoration projects related to wildlife impacts caused by releases from the facility. FMC's other obligations under the consent order include funding an on-site environmental monitor, implementing a site management plan, upgrading the on-site wastewater treatment plant, expanding the groundwater collection system, and increasing financial assurance to \$80 million. Governor Cuomo called the case one of the largest environmental enforcement actions in State history.

## HISTORIC PRESERVATION

### **Appellate Division Affirmed That Owner of Cobble Hill Historic Properties Must Pay \$160,000 for Violating Settlement Requiring Repair**

The Appellate Division, Second Department affirmed a judgment enforcing a so-ordered stipulation of settlement against the owner of two properties within the Cobble Hill Historic District who had agreed to make certain repairs to the buildings by June and September 2014 to comply with his obligation under the landmarks law to maintain the properties "in good repair." The Second Department rejected the defendant's contention that it was impossible for him to comply with the stipulation due to circumstances beyond his control. The appellate court noted that the record showed that the defendant failed to apply for a building permit to complete the repairs even after the Supreme Court, Kings County granted him three extensions. The Second Department therefore affirmed the judgment of \$160,000 against the defendant, representing the \$150,000 fine plus \$1,000 for 10 weeks, as provided for in the stipulation. *City of New York v. Quadrozzi*, 171 A.D.3d 1009, 99 N.Y.S.3d 84 (2d Dept. 2019).

## LAND USE

### **Federal Court Dismissed Shopping Center Developer's First Amendment and Equal Protection Claims Against Town of Clarkstown**

The federal district court for the Southern District of New York again dismissed a shopping center developer's constitutional

claims against the Town of Clarkstown and its Town Board, Planning Board, and Supervisor (Town). The developer alleged that the Town had violated its Fourteenth Amendment equal protection and First Amendment rights and had coerced it into surrendering its First Amendment rights in exchange for discontinuance and conveyance of public roads necessary for continued development of the shopping center. The court previously dismissed a Fifth Amendment takings claim as time-barred and dismissed the other claims without prejudice to renew. In the instant opinion, the court determined that the equal protection claim was also time-barred because the developer did not allege violations of the Equal Protection Clause or acts taken in furtherance of a policy of discrimination during the statute of limitations period. Although the court concluded that a release would not bar the developer's First Amendment challenge and that the statute of limitations for the First Amendment claims would not begin to run so long as the restrictions that allegedly violated the First Amendment were still in effect, the court nonetheless found that the First Amendment claims failed on the merits. The court said the plaintiffs failed to state a facially plausible claim that they had been deprived of their right to petition. The court also held that the Town had not imposed an unconstitutional condition or exaction that burdened the right to petition. The court noted that the developer alleged that the Town had refused to grant a release on development restrictions unless the plaintiffs made millions of dollars in payments to the Town and made other concessions. The court further noted, however, that a claim that an exaction violated the First Amendment required allegations that the payment had already occurred. In the absence of a viable federal claim, the court declined to exercise supplemental jurisdiction over state law claims. *EklecCo NewCo LLC v. Town of Clarkstown*, 2019 U.S. Dist. LEXIS 85487 (S.D.N.Y. May 21, 2019).

### **Appellate Division Said Neighbors' Challenge to Construction of Home Was Barred by Laches**

The Appellate Division, Second Department ruled that the doctrine of laches barred a lawsuit brought by Town of Southampton residents seeking to block construction of a home on a neighboring property. The Second Department therefore reversed orders of the Supreme Court, Suffolk County granting the plaintiffs' motion for a preliminary injunction and denying the defendant's motion to dismiss. The Second Department noted that the plaintiffs—who asserted that the home violated the Town Code because it included a third story—filed their lawsuit three years after the building permit was issued and one of the plaintiffs withdrew an administrative appeal challenging the building permit; two years after the parties entered into a stipulation of settlement in which the plaintiff agreed the defendant could build a residence for which he had a permit or that otherwise complied with Town requirements; and six months after construction commenced. The court further found no indication in the record that the defendant had knowledge that the plaintiffs would reassert their claim that the construction violated the Town Code because the home had three stories. The court also



found that the defendant established he would be prejudiced by the plaintiffs' undue delay. In a separate decision, the court concluded that the plaintiffs had not breached the stipulation of settlement. The court said the stipulation did not preclude the plaintiffs from commencing an action based on their contentions that construction violated the Town Code. *Kverel v. Silverman*, 2019 N.Y. App. Div. LEXIS 4138 (2d Dept. May 29, 2019); *Kverel v. Silverman*, 100 N.Y.S.3d 89 (2d Dept. 2019).

### **Appellate Division Affirmed Determination That Coney Island Community Garden Was Not Parkland**

The Appellate Division, Second Department agreed with the Supreme Court, Kings County that New York City did not violate the public trust doctrine when it destroyed a community garden to build an outdoor amphitheater along the Coney Island boardwalk. The parcel at issue had been used as a community garden between 1997 and 2004 pursuant to a series of licenses under the GreenThumb program and had subsequently been used as a garden without the City's permission until the City developed the amphitheater. The Second Department found that the City respondents had shown that the City's actions and declarations "did not unequivocally manifest an intent to dedicate [the parcel] as parkland," that the City had permitted the garden to exist on a "temporary basis," and that any management of the parcel by the Department of Parks and Recreation "was understood to be temporary and provisional." The appellate court therefore affirmed the court below's determination that the parcel did not constitute parkland at the time it was alienated for use as an amphitheater. *Matter of Coney Island Boardwalk Community Gardens v. City of New York*, 2019 N.Y. App. Div. LEXIS 4143 (2d Dept. May 29, 2019).

### **DEC Commissioner Allowed Seasonal Store to Continue Operations Despite Encroachment on Forest Preserve Lands**

DEC Commissioner Basil Seggos concluded that the owner of a seasonal business that operated outside the entrance booth to the Northampton Beach public campground and day use area could continue to use the structure even though it encroached on State forest preserve lands. The store was built in the 1940s or 1950s and was originally thought to be on private property until a survey in 2002 revealed that a portion of the store and a covered patio were located on State lands. Given that the removal of the encroaching portion would impair the store's viability and have a significant financial impact, the Commissioner determined that the respondent could continue to operate the business on the condition that any transfer of the property, business, store, or other interest would require removal of the encroachment. The Commissioner also required the recording of an amended deed reflecting this condition. In addition, the respondent must remove certain additional encroachments within 120 days (three electrical outlets on wood posts, a PVC cleanout pipe, a section of fence, a concrete block fireplace, and portions of a storage building and a shed). *In re DeMeo*, 2019 N.Y. ENV LEXIS 28 (DEC

May 21, 2019). [*Editor's Note:* This proceeding was previously covered in the November 2016 issue of *Environmental Law in New York*.]

### **Court of Claims Denied Residential Owners' Claims for Vibration Damages Allegedly Caused by FDR Drive Reconstruction Project**

The New York Court of Claims denied claims against the State by the owner of a Sutton Square house built on the roof deck of FDR Drive on the East Side of Manhattan for property damage allegedly caused by the reconstruction of FDR Drive in the early 2000s. The court also denied claims by the owner and the owner of a neighboring property that the reconstruction project caused annoyance and discomfort. Applying an ordinary negligence standard to the claims for damages during the construction phase, the Court of Claims found that the vibration limits adopted by the State from the "prevailing national standard" and incorporated into the New York State Department of Transportation Design Manual were appropriate and that the State had discharged its duty to the claimants under that standard and even under a more conservative standard. The court rejected the owner's argument that the State had a heightened legal obligation to treat his property differently and also said that even if the owner could show that the State violated a mandatory vibration limit, it would still find the State acted reasonably because it was "very responsive" to the owner's complaints. The Court of Claims also agreed with the State that qualified immunity should apply to the State's highway design decisions. In addition, the court dismissed claims of public nuisance, breach of contract, and fraud. *Estate of Whitehead v. State*, 63 Misc. 3d 1226(A) (Ct. Cl. 2019).

### **State Supreme Court Denied Summary Judgment on Extinguishment of Restrictive Covenant on Greenburgh Property**

The Supreme Court, Westchester County found that issues of fact precluded judgment regarding whether a restrictive covenant prohibiting construction of a "tenement house or flat house so-called" on property in the Edgemont section of Town of Greenburgh was enforceable. The owner of the property sought to extinguish the covenant or have it declared unenforceable so that it could construct a 45-unit apartment building. An order of nuns that owned and had a convent on property traceable to the same subdivision sought summary judgment dismissing the complaint against it. The court rejected the plaintiff's arguments that the restrictive covenant did not run with the land and that the property had been released from the covenant. The court found, however, that triable issues existed with respect to factors relevant to its consideration of whether the restriction was "of no actual and substantial benefit" and should be extinguished. In particular, the court noted an absence of evidence on the extent of commercial development in the neighborhood; whether commercial development of a portion of the subdivision changed the character of the remaining 37 acres, which the

order claimed remained forested and rural; whether adjacent school facilities disturbed the residential and rural character; whether the use of the Greenburgh Nature Center affected the character; and whether the order's production of altar bread should be considered in violation of the covenant. *S & R Development Estates, LLC v. Town of Greenburgh*, 63 Misc. 3d 1224(A) (Sup. Ct. Westchester County 2019). [Editor's Note: A related federal case was previously covered in the November 2018 issue of *Environmental Law in New York*.]

## MINING

### Because Mine Operator Had Already Obtained Relief on Vested Rights Evidentiary Issue, Appellate Division Dismissed Appeal as Moot

The Appellate Division, Third Department dismissed as moot an appeal in which a mine operator raised the same evidentiary issue that the Third Department had resolved in an earlier appeal in the mine operator's longstanding dispute with the Town of Schoharie over the company's right to mine on property south of a quarry that had operated since the 1890s. The Town enacted a law in 2005 that prohibited mining in the zoning district in which the property was located and then enacted a similar prohibition in 2015 after a court annulled the 2005 law for noncompliance with the State Environmental Quality Review Act. The mine operator has asserted vested rights claims against the Town in connection with both the 2005 and 2015 laws. In an appeal concerning the 2005 law, the Third Department determined in February 2019 that the mine operator could have its nonconforming use rights evaluated as of the effective date of the 2015 ordinance rather than the date of the 2005 law because the 2005 law had subsequently been declared null and void. Evidence of efforts undertaken and expenses incurred by the mine operator between 2005 and 2015 was therefore relevant. In this appeal concerning the 2015 law, the Third Department stated that its February 2019 decision "makes clear that evidence regarding petitioner's intent postdating the enactment of [the 2005 law] may not be categorically precluded." The court therefore held that the instant appeal was rendered moot and must be dismissed. *Matter of Cobleskill Stone Products, Inc. v. Town of Schoharie*, 2019 N.Y. App. Div. LEXIS 5027 (3d Dept. June 20, 2019). [Editor's Note: A related case was been covered in the June 2019 issues of *Environmental Law in New York*.]

## OIL SPILLS & STORAGE

### DEC Commissioner Ordered Brooklyn and Manhattan Building Owners to Pay Penalties for Failing to Renew Tank Registration

DEC Commissioner Basil Seggos imposed \$5,000 civil penalties on the owners of buildings in Brooklyn and Manhattan for

failing to renew the registrations for petroleum bulk storage facilities before the prior registrations expired in 2017. In Brooklyn, the owner did not submit a registration application for the 1,500-gallon aboveground tank until October 2018 after failing to appear at the pre-hearing conference and adjudicatory hearing in this proceeding. The Manhattan building owners had not yet submitted registration applications and were directed to do so within 15 days. The Commissioner indicated that a \$5,000 penalty for a registration violation that lasted less than two years was appropriate based on DEC precedent. *In re 133-135 East 30th Street Corp.*, 2019 N.Y. ENV LEXIS 24 (DEC May 13, 2019); *In re 241 West 108 Ltd.*, 2019 N.Y. ENV LEXIS 26 (DEC May 21, 2019); *In re 558 Ralph Avenue Realty Inc.*, 2019 N.Y. ENV LEXIS 27 (DEC May 29, 2019).

## SEQRA/NEPA

### Appellate Division Affirmed Dismissal of Challenge to Greenburgh's Massage Establishment Law

The Appellate Division, Second Department affirmed the dismissal on standing grounds of a lawsuit challenging the Town of Greenburgh's local law to license massage establishments. A professional organization for massage therapists and a massage therapist who worked as a solo practitioner asserted claims that the law was preempted by state law and that the Town violated the State Environmental Quality Review Act and the Open Meetings Law. The Second Department said the individual massage therapist did not have standing because the local law exempted solo practitioners. Nor was there evidence in the record that any other member of the professional organization would have standing to sue. *Matter of American Massage Therapy Association v. Town of Greenburgh*, 2019 N.Y. App. Div. LEXIS 4980 (2d Dept. June 19, 2019).

### Appellate Division Said Town Failed to Adequately Analyze Sewer Easement Impacts on Wildlife and Surface Waters

The Appellate Division, Fourth Department ruled that the Town of Seneca Falls failed to take a hard look and provide a reasoned elaboration of the basis for its determination that acquisition of an easement for installation of a sewer line along a nature trail commemorating the women's rights movement would not have a significant impact on wildlife or surface water. DEC had informed the Town that certain endangered, threatened, or rare species were present on the project site. For the bat species, the Town reasoned that there would be no direct take because clearing of the trees in which bats roost would only take place during winter when the bats were hibernating in caves. For the other species, however, the Town merely noted their presence on the Environmental Assessment Form (EAF) and included only a "bare conclusion" that there would be no significant impact on them. The court found that hard look requirement of the State Environmental Quality Review Act (SEQRA) was

not satisfied. DEC also had made recommendations for avoiding impacts on surface water, including the stream corridor. The EAF noted that it would reroute the sewer main locations “to the extent practicable” to avoid impacts and would use directional drilling when rerouting was impracticable. The court noted that the Town indicated elsewhere that it would use directional drilling “when possible” but had not addressed how it would avoid impacts on the stream corridor when rerouting was impracticable and directional drilling was impossible. Nor had the Town concluded that such circumstances would not simultaneously exist. The court found that the setting forth of “general practices” for avoiding surface water and stream corridor impacts without analysis of whether implementation of the practices in this particular project would successfully avoid impacts did not satisfy SEQRA’s “reasoned elaboration” requirement. The negative declaration was therefore arbitrary and capricious. The court rejected challenges with respect to historic and archaeological resources; noise, odor, and light; and consistency with community character. *Matter of Frank J. Ludovico Sculpture Trail Corp. v. Town of Seneca Falls*, 2019 N.Y. App. Div. LEXIS 4599 (4th Dept. June 7, 2019).

#### **State Supreme Court Said Zoning Board’s Consideration of Materials Submitted After Hearing Warranted Nullification of Negative Declaration**

The Supreme Court, Nassau County annulled negative declarations issued by the Town of North Hempstead Board of Zoning Appeals for variances to construct an addition to a hospital. The court found that the BZA had improperly relied on materials submitted after the public hearing closed, including a response to the petitioner’s testimony at the hearing; additional information on sewer availability, traffic, sun shading devices, and other topics; and detailed explanations from the applicant in response to requests from the Town Department of Planning & Environmental Protection. The court said fairness required that the petitioner be given an opportunity to rebut this evidence. *Matter of Greentree Foundation v. Mammina*, Index No. 90/2019 (Sup. Ct. Nassau County June 17, 2019).

#### **State Supreme Court Said Town of Islip Complied with SEQRA for Expansion of Senior Citizen Development**

The Supreme Court, Suffolk County denied an Article 78 petition challenging the Town of Islip’s compliance with the State Environmental Quality Review Act in connection with approvals for the expansion of a senior citizen residential development. The lead agency issued a negative declaration for the project, which involved building 156 additional units. The court found that the Planning Board and Town Board took a hard look at the relevant areas of environmental concern and made a reasoned elaboration for approving a negative declaration. The court also found that the Planning Board and Town Board

considered all of the statutory factors and used the requisite balancing tests in their respective determinations approving the expansion project. *Matter of Blue Point Community Civic Association, Inc. v. Town of Islip*, 2019 N.Y. Misc. LEXIS 2975 (Sup. Ct. Suffolk County June 11, 2019).

#### **State Supreme Court Largely Rejected Challenges to Lake George Boat Storage Facility but Remanded for Additional SEQRA Review**

The Supreme Court, Warren County remanded a site plan application for a boat storage facility to the Village of Lake George Planning Board for additional review under the State Environmental Quality Review Act (SEQRA) but otherwise rejected challenges to Village approvals for the facility. The court also rejected claims challenging a local law that allowed waivers from the Village’s Architectural Standards and Guidelines. With respect to the SEQRA review of the site plan application, the court found that although the Planning Board had attempted to review the impacts of the boat storage facility “as a whole” by also considering the applicant’s plans for outdoor boat storage on a neighboring parcel, the pending application did not contain sufficient information to support such a review. The court was not persuaded, however, by the petitioner’s other SEQRA arguments. First, the court said the Village Board appropriately classified the local law as an Unlisted action, completed a short environmental assessment form, and concluded that the law would not result in significant adverse impacts. Second, the court found that an area variance granted by the Zoning Board of Appeals was properly classified as an individual setback variance and therefore a Type II action. Third, the court found that SEQRA did not require a separate review for each individual waiver granted pursuant to the new local law. The court further indicated that “waiver requests—when considered apart from the application for site plan approval as a whole—arguably constitute Type II actions.” With respect to the petitioner’s non-SEQRA claims, the court found that the petitioner, who owned parcels adjacent to the project, had standing to challenge the new local law and that the challenge was ripe. The court rejected, however, the petitioner’s argument that the local law violated Village Law § 7-712-b by allowing the Planning Board (instead of the Zoning Board) to grant relief from dimensional and physical requirements. The court found that the local law was a proper exercise of the Village’s discretion to provide applicants with “two avenues to address their failure to comply” with such requirements. The court also found that the Zoning Board had properly granted a variance, that the failure to pay an application fee did not require annulment of the variance, that the record sufficiently supported both the granting of waivers under the new local law and the Planning Board’s determination that site plan review criteria were met, and that the project’s compliance with zoning was outside the Planning Board’s authority and therefore not properly before the court. *Matter of Carr v. Lake George Village Board*, 2019 N.Y. Misc. LEXIS 2734 (Sup. Ct. Warren County May 29, 2019).



## SOLID WASTE

### Federal Court Allowed Negligence Claim Against Landfill Operator, Dismissed Nuisance and Gross Negligence Claims

In a putative class action on behalf of owners/occupants and renters of residential properties within 2.5 miles of the High Acres Landfill and Recycling Center in the Village of Fairport, the federal district court dismissed public nuisance and gross negligence claims against the landfill's operator but allowed an ordinary negligence claim to proceed. The dismissals were without prejudice. The court said the plaintiff's allegations of a "mere possibility" of "substantial interference" with the public's right to clean air were not sufficient to state a claim for public nuisance. The court also found that the plaintiff failed to allege facts that would establish "an extreme departure from standards of ordinary care" or the absence of "even slight care or slight diligence," as would be necessary to sustain a gross negligence claim. The court was not persuaded, however, by the defendant's argument that the plaintiff's alleged diminution in property value constituted only "purely economic harm" and therefore was not recoverable under an ordinary negligence theory. The court distinguished the plaintiff's alleged damages as "stigma damages" that are recoverable because they result from "actual or imminent invasion of a landowner's property by a defendant's polluting conduct." The court also concluded that the Clean Air Act did not preempt the plaintiff's common law causes of action, that the doctrine of primary jurisdiction did not require dismissal or stay of the plaintiff's requests for injunctive relief, and that the claims did not raise a nonjusticiable political question. *D'Amico v. Waste Management of New York, LLC*, 2019 U.S. Dist. LEXIS 50323 (W.D.N.Y. Mar. 25, 2019).

### Appellate Division Affirmed Dismissal of Defamation and Other Claims Against Town Officials Who Raised Concerns with DEC About Septic Dumping

The Appellate Division, Third Department ruled that absolute immunity shielded a town supervisor and town council member from claims of defamation, intentional and tortious interference with business relations, and prima facie tort in connection with the officials' emails to DEC complaining that "septic dumping" was occurring on a plaintiff's property and was causing neighboring children to become sick. The court found that "discretionary reporting" of conditions that were allegedly making children sick was consistent with the scope of the officials' duties, and that the emailed reports to DEC "were made discreetly" from town computers and "not broadcast in public statements or press releases." The court found no allegations based on the defendants' individual capacities or any "totally unwarranted conduct." Absolute immunity therefore applied. *Enviroventures, Inc. v. Wingert*, 171 A.D.3d 1290, 97 N.Y.S.3d 791 (3d Dept. Apr. 4, 2019).

## TOXIC TORTS

### Federal Court Declined to Dismiss Bethpage Plaintiffs' Toxic Tort Claims as Untimely

The federal district court for the Eastern District of New York denied motions to dismiss toxic tort claims brought by residents and property owners of Bethpage in connection with alleged releases from Northrop Grumman's former manufacturing and testing site as well as 18 acres donated to the Town of Oyster Bay by Grumman Corporation. The court said it could not conclude as a matter of law that the claims were barred by the statute of limitations. In considering the motions to dismiss, the court considered certain materials outside the complaint, including public records specifically referenced in the complaint and documents that referenced soil testing results that had been filed in a separate state court proceeding by the plaintiffs against the Town of Oyster Bay. The court decided it would not consider an email from a plaintiff to DEC that the defendants contended was part DEC's administrative record or an article published on the plaintiffs' counsel's website in 2015 titled "Harmful Levels of Toxic Chemicals in Bethpage Yard Soil." The court noted that the applicable statute of limitations—CPLR 214-c, as modified by CERCLA's "federally required commencement date"—required that toxic tort claims for injury to persons or property be brought by the later of (1) either three years from the date of discovery of the injury by the plaintiff (or from the date when through the exercise of reasonable diligence the injury could have been discovered by the plaintiff) or (2) one year from the date the plaintiff knew or reasonably should have known that the injury was caused or contributed to by the hazardous substance. The court rejected the plaintiffs' contention that it was law of the case that the claims did not accrue until April 2016 due to a decision in the separate state court proceeding allowing the plaintiffs to file a late notice of claim against the Town. The court also found, however, that it could not determine as a matter of law whether records of decision (RODs) issued by DEC in 1995, 2001, and 2013 put the plaintiffs on inquiry notice of their personal injury and property damage claims. The court said the defendants' argument that the RODs did put the plaintiffs on notice conflated the claims for diminution in value due to stigma with claims for damages resulting from actual contamination. The court also said plaintiffs' "mere suspicion" that they have incurred damages because was inadequate to satisfy the "reasonably should have known standard." The court noted it had no way of determining based on the complaint's allegations which plaintiffs might have lived in areas identified as contaminated in the public documents, which plaintiffs lived in areas that the RODs indicated need not be concerned about contamination, and the dates on which plaintiffs received diagnoses. *Romano v. Northrop Grumman Corp.*, 2019 U.S. Dist. LEXIS 99435 (E.D.N.Y. June 13, 2019). [Editor's Note: This case was previously covered in the March 2018 issue of *Environmental Law in New York*.]



## WILDLIFE & NATURAL RESOURCES

### Commercial Whelk License Holder's Failure to File Monthly Reports Resulted in \$1,000 Penalty

DEC Commissioner Basil Seggos imposed a \$1,000 civil penalty on the holder of a commercial whelk license who failed to file four vessel trip reports (VTRs) from June through September 2018. License holders must submit monthly VTRs or reports indicating that no trips were made related to the license. The Commissioner also ordered the respondent—who did not file an answer or appear in the proceeding—to submit the reports within 30 days. *In re Mohammed*, 2019 N.Y. ENV LEXIS 30 (DEC June 11, 2019).

## NEW YORK NEWSNOTES

### Legislature Passed Climate Change Bill to Put New York on Path to Reducing Greenhouse Gas Emissions by 85% by 2050

On June 18 and 19, 2019, the New York State Senate and Assembly passed the Climate Leadership and Community Protection Act (S6599). Governor Cuomo signed the bill into law on July 18 (Chapter 106). The Act would require DEC to set statewide greenhouse gas emissions limits of 60% of 1990 emissions for 2030 and 15% of 1990 emissions for 2050. DEC must then promulgate regulations to achieve those limits. The Act permits and sets criteria for alternative compliance mechanisms for sources to achieve net zero emissions and would allow DEC to provide for use of such mechanisms to account for up to 15% of statewide emissions if the offsets do not place a disproportionate burden of environmental impact on disadvantaged communities. DEC, in consultation with the New York State Energy Research and Development Authority, would also establish a social cost of carbon for use by State agencies. The Act also requires the New York State Public Service Commission (PSC) to establish a renewable energy program to require at least 70% of statewide electric generation in 2030 to come from renewable sources and to achieve zero emissions from electricity by 2040. The PSC must also establish programs to require 9 gigawatts (GW) of offshore wind generation by 2035, 6 GW of photovoltaic generation by 2025, and 3 GW of statewide energy storage capacity by 2030. These programs, as well as measures established in the ongoing PSC energy efficiency proceedings, must be designed to provide benefits to disadvantaged communities.

The Act also establishes a Climate Action Council that will prepare and approve a scoping plan for achieving the Act's greenhouse gas limits. The Council must also make recommendations for reduction of emissions beyond 85%, net zero emissions in all sectors of the economy. A draft scoping plan must be completed in two years, with the final plan due in three years. The scoping plan's recommendations must be incorporated into the State Energy Plan.

The Climate Advisory Council's work is to be informed by advisory panels in areas of special expertise such as transportation, energy-intensive and trade-exposed industries, land-use and local government, energy efficiency and housing, power generation, and agriculture and forestry, as well as by a Just Transition Working Group. The Just Transition Working Group will also prepare a separate report to address job creation to counter climate change and the types of jobs, skills, and training required, as well as workforce disruption due to community transitions. In addition, the Act creates a Climate Justice Working Group that would establish "criteria to identify disadvantaged communities for the purposes of co-pollutant reductions, greenhouse gas emissions reductions, regulatory impact statements, and the allocation of investments" related to the Act. (The Act sets a goal of investing or directing resources so that disadvantaged communities receive 40% of the overall benefits of spending on clean energy and energy efficiency programs and requires that disadvantaged communities receive no less than 35% of overall benefits of spending on such programs.) The Climate Justice Working Group will also consult with DEC in DEC's establishment of a demonstration program for community air monitoring and a strategy for reducing toxic air contaminants and criteria air pollutants. A separate bill passed by both houses (S2385) would create a permanent Environmental Justice Advisory Group tasked with developing a model environmental justice policy for State agencies. The Advisory Group would also have various consulting responsibilities under the Act.

The Act requires DEC to issue annual reports on statewide greenhouse gas emissions and to issue progress reports on implementation of the Act at least every four years. DEC also is primarily responsible for a report on barriers to, and opportunities for, access to or community ownership of services and commodities such as distributed renewable energy resources, energy efficiency investments, zero- and low-emission transportation options, and adaptation measures.

Most of the Act is codified in a new Article 75 of the Environmental Conservation Law and new Section 66-p of the Public Service Law, although some provisions will not be codified, including a provision that requires State agencies to determine whether certain actions such as permitting decisions and contracts are consistent with the Act's greenhouse gas limits and to identify alternatives and mitigation measures if actions are inconsistent with the limits.

### DEC Proposed Changes to Conform Hazardous Waste Management Requirements to Federal Regulations

In the June 12, 2019 issue of the *NYS Register*, DEC published notice of proposed amendments to its hazardous waste management regulations. The proposal incorporates changes made in 38 federal regulations promulgated from September 30, 1999 through April 8, 2015, with certain conforming changes through November 28, 2016. DEC said the changes were necessary to maintain New York's authorization to administer and

enforce its regulations in lieu of the federal Resource Conservation and Recovery Act regulations. In addition, the proposed rule addresses approximately 80 typographical errors, clarifications, and inconsistencies between State and federal regulations identified by DEC. Eleven of the rules relate to National Emission Standards for Hazardous Air Pollutants, including standards for hazardous waste combustors and surface coating of automobiles and light-duty trucks. Other regulations affected by the proposal include used oil management standards, treatment of mercury-containing equipment as universal waste (currently provided for pursuant to Commissioner Policy-39), and management requirements for recycling cathode ray tubes (CRTs) and glass from CRTs. The regulations affected are at 6 N.Y.C.R.R. Parts 370, 371, 372, 373, 374, and 376. DEC said it would take comment on the proposal through August 26, 2019.

### **DEC Announced Additional Delay in Enforcement of Household Cleaning Product Disclosure Requirements**

In the June 12, 2019 issue of the *Environmental Notice Bulletin*, DEC announced that it would not begin enforcing the requirements of its new disclosure program for household cleaning products until January 2, 2020. The first milestone for disclosure was originally July 1, 2019, but DEC announced in January 2019 that it would delay enforcement until October 2, 2019. In announcing the further extension of the enforcement start date to January 2, DEC said it would continue to work with manufacturers on the design of their websites and would entertain questions regarding compliance with requirements for website design or safety data sheets.

### **Westchester County Adopted Ban on Styrofoam Food Service Ware and Loose Fill Packaging**

On June 12, 2019, Westchester County adopted a local law banning food service vendors, mobile food commissaries, and retail stores from using food service ware that consists of expanded polystyrene (EPS). The law (Local Law 7) also prohibits the sale of EPS foam loose fill packaging. The food service ware ban does not apply to prepackaged foods that are filled and sealed prior to receipt by the vendor, commissary, or store or to containers used to store fresh produce, raw eggs, or any raw or uncooked meat, pork, fish, seafood, or poultry sold from a butcher case. The packaging ban does not apply to retail sale of electronics packaged in EPS loose fill packaging prior to entering the store. The law takes effect December 9, 2019 (180 days after its adoption.)

### **EPA Rejected Petitions Challenging Air Permits for Compressor Stations**

In the June 7, 2019 issue of the *Federal Register*, the U.S. Environmental Protection Agency (EPA) published notice that it was denying eight petitions that requested that EPA object to

Clean Air Act Title V permits for compressor stations in Putnam County and Rockland County. The compressor stations are associated with the expansion of the Algonquin natural gas pipeline. EPA also treated two other submittals that raised concerns about the compressor stations as Title V petitions and denied them. EPA rejected a number of claims made by the Westchester County Board of Legislators (Westchester County), one of the petitioners. Westchester County had asserted that the permits were inadequate in numerous respects, including for failing to adequately assess health risk; failing to require adequate monitoring of fugitive, blowdown, and greenhouse gas emissions; and failing to set adequate carbon monoxide and volatile organic compound emission limits. In many cases, EPA said the County had not raised the issues with reasonable specificity during the public comment period. EPA further determined that Westchester County had not demonstrated that the Title V permits did not comply with existing applicable requirements. EPA also rejected the arguments of a nonprofit environmental education group and a number of individual petitioners.

### **DEC Announced Launch of NYHABS Map and New Public Reporting Form**

On June 4, 2019, DEC announced the launch of a new online map and reporting system for Harmful Algal Blooms (HABs). The system, called "NYHABS," includes an interactive map that is updated daily and a new mobile phone-friendly public reporting form. After DEC and the New York State Department of Health evaluate reports, they are posted in the NYHABS system. The NYHABS map does not show marine HABs such as red and brown tides, other types of algae blooms, some HABs on Lake Champlain, and HABs from previous years. It also does not include information on public beach closures or drinking water information. Each dot on the NYHABS map represents a HAB observation and includes the date of the observation; the HAB status (suspicious, confirmed, or confirmed with high toxins); the extent of the HAB (small localized, large localized, widespread or lakewide, or open water); who reported the HAB; and any pictures submitted in the report. The NYHABS map is available at <https://bit.ly/2GcfywG>. The reporting form is available at <https://bit.ly/2GaSoqj>.

### **EPA Proposed Listing Putnam County Arsenic Mine on NPL**

In the June 3, 2019, issue of the *Federal Register*, EPA proposed to list an arsenic mine in the Town of Kent in Putnam County on the National Priorities List (NPL) pursuant to CERCLA. The site was proposed for listing based on the Agency for Toxic Substances and Disease Registry of the U.S. Public Health Service issuance of a health advisory regarding arsenic levels in residential soils. The advisory is available at [https://www.atsdr.cdc.gov/HAC/pha/ArsenicMineSite/Arsenic\\_Mine\\_Advisory-508.pdf](https://www.atsdr.cdc.gov/HAC/pha/ArsenicMineSite/Arsenic_Mine_Advisory-508.pdf).

### EPA Denied Petitions That Raised Concerns About Radon Emissions at Landfill

In the May 23, 2019 issue of the *Federal Register*, the U.S. Environmental Protection Agency (EPA) published notice of its denial of two petitions requesting that EPA object to the Clean Air Act Title V permit for the Hyland Landfill in Allegany County. One of the petitions raised concerns about the landfill's acceptance of drill cuttings and other drilling wastes from natural gas drilling operations in Pennsylvania, and the possibility that the deposition of these wastes would result in radon emissions from the Hyland Landfill. EPA said this petition did not allege the permit's violation of existing requirements. EPA also indicated that "[a]ny implication that the EPA should establish such standards governing radon from landfills—whether through the current title V permit or through some other authority related to the EPA's hazardous air pollutant program under Section 112 of the CAA—is beyond the scope of the current title V permit action." EPA said it was not clear what relief the second petition (which also raised concerns about radon emissions) sought from EPA but nonetheless denied the petition because it did not identify existing requirements regarding control of radon emissions with which the permit did not comply.

### EPA Approved DEC Authority to Allocate Allowances in CSAPR Trading Program

In the May 21, 2019 issue of the *Federal Register*, EPA published notice of its adoption of a direct final rule approving into the New York State Implementation Plan the DEC regulations that replace the default allowance allocation provisions of the Cross-State Air Pollution Rule (CSAPR) federal trading programs for ozone season nitrogen oxides (NO<sub>x</sub>) emissions, annual NO<sub>x</sub> emissions, and annual sulfur dioxide (SO<sub>2</sub>) emissions. The approval of the provisions allows DEC to allocate CSAPR allowances to regulated entities in New York beginning in the 2021 control period for ozone season NO<sub>x</sub> and beginning in the 2023 control period for annual NO<sub>x</sub> and SO<sub>2</sub> allowances. EPA issued the approval as a direct final rule because it believed the approval to be noncontroversial but said it would withdraw the approval if it received adverse comment.

### WORTH READING

Ctr. for Climate Integrity, *High Tide Tax: The Price to Protect Coastal Communities from Rising Seas* (June 2019), <https://bit.ly/2Y3kYUW>

Michael B. Gerrard & Edward McTiernan, *New Climate Law Will Reshape NY's Key Sectors*, N.Y.L.J., at July 11, 2019, at 3, <https://bit.ly/32jXrhW>

Jeffrey Gracer, *New York State Legislature Passes Historic Act to Address Climate Change*, N.Y.L.J., at June 27, 2019, at 4, <https://bit.ly/2KGA0tf>

Diana Hernández et al., *Public Housing on the Periphery: Vulnerable Residents and Depleted Resilience Reserves Post-Hurricane Sandy*, 95 J. URB. HEALTH 703 (Oct. 2018), <https://doi.org/10.1007/s11524-018-0280-4>

Karen Meara & Christopher Rizzo, *Challenges in Complying with New York City's 2019 Climate Mobilization Act*, N.Y.L.J., June 20, 2019, at 3, <https://bit.ly/2L2ePkN>

M.J. Bradley & Associates, LLC, *Life Cycle Analysis of the Northeast Supply Enhancement Project* (June 11, 2019), <https://bit.ly/2XT8R8C>

N.Y.C. Office of the Comptroller, *Audit Report on the Department of Parks and Recreation's Trees & Sidewalks Program*, No. MH18-058A (June 20, 2019), <https://on.nyc.gov/2NL2STG>

N.Y. State Common Retirement Fund, *Climate Action Plan 2019* (June 2019), <https://bit.ly/32t0og4>

Gary Svirsky et al., *Current Trends in Application of the Absolute Pollution Exclusion in CGL Policies: Cross-Border Comparison Between New York and Canadian Laws*, 34 J. ENVT. L. & LITIG. 97 (2019), <https://bit.ly/2NNuVle>

Christopher Wright, *Can a Combined Zoning Lot Include a Partial Tax Lot?*, N.Y.L.J., June 24, 2019, at 13, <https://bit.ly/31RwotN>

### UPCOMING EVENTS

September 22–24, 2019

NYSBA Environmental and Energy Law Section Fall Meeting, Mohonk Mountain House, 1000 Mountain Rest Road, New Paltz. For information, see [http://www.nysba.org/Sections/Environmental\\_and\\_Energy/Environmental\\_\\_\\_Energy\\_Law\\_Section.html](http://www.nysba.org/Sections/Environmental_and_Energy/Environmental___Energy_Law_Section.html).

September 23–29, 2019

Climate Week NYC 2019, New York City. For information, see <https://www.climateweeknyc.org/climate-week-nyc-2019>.

November 4–6, 2019

Annual Recycling Conference, New York State Association for Reduction, Reuse and Recycling, Otesaga Resort Hotel, 60 Lake Street, Cooperstown. For information, see <https://www.nysar3.org/page/annual-recycling-conference-23.html>.

November 7, 2019

Urban Redevelopment: Building Stronger Communities, Center for Creative Land Recycling, 8:30 AM–7 PM, National Grid, 1 MetroTech Center, Brooklyn. For information, see <https://bit.ly/31P0azm>.

November 20–21, 2019

2019 Annual Environment Conference, The Business Council of New York State, Inc., Holiday Inn, Saratoga Springs. For information, see <https://www.bcnys.org/event/2019-annual-environment-conference-0>.

*December 12, 2019*

*NYSBA Environmental and Energy Law Section Brownfields/ Superfund Annual Update*, 42 West 44th Street (New York City Bar Association building), New York City. For information, see [http://www.nysba.org/Sections/Environmental\\_and\\_Energy/Environmental\\_\\_\\_Energy\\_Law\\_Section.html](http://www.nysba.org/Sections/Environmental_and_Energy/Environmental___Energy_Law_Section.html).

*May 17–20, 2020*

*Strive for Sustainability—Solid Waste & Recycling Conference with Trade Show*, Federation of New York Solid Waste Associations, The Sagamore, 110 Sagamore Road, Bolton Landing. For information, see <https://conference.nyfederation.org/>.



## Environmental Practice Group